

## **Soft law and legal norms - useful functions, conditional efficacy and genuine risks: advantages/disadvantages**

Soft law as I understand it stands principally for two phenomena: Firstly, acts that are issued in one of the legal forms provided for by the constitution, but without being strictly binding and enforceable in themselves; secondly, rules that are not formal legal acts - because they are not issued by a legislative authority or not in the form provided for by the constitution -, but are nevertheless aimed at influencing human behaviour.

In this short input, I would like to concentrate on this second type of soft law. It can have various functions, aiming at preparing, accompanying or even substituting statutory law. Among these, I think the most effective and most important one, at least in the context of the Austrian legal system, is to complement legal norms and accompany their implementation and enforcement.

I would like to give you a few examples for this function of soft law, showing some of the advantages and disadvantages involved.

One source of soft law can be seen in the circulars and guidelines of administrative authorities, in particular of the tax administration. These guidelines specify laws and present examples for their implementation in certain groups of cases. For specifying a law in a general abstract manner the Austrian constitution actually prescribes as instrument the administrative regulation, usually issued by the competent minister. Regulations are binding and offer legal certainty for the persons subject to the laws, they can only be annulled by the Constitutional Court. Guidelines and circulars, on the other hand, are binding only for the administrative authorities of a lower level and do not establish legal rights of the individuals concerned; they cannot prevent courts from interpreting

the law in a different way. This can certainly be a disadvantage for the persons subject to the laws. But their legitimate expectations created by a guideline made public are respected at least insofar as compliance with the guideline will usually exclude culpability. According to a special fiscal provision (*Verordnung des Bundesministers für Finanzen betreffend Unbilligkeit der Einhebung im Sinn des § 236 BAO*), authorities shall even waive the collection of taxes if the debtor has made important arrangements based on the trust in positions published by the Minister of Finance that were not manifestly incorrect, no matter if they are subsequently held unlawful by a court. Thus, these guidelines have effects very close to the impact of hard law. But they are still more flexible and leave the courts a sufficient scope of law application. They can also be seen as an attempt to avoid overregulation, yet offering points of orientation for the interpretation of laws. In this way, administrative circulars and guidelines may be an answer to the need of clarifying and specifying rules without letting statutes and formal administrative regulations become too detailed and casuistic.

Similar conclusions could be made for other soft law instruments aimed at interpreting, clarifying and specifying hard law provisions, such as - among the many examples in EU law - the recommendation and guidelines issued by the European Commission for the implementation of the Framework Directive for electronic communications networks and services or the decisions by the Administrative Commission under the EU Regulation on the coordination of social security systems.

In all these examples, soft law is issued by public institutions and authorities and does not contain original rules, but serves only - as I said - to specify, interpret and clarify hard law. In other cases, soft law is created by private players. When statutes refer to this kind of soft law, its function is usually to allow self-regulation and include expert knowledge in developing rules. Reference to soft

law instead of strict hard law rules can also aim at avoiding tensions with fundamental rights: As an example, I'm thinking of the Market Abuse Directive, implemented in Austria by the Stock Market Act (*Börsegesetz*). It provides that when assessing market manipulation in respect of journalists, the rules governing their profession (such as - in Austria - those issued by the Press Council) must be taken into account. Legally binding rules for the behaviour of journalists could certainly come into conflict with the freedom of the press. The question is if the detour of referring to an instrument of self-regulation guarantees that the law and its enforcement are unfailingly uncritical.

The main problem with regard to soft law, particularly when created by private players, seems its legitimacy. To ensure a maximum of legitimacy, the creation process should be as democratic and transparent as possible and all relevant stakeholders should be involved. In some cases, hard law rules themselves provide for these conditions when referring to soft law, ensuring a balanced composition of the decision bodies as well as democratic procedures, at least to a certain extent. An example is the KommAustria Act (*KommAustria-Gesetz*), defining the duties of the broadcasting regulatory authority: Article 39 of this statute provides that when the authority examines violations of advertising rules, the rulings of generally acknowledged self-monitoring bodies have to be taken into account, and it defines generally acknowledged self-monitoring bodies as those that broadly represent all the professional groups concerned and ensure the necessary transparency in the making and implementation of decisions. Another good example is the Austrian Standards Act (*Normengesetz*), stipulating that all relevant public and private players must be involved in the development of Austrian Standards (ÖNORMEN). Additionally, special funds are granted to enhance the participation of consumer representatives, organised in the Consumer Council - *Verbraucherrat* (an institution that participates also in the preparation of product safety laws and is explicitly referred to in the Product

Safety Act - *Produktsicherheitsgesetz*). But, unfortunately, there are also cases where soft law rules are dictated only by small groups of players without democratic legitimacy. In these cases, reference to soft law by legal norms seems most delicate to me.

Often, less legitimacy will also mean less acceptance, thus counteracting another positive effect soft law might have.

Let me summarise: Among the advantages of soft law I see its flexibility, the chance of large-scale inclusion of expert knowledge, the possibility of utilising instruments of self-regulation and - in consequence - a higher acceptance in comparison to hard law. But the advantages imply also possible disadvantages: flexibility may mean a lack of legal certainty, and delegating decisions to experts and groups of interest can raise problems of (democratic) legitimacy. It should be a task of hard law statutes and - to a certain extent - of (administrative) judges to create conditions for the development and use of soft law that reinforce its advantages and minimise its disadvantages. I hope having offered some starting points for reflections along these lines.

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