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The Role of Soft Law in Functioning of Supranational Competition Networks

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Abstract

The article discusses the issue of soft law and its role in the functioning of supranational competition networks. It draws from the assumption that international cooperation is crucial for competition authorities around the world and that the most efficient and comprehensive form of such cooperation takes the form of supranational competition networks. For networks, establishing common standards in the form of soft law is essential for development of the network and the deepening of cooperation between network members. The article concludes that supranational soft law has its eminent advantages like informality, flexibility, and accessibility which allow it easily to respond to the changing needs of authorities and stakeholders, and to adapt to evolution of the economic and regulatory environment. However, the problems of legitimacy and transparency in the process of establishing soft law rules are yet to be resolved.

Keywords

supranational networks, soft law, competition law, competition authority, international cooperation

Introduction

National competition authorities (NCAs) have been cooperating closely for a long time. However this international cooperation of NCAs has been flourishing in recent years. It takes various forms, depending on the needs and goals of participating authorities. The significant propagation of fora devoted to the development of competition law cooperation at an international level – such as the International Competition Network (ICN) or UNCTAD, and at a regional level – such as the European Competition Network (ECN), European Competition Authorities (ECA) or Nordic Co-operation, is an

undeniable fact. Furthermore, bilateral cooperation in this area is also booming. Such an upsurge of supranational administrative networks is not unique to antitrust field, but international cooperation in the area of enforcement of competition law is especially well situated to allow study of these phenomena. As one researcher put it, *if networking is the new world order – antitrust is the provocative example.*[1] Soft law plays a crucial role in the functioning of competition networks and in many situations it is the most distinguished result of networks of competition authorities cooperating internationally. Therefore, it is more than justified to analyse this issue more closely.

The aim of the article is to briefly discuss the problem of soft law and its role in the functioning of supranational competition networks. First, a general definition of supranational administrative network is introduced. Second, some observations on the development of forms of international cooperation between competition authorities are offered. It is followed by a presentation of the issue of soft law in the practice of supranational competition networks. Furthermore, the significance and functions of soft law in the functioning of supranational competition networks are discussed. Afterwards the article shows the impact of supranational soft law on domestic legal systems. Considerations are concluded with a presentation of the risks associated with supranational soft law.

What are supranational competition networks?

Supranational competition networks may take various forms and are not a homogenous phenomena[2]. The classical definition of transgovernmental networks describes them as sets of direct interactions among sub-units of various governments, which are not controlled by the policies of the cabinets or chief executives of those governments.[3] This definition forms a part of the wider concept of transgovernmentalism in international relations. Under this concept, states are no longer the only participants in international relations, but there are several other new participants, namely networks. However, for the purpose of this article, a more workable definition is used. Therefore, the term network primarily describes non-hierarchical or barely-hierarchical forms of cooperation that are located outside of the usual forms of administrative cooperation.[4] Networks offer a more flexible form of achieving common goals than international organisations or completely decentralised structures. They involve technocrats who are experts in a given field and are capable of resolving common problems without any involvement from their governments.[5]

1 EM Fox, 'Linked-in: Antitrust and the Virtues of a Virtual Network' in P Lugard (ed), *The International Competition Network At Ten: Origins, Accomplishments and Aspirations* (Intersentia 2011) 105.

2 M Błachucki, 'The Evolution of Competition Authorities Networks and the Future of Cooperation between NCA's in Europe' (2018) OEZK 11(4), 119–120.

3 RO Keohane, JS Nye, 'Transgovernmental Relations and International Organizations' (1974) Wld Pol 27(1), 43.

4 JP Terhechte, International Competition Enforcement Law Between Cooperation and Convergence (Springer 2011) 14.

5 K Raustiala, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law' (2002) Virginia Journal of International Law 43(1) 23–25.

This form of cooperation is typical for competition authorities around the world. It is especially well developed in Europe. The European Union eagerly promotes the establishment and development of networks among European national authorities in various areas (energy, telecommunications, railways etc.) forming a composite European administration.[6]

Soft law as the next step of deepening of international cooperation of NCAs

The cooperation between competition authorities within supranational networks has now become more intense, which has had a direct impact on other networks. Creating institutionalised forms of cooperation, by setting up official or unofficial networks and concluding bilateral or multilateral agreements, lends a sense of permanence to such cooperation and provides opportunities to deepen it. Several stages can be discerned from the evolution of these forms. The second step, after becoming acquainted and exchanging experience and expertise, most often involves negotiating broad cooperative frameworks and ground rules acceptable to all the participating agencies (e.g. ICN, ECA, CECI and MWG), and laying the foundations for further activity. Compiling reports, commissioning studies, and comparing domestic administrative regulations and practices is typically the next stage. Those that have been created in an orderly manner can be distinguished from simple exchanges of experience and expertise in that they highlight areas of disagreement and encourage more detailed joint documents in selected areas. These can differ in nature, i.e. ICN has produced numerous manuals and handbooks to assist in administration (e.g. procedural manuals, workbooks, market surveys, templates, and toolkits) and model documents (e.g. waivers of confidentiality and agreements with trustees and other fiduciaries).

The soft law in the practice of supranational competition networks

Soft law documents, e.g. recommendations, best practice handbooks, standards and guidelines, and other agreed principles, are produced in addition to documents that directly support administrative practice under the umbrella of international cooperation between competition agencies. It would be difficult to overestimate the value of these documents. Although they are not officially binding, their relevance and persuasive authority are crucial for the development of the administrative practices of many competition agencies, and for subsequent amendments to domestic regulations. Soft law documents created through international cooperation enable national authorities to learn new tools, principles and principles. They can then seek to apply them in order to remain fully-fledged

6 P Craig, 'Shared Administration, Disbursement of Community Funds and the Regulatory' in HCH Hofmann, AH Türk (eds), *Legal Challenges in EU Administrative Law – Towards an Integrated Administration* (Edward Elgar 2009) 34–36.

participants. Furthermore, mutual principles that have been agreed to at an international forum constitute a compelling argument for legislative amendments at the national level. At the same time, soft law is a broader topic that assumes particular importance in the context of transnational competition authorities and their activities.

The soft law regulations laid down by transnational competition networks play a dominant role in international competition law. The universality of these regulations is such that other soft law policies and principles, e.g. those determined by private entities, only play a marginal role (as opposed to other regulatory areas and the evolving detailed transnational soft law conventions / acts described in Codes of Good Practice).[7] Soft law is a practical and theoretical challenge for jurisprudence. The sheer wealth and heterogeneity of material available makes it inordinately difficult to formulate a uniform and comprehensive definition. Soft law is most commonly understood as informal rules that can generate certain practical results despite not having the force of law.[8] Soft law is often created by transnational networks without any direct legal basis. It should be noted that informally created transnational law, including soft law, depends on cross-border cooperation on the part of national administrative authorities, as well as the possible contribution of non-governmental entities and NGOs (this is an aspect of the informality of creating law) for its effectiveness. Moreover, this has to take place in fora other than conventional international organisations and / or between entities other than those concerned with conventional diplomatic relations, e.g. regulatory authorities or government agencies (this is an aspect of the informality of the contributing entities). Finally, this cooperation does not result in adopting formal conventions, agreements or other legally binding obligations (the informality of the results of cooperation).[9] Soft law appears in many branches and fields of law, although its development has been particularly strong in public international law, especially on issues related to disarmament, the international economic order, the international monetary order, environmental protection, and human rights.[10] Soft law is also considered typical of the development of competition law.[11]

7 DM Bowman, GA Hodge, 'Counting on Codes: An Examination of Transnational Codes as a Regulatory Governance Mechanism for Nanotechnologies' (2009) Regulation & Governance 3(2) 159 et subseq.

8 A Jurcewicz, 'Rola «miękkiego prawa» w praktyce instytucjonalnej Wspólnoty Europejskiej' [The Role of «Soft Law» in the Institutional Practice of the European Community] in C Mik (ed), *Implementacja prawa integracji europejskiej w krajowych porządkach prawnych* [Implementation of the Law of European Integration in National Legal Orders] (TNOiK 1998) 111.

9 J Pauwelyn, 'Informal International Lawmaking: Framing the Concept and Rresearch Questions' in J Pauwelyn, R Wessel, J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 22.

10 P Skuczyński, Soft law w perspektywie teorii prawa' [Soft Law from the Perspective of the Theory of Law] in O Bogucki, S Czepita (eds), *System prawny a porządek prawny* [Legal System vs Legal Order] (Wydawnictwo Naukowe Uniwersytetu Szczecińskiego 2008) 326.

11 M Błachucki, 'Stanowienie aktów tzw. prawa miękkiego przez organy administracji publicznej na przykładzie prawa antymonopolowego' [Establishing so-called Soft Law by Public Administration Bodies on the Example of Antitrust Law] in M Stahl, Z Duniewska (eds), *Legislacja administracyjna. Teoria, orzecznictwo, praktyka* [Administrative Legislation. Theory, Jurisprudence, Practice]

Soft law has featured in international trade, when countries have acknowledged the advantage of informal soft agreements over those that create rigid obligations and require formal ratification.[12] The fact that soft law is now used in international and transnational trade to obviate the role of national governments and circumvent their exclusive authority to establish legal regulations may seem ironic. Transnational competition networks have largely supplanted national governments in this sphere of legislative activity by creating their own procedural regulations. As a result, the boundary between public and private sphere has become blurred in many places.[13]

The significance and role of soft law in the functioning of supranational competition networks

Soft law is used to strengthen the role of supranational organisations and networks. Transnational competition networks can substantially contribute to the escalation of this process. The example of EU law shows that it has developed when the countries sitting on the European Council could not bring themselves to accept inflexible regulations. The road to embracing EC soft law guided the development of this branch of law, and in so doing, forced it to become harmonised.[14] The EC's practical utilisation of soft law advances soft harmonisation, and with the assistance of the way(s) in which it has been interpreted, additionally enables the appropriation of areas hitherto considered the preserve of EU legislative bodies. Loosely-worded treaty provisions, together with the conflicting interests of member states, have proved decisive in the success of the EC.[15] The adoption of soft law precedes the adoption of law. European state aid law is a case in point. Crucially, this is an example of how soft instruments are gradually supplanted by hard ones.[16] An analysis of selected transnational competition networks reveals that the involvement of national administrative bodies considerably shortens the odds of adoption of legal regulations drawn up or deemed essential in the network forum. The additional conclusion of bilateral agreements between national administrative bodies and those from leading jurisdictions further increases the probability of foreign standards being incorporated into the domestic legal framework.[17] Similar observations apply to soft law created within the European Competition Network (ECN). ECN resolutions (including those

(Wolters Kluwer 2012) 236–237.

12 M Cini, *From Soft Law to Hard Law? Discretion and Rule-making in the Commission's State Aid Regime* (European University Institute 2000) 4.

13 K Sahlin-Andersson, 'Emergent cross-sectional Soft Regulations: Dynamics at Play in the Global Compact Initiative' in: U Morth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar 2004) 130–131.

14 M Blauberger, *From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law* (MaxPlanck-Institut für Gesellschaftsforschung 2008) 13.

15 Ibid 22.

16 M Cini 26.

17 D Bach, A Newman, 'Transgovernmental Networks and Domestic Policy Convergence: Evidence from Insider Trading Regulation' (2010) Int'l Org 64(3), 507.

concerning independence and 'appropriate measures') and recommendations (including those concerning leniency and priorities) have become the basis for their codification and development into ECN+ directives. The ECN has come to advocate 'soft harmonisation', and the results have been very positive. The EC acknowledges, however, that the next stage involves transferring these consensual standards to the legal system as hard law. The strengthening of national, ECN, and especially EU, competition authorities is the intended end result of these changes. The position of national competition authorities is strengthened *vis-à-vis* that of national governments to the extent that the ECN, and especially the EC, can expand their influence on not only the jurisdiction, but also the makeup, of a national competition administration for EU countries.

Soft law instruments have a multiplicity of forms and can therefore fulfil a variety of functions. Three basic functions can be identified under EU law:

- The pre-law function can be understood two ways: (i) a soft law act that is consultative in nature, published with a view to canvassing the opinions of interested parties, and subsequently enacted as a universally binding law on that basis; and (ii) more broadly as a soft law instrument adopted to possibly pave the way for the future enactment of hard law;
- Supplementing the post-law function, i.e. soft law is negotiated after universally binding regulations have been adopted with a view to supplementing and consolidating them. In this situation, the universally binding regulations anticipate the drafting of soft law documents;
- Supplanting the para-law function, i.e. soft law can be an alternative to conventional legislation. One example of this might be programmatic documents of a prospective nature, e.g. policies of various kinds.[18]

The soft law documents negotiated in the forums of transgovernmental networks provide a clear example of these functions being fulfilled. The soft law instruments adopted in these forums frequently serve as templates for national and even supranational (especially the EU) legislatures. The soft law of these networks additionally supplements national hard law. Indeed, many of them contain recommendations and other guidelines that regulate certain issues in a more detailed manner than national statutes, where they are often defined in very general terms. This is certainly the case with competition law, where soft law can be applied at both the national (where it is adopted by antitrust authorities) and the transnational (where it is adopted by transnational networks) levels. Moreover, the soft law of transnational competition networks can replace hard law in some cases, especially when a given country lacks the political will to regulate a particular issue. The 2014 OECD recommendation concerning international cooperation in competition matters may be a case in point. Faced with a lack of political will to create a binding international convention along the lines of the OECD taxation conventions, the

18 L Senden, *Soft Law in European Community Law* (Hart 2004) 120.

relevant transnational network members decided to accept this 2014 recommendation. This demonstrates that soft law enacted by transnational competition networks can complement, or even supplant, binding national legal standards, as well as international public law, in some situations.

The impact of supranational soft law on domestic legal systems

It is also worth considering the ways in which soft law instruments negotiated by transnational competition networks can be reflected in a national legal system, and how they can guide a public administrative body in exercising its administrative jurisdiction. As noted above, although unofficial transnational standards are not binding, they nevertheless bring about practical results and influence universally binding national and international law. It is emphasised in the literature that unofficial transnational standards (i.e. soft law negotiated by networks) can be included in national law through:

- being incorporated into transnational standards in toto without any special oversight;
- specific references to specific transnational standards in legal documents;
- transnational standards being commonly referenced or treated as general principles, e.g. as good industry practices or the best available technologies (BAT);
- applying designated provisions to make transnational standards one of the (non-binding) bases of published decisions;
- employing transnational standards as guidelines for interpreting national regulations governing ill-defined concepts;
- having private parties apply transnational standards directly in civil law relationships.[19]

Polish law provides some excellent examples as to how the influences enumerated above are reflected in administrative practice and the judgements of civil and administrative courts. The Telecommunications Law [Art. 3 (3)] directly refers to the application of soft law on the part of antitrust authorities, and civil courts competent in competition cases cite mutually agreed-upon transnational practices in their judgements.[20]

Risks associated with supranational soft law

Instituting soft law may be a sign that the law is being modernised, but it can also be an attempt to circumvent conventional and official legislative processes. Soft law is associated with the following risks:

19 O Dilling, M Herberg, G Winter, 'Introduction: Exploring Transnational Administrative Rule-Making' in O Dilling, M Herberg, G Winter (eds), *Transnational Administrative Rule-Making. Performance, Legal Effects, and Legitimacy* (Hart 2011) 5–6.

20 M Błachucki, 'Judicial control of guidelines on antimonopoly fines in Poland' (2016) C & R 25, 57 et subseq.

- it can encroach on established lawmaking processes;
- it can bypass legislatures;
- its substance can be imprecise and unwarranted;
- it is not fully embedded in positive law;
- it does not readily lend itself to judicial evaluation;
- very little soft law is publicly available and its creation is not influenced by public opinion;
- it enables judges and administrators to assume a dominant role in creating public policy.[21]

These risks vary in nature and extent, but they mostly result from soft law being embedded in the legal system before universally binding legal regulations have been created to govern it. Most of these risks can be avoided by adopting explicit procedures to create and monitor soft law instruments. The emergence and development of soft law is incontrovertible evidence that public administrative authorities have exceeded their remit to apply the law, and have begun to create it in certain areas. These risks are increasing in the case of soft law established by transnational competition networks. The practice of Poland's Office of Competition and Consumer Protection (OCCP) proves that it is acting independently of other Polish public administrative agencies and ministries by participating in the creation of soft law as part of a competition network. Its operations in this domain are neither specified anywhere in the law nor subject to any judicial or administrative oversight whatsoever. Moreover, when they create soft law instruments, competition networks generally define the adoption procedures themselves, and do not as a rule subject them to any external oversight. Adopting soft law instruments as part of a competition network can impact, and even go beyond, statutory matters governed by Polish law. While the documents are generally accessible online, only a meagre portion of them are available on the OCCP website, even though it was involved in drafting them.

Soft law created by transnational competition networks has sparked a great deal of controversy, especially over the legitimacy of these bodies to create such regulations and having this kind of quasi-normative legislative act inserted into national legal systems. Soft law instruments are rarely created by competition networks in accordance with any clear rules. At times, there is only a 'recognised standard of competence' (e.g. that accorded to the OECD) to warrant their adoption. They are very rarely adopted pursuant to a regulated procedure. These instruments are almost never overseen by independent courts or even other national administrative bodies. This lack of legitimacy and oversight can be resolved by having third parties involved in adoption of soft law instruments (in respect of which the rules agreed to will be applied). In principle, this involvement should lend these documents a certain degree of legitimacy and ensure that both government agencies and third parties act in accordance with them. This practice is employed by the ICN, which involves NGO advisers in its activities. This gives them an opportunity to

21 M Cini 5.

influence the substance of soft law instruments adopted by transnational competition networks associated with the ICN. The OECD likewise allows third parties to articulate their requirements when drawing up its recommendations. However, a lot of networks, especially in Europe, make use of highly opaque procedures to create soft law instruments.

Conclusions

The undertaken analysis leads to the conclusion that the soft law plays a crucial role in the international cooperation of NCAs within supranational competition networks. Adopting soft law is the next step in the development and broadening of international cooperation of NCAs. It serves as a basis for further steps in strengthening the cooperation and networks. NCAs establish legislative aims and standards of operation, and coordinating administrative practice in the form of soft law. Soft law functions as a basis for creation of a level playing field for NCAs where the same or similar rules apply to all members of the network. Supranational soft law has its obvious advantages like informality, flexibility, and accessibility, which allow it to easily respond to the changing needs of authorities and stakeholders and to adapt to the evolving economic and regulatory environment. On the other hand, the lack of legitimacy and accountability in the preparing of supranational soft law is especially visible. It leads to undermining of the role of the state and national laws. These risks are deepened by the real impact that supranational soft law has on the administrative practice of NCAs and its indirect influence on national laws.

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