The EU and the Challenge of Informal International Law-Making: The CJEU’s Contribution to the Doctrine of International Law-Making

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1. Introduction

Nowadays, it is generally conceded that the patterns of dispersion of authority have changed dramatically and that a great part of norm creation occurs outside the classic international law framework. The emergence and proliferation of informal means of cooperation has challenged the monopoly of traditional forms of international law-making. This shift to informality has forced modern international legal scholarship to rethink whether, and if so to what extent, the international legal order can adapt to and assimilate the sweeping changes on the international plane. Different accounts of how the discipline ought to come to terms with the phenomenon of informal international law have been offered; however, these often tend to neglect the practice of the EU and its principal judicial organ.

In this light, the present contribution purports to examine how the CJEU has treated informal law in its practice with a view to ascertaining the Court’s contribution to the continuing development of the doctrine of international law-making. The main argument advanced here is that the CJEU has recourse to a range of tools for factoring in new social developments, while keeping clear boundaries between law and non-law. It is asserted that current theorizing on the topic should engage more strongly in this practice since it attests to international law’s ability to cope with informality.

The paper begins by briefly sketching out the main theoretical approaches to the phenomenon of informal international law. Two major strands of thought are examined. The first one includes authors who have suggested that, since new developments cannot be accommodated within the traditional framework, the discipline should move away from the classic, binary understanding of law and adopt a more flexible definition of ‘international law’ that would allow us to incorporate new actors, processes and outputs. The second one emphasises the importance of a clear distinction between law and non-law in order to maintain the identity of international law qua law.

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Against this background, the paper continues by focusing on the relevant practice of the CJEU. It is shown that, when confronted with informal instruments, the Court has consistently treated the distinction between law and non-law as something real and relevant – thereby refusing to adopt a ‘pluralised’ notion of law. Thus, the Court’s approach corroborates the arguments of those in favour of a bright line separating law from non-law. The Court’s insistence on a separation between law and non-law does not mean that it is unable to keep pace with the changing realities in modern social practice. On the contrary, it is argued that the Court has developed an array of mechanisms that allow it to capture manifestations of normativity that escape the traditional framework.

First, in keeping with the current trend of deormalization of international-law making, the Court’s practice in ascertaining the normative status of informal international agreements evidences the irrelevance of considerations of form and the importance attached to the ‘reality of consent’. In a series of judgments, the Court has found that the form in which an instrument is clothed does not affect its legal character as long as it expresses the intention of its authors to be bound. Secondly, the CJEU has expressly acknowledged the normative significance of instruments that are not per se binding. For instance, it has been accepted that non-binding law may have legal effects to the extent that it creates legitimate expectations on the parties concerned, or to the extent that it is used to assist interpretation of other legal acts. By accepting that normative utterances can be legally relevant without being legally binding, the CJEU has followed public international law’s sophisticated distinction between the broader concept of normativity and that of legality. This distinction is crucial since it enables the Court to take into account the normative contours of conduct that falls below the threshold of ‘bindingess’, and thus to assimilate social reality while keeping the boundary between law and non-law intact.

The paper concludes by stressing the wider implications of the findings reached herein. The CJEU’s treatment of informal international law is an important source of guidance on how international courts may come to grips with informal instruments without radically departing from the existing structure. The Court’s practice is also of cardinal importance in shaping the modern doctrine of international law-making since it re-entrenches formalism, thereby lending normative and explanatory force to theoretical approaches that insist on retaining the distinction between law and non-law.
2. Informal Law-Making: An Infinite Variety

From the outset, it needs to be noted that, although all legal systems suffer from a certain degree of inherent indeterminacy, international lawyers are routinely faced with a considerably higher degree of uncertainty in relation to their domestic law colleagues. In the early 1980s, Jennings voiced concern over the increasing difficulty of distinguishing between legal and non-legal norms at the international level.¹ The unprecedented rise of informal international law witnessed in recent years has obscured the distinction between law and non-law even further.

International law never put great emphasis on form and formalities to begin with. In municipal legal systems, the law often stipulates specific requirements regarding the form of legal transactions, the non-observance of which may result in rendering the transaction in question invalid.² However, this is not the case with international law where the form in which a transaction is clothed does not say much about its legal character.³ Furthermore, the patterns of dispersion of authority have changed dramatically in recent years and it is generally conceded that a great part of norm creation nowadays occurs outside the classic international law framework.⁴ This turn to informality manifests itself in two ways. First, there is empirical evidence showing a sharp decline in the conclusion of formal instruments and a concomitant rise of informal means of co-operation.⁵ Modern practice is anything but unfamiliar with ‘Memoranda of Understanding’ or ‘Common Positions’, terms that are employed to denote instruments that embody some sort of common understanding but fall short of international agreements proper (output informality).⁶ Pauwelyn, Wessel and Wouters have identified three main reasons underpinning this trend. The slowdown in formal law-making may be the result of the fact that most policy areas are already covered by multilateral agreements.⁷ It may also be perceived as a natural reaction to the exponential growth in

¹ R.Y. Jennings, What is International Law and How Do We Tell When We See It?, 37 Schweizerisches Jahrbuch für Internationales Recht 59 (1981), p. 60.
² Case concerning the Temple of Preah Vihear, ICJ Reports 1961, p. 17 at p. 31.
the number of agreements concluded during the 1990s. Finally, the decline in formal law-making may be the result of the recent economic crisis which forced States to focus more on national issues and to avoid undertaking new international obligations.

Secondly, the shift towards informality reflects the range of actors involved in normative activity in a globalised world. A wide array of entities, such as NGOs, transnational corporations and non-State armed groups, that have traditionally been seen as objects, rather than subjects, of international law (let alone law-makers), have entered into the scene and challenged the norm-making monopoly of traditional subjects (author informality). Thirdly, the increasing complexity of modern global challenges has also affected the ways in which States co-operate both among them and with new internationally active actors. Networks of civil servants meeting in informal contexts, such as the G-20 and the Financial Stability Forum, have come to replace or complement more formal mechanisms of coordination and standard-setting (process informality).

Overall, the declining importance of form and formalities, treaty-fatigue, and the proliferation of new actors, outputs and processes have accentuated the phenomenon of informal international law-making, and thus, the problem of distinguishing between law and non-law.

At the EU level the situation is not much different. Over the last decades, it has become widely accepted that binding legislation is not the only way to realise European integration. The focus is now increasingly shifting to informal regulatory instruments, including benchmarking, standardisation, self-regulation, co-regulation and open coordination. Advocate General Cosmas highlighted this, in his Opinion in Dior, as early as 2000.

As Community law now stands, the need for practical harmonisation … can only be based on procedures and obligations falling within an alternative framework often marked by a lack of strictness (soft law). That is neither paradoxical nor contradictory. It is justified by the variable geometry and the still incomplete institutionalisation of the coexistence of national, Community and international legal orders. In the context of that institutionalisation, law and politics exchange characteristics: the former imposes its strict

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and binding nature on the latter and the latter in turn instils its relativity and flexibility in the former.\(^\text{14}\)

The Commission, in its 2001 White Paper on European Governance, also acknowledged the increased reliance on informal instruments. According to the Commission: “legislation is often only part of a broader solution combining formal rules with other non-binding tools such as recommendations, guidelines, or even self-regulation within a commonly agreed framework.”\(^\text{15}\) In the 2003 Interinstitutional Agreement on Better Law-Making, the institutions recognised “the need to use, in suitable cases or where the Treaty does not specifically require the use of a legal instrument, alternative regulation mechanisms.”\(^\text{16}\)

In the context of EU law informal instruments are often systematised in accordance with their function.\(^\text{17}\) A functional typology of informal EU law typically includes preparatory and informative instruments, such as Green and White papers and Action Plans;\(^\text{18}\) interpretative and decisional instruments, such as Communications and Guidelines issued by the Commission;\(^\text{19}\) and steering instruments, such as Council Conclusions, Council Declarations and Council Resolutions.\(^\text{20}\) Recent years have also witnessed the proliferation of informal instruments issued by private actors. The trend towards privatisation manifests itself through the increased engagement of private actors with autonomous self-regulation, the emergence of mixed public-private acts (co-regulation) and the proliferation of standard-setting instruments.\(^\text{21}\)

Finally, it needs to be noted that the shift from formal to informal law-making has not gone unchallenged. In its 2007 Resolution on the implications of the use of informal instruments, the Parliament issued a stern warning against overreliance on informal regulation since this may result in ‘competence creep’.\(^\text{22}\) According to the Parliament: “where the Community has legislative competence, the proper way to act is through the

\(^{14}\) Opinion of Advocate General Cosmas in Joined Cases C-300/98 and C-322/98 Dior et al. [2000], ECR I-11307, para. 76.
\(^{16}\) Interinstitutional Agreement on Better Law-Making, 2003, OJ C321/01, para. 16
\(^{19}\) A. Peters, I. Pagotto, \textit{ibid.}, p. 17. L. Senden, \textit{ibid.}, p. 82.
\(^{20}\) A. Peters, I. Pagotto, \textit{ibid.}, L. Senden, \textit{ibid.}
\(^{22}\) European Parliament Resolution of 4 September 2007 on Institutional and Legal Implications of the use of “Soft Law” Instruments (2007/2028(INI)).
adoption of legislation by the democratic institutions of the Union … in so far as this still appears necessary having due regard to the principles of subsidiarity and proportionality.”

The Parliament, while acknowledging that such instruments can be used as “interpretative and preparatory tools for binding legislative acts” they should not be treated as ‘legislation’ as this would create confusion and jeopardise legal certainty.

Before embarking upon any further discussion, an important note regarding the use of the term ‘informal international law’ throughout the paper needs to be made here. Informal international law-making is used here in juxtaposition to formal international law-making - without prejudice to the binding nature of instruments resulting therefrom. In this vein, the instruments discussed here are ‘informal’ to the extent that they dispense with certain formalities traditionally associated with international law, in terms of authorship, output and process, and thus, they are not readily cognisable as international law proper. The term ‘informal international law’ has been chosen over ‘soft law’, since the former is linguistically more accurate in describing the rich tapestry of practice described above. The hallmark of new developments is the lack of any formalities associated with traditional forms of law-making and not the lack of binding character of informal instruments per se. Thus, ‘informal law’ best encapsulates the realities on the ground since it is ‘value-free’ and it may be used to describe both instruments that, while lacking in form, may still be construed as binding, such as joint communiqués and unilateral declarations, and instruments that escape the traditional framework by virtue of being promulgated by non-State actors. By way of contrast, it is believed that the term ‘soft-law’ is bound to create confusion as there is no widely agreed definition thereof and it has been invoked in the literature to describe a wide range of diverse phenomena, some of which fall outside the purview of the present contribution, such as the question of the binding nature of norms couched in hortatory language that are included in an otherwise binding instrument.

23 Ibid., point J.
24 Ibid., points M. - N.
3. Framing the Debate: The Grey Zone and the Bright Line Schools of Thought

Scholars who have addressed the phenomenon of informal law-making can be divided in two camps: the grey zone and the bright line schools of thought. The academic debate has been summarised most succinctly by Shelton: “In respect of ‘relative normativity’, scholars debate whether binding instruments and non-binding ones are strictly alternative or whether they are two ends in a continuum from legal obligation to complete freedom of action, making some such instruments more binding than others.”

Faced with the challenges posed by informal international law in its multiple dimensions, part of the discipline has felt that the traditional means of law-ascertainment, namely the sources doctrine, is ill-suited to accommodate the growing complexities of modern international life. As a result, several strands of literature have articulated different visions of international law (law as process/New Haven school of international law), as well as different means of gauging normativity that radically depart from existing structures (effects-based approach; substance-based approach; effects/substance-based approach). A common denominator of all these approaches is the (deliberate or unintentional) muddling of the distinction between law and non-law. Attempts to refocus the discipline’s cognitive lens in order to grasp a changing world order have, at some point or another, stumbled upon the binary distinction between law and non-law which they have treated either as something that can be done away with altogether, or as something important, but nevertheless porous. By doing so, authors have invariably accepted the existence of a ‘grey zone’ between law and non-law. In other words, they have accepted that there are no clear boundaries between the legal and the non-legal and that an instrument can be law, non-law, but also fall somewhere in

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33 For a comprehensive overview see J. Ellis, *supra* note 26.
between the grey zone of normativity that separates law from non-law (grey zone school).  

Other authors have resisted the trend of deformalization discussed above and have fiercely advocated in favour of maintaining a clear distinction between law and non-law (bright line school). The distinction is considered of cardinal importance in retaining the identity of international law qua law on a number of grounds. First, it has been asserted that legal certainty, stability and predictability in international relations, key functions of the international legal system, are contingent on the existence of a clear boundary between *lex lata* and *lex ferenda*. The International Law Commission (ILC) acknowledged this much in its introductory note to the 2006 Guiding Principles on unilateral acts of States: “Clearly, it is important for States to be in a position to judge with reasonable certainty whether and to what extent their … conduct may legally bind them on the international plane.” Secondly, the regime governing the international responsibility of States, at least in so far as this is reflected in the (Draft) Articles on State Responsibility, functions on the basis of a dichotomy between legal and non-legal obligations. If legal and non-legal obligations were conflated, the regime of sanctions for breaches of obligations of a legal nature would be impossible to apply. This would mean that international law would lose its ‘normativity’, namely its ability to be “a means of control that effectively limits the acts of entities subject to it”, and thus, its quality as ‘law’ proper.

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35 The term ‘deformalization’ is used here to connote the rejection of the idea that the characterization of a norm as ‘legal’ depends on whether or not it meets certain predefined formal standards as to what constitutes law. See M. Koskenniemi, The Politics of International Law – 20 Years Later, 20 *EJIL* 7 (2009), pp. 7-19.
It has also been claimed that abandoning the binary system of normativity would comprise international law’s neutrality. A grey zone of normativity would leave too much leeway for powerful States to manoeuvre and bend the law to fit their interests. Stripped of its neutrality, law would become synonymous with politics and power-brokering. As Tomuschat stresses:

States like China, Russia or the United States are in a much better position to pursue a deliberate strategy of inventing new concepts in order to promote their political goals … Discourse on what is right and what is wrong must be crystal-clear and should not fall into the hands of a few magicians who invariably are able to prove that law and justice are on their side.43

Finally, muddying the waters comes at a price for the discipline itself too. Nowadays, the “invisible college of international lawyers” seems to be divided into different groups, each using their own means of ascertainment of legal rules. The mushrooming of theory in the field of law-making carries with it the risk of disappearance of a common lingua franca of international law. However, if we lack a shared language to cognise international law, our critique thereof becomes too fragmented to be meaningful. As Crawford put it: “while the builders of the Tower of Babel speak mutually incomprehensible languages, there is no guarantee that they build the same Tower.”

This section sketched out the two main theoretical approaches to international law-making. The arguments floated by bright line theorists are compelling: in their attempt to cast the net wide and thus, capture manifestations of normativity that escape the traditional framework, grey zone theorists have invariably conflated the distinction between law and non-law. This blurring of the normativity threshold has proven to be Achilles heel of the grey zone school. Ultimately, this school of thought fails to convince exactly because it creates uncertainty about the distinction between law and non-law. At

47 As Klabbers put it: “In the end, current theorizing about law forsakes an important point: the point that law ideally should be cognizable, and should be cognizable as such.” J. Klabbers, supra note 36, p. 103.
the same time, the concerns underpinning the grey zone school are not so easily dismissed. How can a diffuse and horizontal system such as international law, retain its formalism in the face of the sweeping changes on the international plane without becoming increasingly obsolete? The next section endeavours to explore how proponents of the binary nature of law have tackled this question and more particularly, how the practice of the CJEU may be used to buttress their line of thought.

4. Informal Law and the Practice of the International Courts and Tribunals: The CJEU’s Contribution to the Debate on International Law-making

Advocates of a strict separation between law and non-law have pointed out that grey zone theorists consistently downplay the ways in which international courts and tribunals treat informal law in their practice.48 Bright line theorists typically rely on judicial practice pertaining to the existence of mechanisms allowing informal prescriptions to be absorbed into the system. This practice confirms the system’s inherent capacity to cope with informality – without diluting the distinction between law and non-law.49 However, these accounts tend to focus on ICJ jurisprudence and the relevant practice of the CJEU often goes unnoticed.50 At the other end of the spectrum, the theoretical challenges posed by informal law have remained at the margins of EU academic discourse. In 2011 Peters remarked that:

although some attention has been paid to interinstitutional agreements …, the overall phenomenon of soft regulation has been much less thoroughly explored on the EU level than it has in public international law. Textbooks and general courses on European Union law still either do not mention soft law at all or only treat it in an extremely cursory function with some standard examples.51

50 See for example D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford: Oxford University Press, 2003). Klabber’s work on the topic of informal law is an important exception, see fn. 74 and 75.
However, it is submitted that this almost exclusive focus on ICJ case-law may result only in a partial picture of modern law-making and law-ascertainment processes. Thus, the remainder of this section zooms in on judicial statements on the legal effects of informal instruments emanating both from the ICJ and the CJEU. Two main points are advanced here. First, both courts largely share the same mechanisms for ‘filtering through’ informal output, thereby confirming the existence of a common framework for assimilating social reality. Secondly, the CJEU’s pronouncements on informal law manifest that the EU legal order is neither unfamiliar nor inherently incompatible with the idea that law is not only a question of threshold and that normative utterances that remain below the normativity threshold may still have important legal ramifications – something that classic international law understood very well. This not only lends explanatory force to theoretical approaches that insist on retaining the distinction between law and non-law, but also confirms the importance of taking into account the CJEU’s case-law in the on-going debate on modern international law-making.

4.1 Irrelevance of considerations of form

Klabbers argues that, far from shrugging their shoulders when faced with informal instruments, or instruments that cannot be shoehorned into the traditional sources of international law, international adjudicatory bodies have invariably accepted their binding force as long as they manifest the intention of their author/s to be bound. The ICJ’s practice in relation to informal international agreements evidences the irrelevance of considerations of form and the importance attached to the ‘reality of consent’. In the Aegean Sea Continental Shelf Case, in the Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, in the Cameroon v Nigeria Case, and, more recently, in the Pulp Mills Case, the Court found that the form in which an instrument is clothed does not affect its legal character as long as it expresses the intention of its authors to be bound. Thus, in the context of the aforementioned cases, it was held that a joint

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52 J. Klabbers, supra note 48, pp. 226-239.
54 Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, ICJ Reports 1994, p. 112, paras. 25, 27.
communiqué, the minutes of a discussion between Ministers for Foreign Affairs, a joint declaration and a joint press release could be, in principle, considered as formally binding upon their author States to the extent that they recorded an agreement to be bound.

The same disregard for considerations of form has been shown by the CJEU. In France v Commission, the Court indicated its broad understanding of the term ‘agreement’ that encompasses “any undertaking entered into by entities subject to international law, whatever its formal designation.”58 Similarly, in its Opinion in the Case of the Convention on the Civil Aspects of International Child Abduction, the Court noted that the essence of international agreements is that they express “a convergence of intent” on the part of two or more subjects of international law,59 thereby signifying that it pays little attention to questions of form. More recently, in its 2014 Venezuelan Fishing Rights judgment, the Court had little trouble coming to the conclusion that a Council Decision authorizing Venezuelan fishing vessels to fish in EU waters off the coast of French Guiana culminated into the establishment of an international agreement between the EU and Venezuela once the latter tacitly accepted it.60

Furthermore, in the context of judicial review, the CJEU has consistently held that the form in which an act is cast is immaterial as regards the question whether it is open to challenge under Art. 263 TFEU.61 According to the Court what matters is whether the act is capable of affecting the legal interests of the applicant by bringing about a distinct change in his/her legal position.62 Thus, in IBM and in Bosman the Court found that a Commission letter and a joint press release issued by the Commission and the Union of European Football Associations were not reviewable acts within the meaning of Art. 263 TFEU purely on the basis of their contents and paid no heed to their form.63 In ERTA, the informal character of the Council resolution adopted on 27 March 1970 laying down

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58 Case C-327/91 French Republic v Commission of the European Communities [1994], ECR I-03641, para. 27. (Emphasis added). See also Opinion 1/75 [1975], ECR I-1355, at p. 1360. For an overview of the concept of ‘agreement’ under EU law see J. Odermatt, The European Union as a Global Actor and its Impact on the International Legal Order, Ph.D. Thesis, University of Leuven, 2016, pp. 101-104. For the view that the CJEU’s approach to what constitutes an ‘agreement’ is wider than that under international law, see J. Odermatt, ibid., pp. 103-104.


62 Ibid.

its position regarding the negotiation of a European Road Transport Agreement did not preclude the Court from ascribing legal effects thereto.\textsuperscript{64} According to the Court:

\begin{quote}
[T]he proceedings of 20 March 1970 could not have been simply the expression or the recognition of a voluntary coordination, but were designed to lay down a course of action binding on both the institutions and the Member States \ldots In the part of its conclusions relating to the negotiating procedure, the Council adopted provisions which were capable of derogating from the procedure laid down by the Treaty regarding negotiations with third countries and the conclusion of agreements. Hence, the proceedings of 20 March 1970 had definite legal effects both on the relations between the Community and the Member States and on the relationship between the institutions.\textsuperscript{65}
\end{quote}

In a more recent case (\textit{OIV}) the Court was confronted with the question of the legal character and effects of an informal act issued by an international organisation to which the EU is not a member.\textsuperscript{66} The case concerned an action for annulment brought by Germany against a Council decision establishing the position of the EU in the International Organisation of Vine and Wine (OIV).\textsuperscript{67} Germany argued, \textit{inter alia}, that OIV acts cannot be considered as ‘acts having legal effects’ within the meaning of Art. 218(9) TFEU since they are merely ‘recommendations’ and thus, they have no binding force under international law.\textsuperscript{68} Advocate General Cruz Villalón, siding with applicant, opined that OIV resolutions merely constitute non-binding international technical standards and, as such, they come under the heading of ‘soft law’.\textsuperscript{69} The Advocate General, while acknowledging that “in recent years, the doctrine on the sources of international law has increasingly sought to also cover acts, which although not legally binding, none the less exhibit a degree of relevance through references made to them,

\textsuperscript{64} Case 22/70 \textit{Commission of the European Communities v Council of the European Communities} [1971], ECR I-00263. For an analysis of the case, see E. Stein, Lawyers, Judges and the Making of a Transnational Constitution, 75 \textit{AJIL} 1 (1981).
\textsuperscript{65} \textit{Ibid.}, paras. 53-55.
\textsuperscript{67} \textit{Ibid.}, para. 22.
\textsuperscript{68} \textit{Ibid.}, para. 36.
\textsuperscript{69} Opinion of Advocate General Cruz Villalón in Case C-399/12 \textit{Federal Republic of Germany v Council of the European Union} [2014], ECLI:EU:C:2014:289, paras. 84-99.
the reliance placed on them for the purposes of interpreting binding law or their practical effectiveness …”,70 argued that “‘soft law’ is neither a legally relevant category of acts nor one that can be clearly circumscribed.”71 On this basis, the Advocate General concluded that OIV resolutions cannot be considered as ‘acts having legal effects’.72 However, the Court disagreed with this overly narrow approach and dismissed the application. It found that, despite their informal character and non-binding nature, EU legislation requires them to be taken into consideration when drawing up rules in the relevant field and, thus, such recommendations “are capable of decisively influencing the content of [EU] legislation.”73 The Court’s approach in relation to what constitutes a reviewable act as well as an ‘act having legal effects’ within the meaning of Art. 218(9) TFEU shows that it will not hesitate to ascribe legal consequences to informal instruments that may give rise to ‘normative ripples’ by affecting the legal position of their addressees, or by influencing the content of EU legislation.

In 1998 Klabbers concluded in a brief overview of the CJEU’s case-law that, as a general rule, the Court applied norms “with a benign neglect of the type of instrument in which the norm was laid down.”74 As this brief account has shown, in more recent years the situation has not changed much. Considerations of formality do not play a prominent role in the Court’s assessment of the normative contours of a given instrument. More recent case-law confirms that the Court consistently favours analysis of the contents of an instrument over its form.75

4.2 The Distinction between Legal Acts and Legal Facts

Much of the critique levelled against accepting a bright line between law and non-law stems from the belief that this acceptance amounts to embracing a voluntarist outlook on international law.76 However, insisting on a separation between law and non-law does not entail denying the relevance of instruments that are not per se binding. Bright line

70 Ibid., para. 97.
71 Ibid., para. 98. (Emphasis in the original).
72 Ibid.
73 Case C-399/12, supra note 66, para. 62.
74 J. Klabbers, supra note 41, at p. 388.
theorists accept that normativity is a broader concept than legality \(^{77}\) and that “a normative proposition can be legally relevant without being legally binding.” \(^{78}\) 

The distinction between legal acts and legal facts is crucial in understanding this broad formulation of normativity. The relevant concepts are rooted in the civil law tradition and play a key role in the classification of the sources of obligation — especially under French law. \(^{79}\) Verzijl’s \(^{80}\) and D’Aspremont’s \(^{81}\) studies on the topic are two of the few English-language works where the doctrinal distinction between legal acts and legal facts is treated at some length. \(^{82}\) Legal acts allow subjects of international law to create new rules to the extent that they manifest the intention of their author/s to be bound. Thus, in order “to enable it to qualify as legal act, the legal effect of the act must directly originate in the will of the legal subject to whom the behaviour is attributed and not to any pre-existing rule in the system.” \(^{83}\) On the other hand, legal facts are acts the legal basis of which may be found in a pre-existing rule in the system. Thus, their legal effects “originate in the legal system itself, which provides for such an effect prior to the adoption of the act.” \(^{84}\)

This distinction allows bright line theorists to take into account the normative effect of conduct that is not per se binding and thus, to assimilate social reality in a much subtler way than they have been given credit for. Although the refined distinction between legal acts and legal facts has not found its way into EU law literature, the notion that normativity is a broader concept than legality is not alien to EU lawyers. According to Snyder:

> [W]hat counts as ‘legally binding’ or ‘fully binding under Community law’ is a highly complex concept, even for those acts which are expressly provided in Article 189 EC …


To have legal effects does not necessarily mean to be legally binding erga omnes, in the sense of an EC regulation or of a law in the popular sense of the world.\textsuperscript{85} Similarly Senden argues that the CJEU

\hspace{1cm}[H]as adhered to a broader concept of legal effect that legally binding force alone. It has done this by reasoning that the fact that an act does not (intend to) have legal effects does not mean that it has no legal effect at all … As such, the concept of legal effect can be understood as an umbrella concept, covering not only the notion of … legally binding force but also that of indirect legal effects.\textsuperscript{86}

Practice abounds with manifestations of legal facts. The way in which the doctrine of estoppel operates in international law is a good example. Under the doctrine of estoppel, conduct, that may itself remain below the threshold of bindingness, may create legal effects to the extent that another party has relied thereon to its own detriment.\textsuperscript{87} The CJEU has also accepted that induced reliance on informal instruments is not without normative significance.\textsuperscript{88} Thus, in \textit{Dansk Rørindustri} the Court ruled that the Commission’s Guidelines on the method of setting fines for breaches of competition law are binding since they may create legitimate expectations on the parties concerned.\textsuperscript{89} According to the Court:

\hspace{1cm}In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects.\textsuperscript{90}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} Joined cases C-189/02, C-202/02 P, C-205/02 P to C-208/02 P \textit{Dansk Rørindustri et al v Commission of the European Communities} (2005), ECR I-05425, paras. 210-213.
\item \textsuperscript{90} \textit{Ibid.}, para. 211.
\end{itemize}
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Based on the same rationale the Court has found that, in the area of State aid, the Commission is bound by the guidelines and notices that it issues to the extent that they do not depart from the rules in the Treaty.\(^91\)

The protection of legitimate expectations has also heavily influenced the approach adopted by the Court towards other informal instruments in the field of EU competition law. In Delimitis, Advocate General van Gerven explained the legal status of the Commission Notice governing agreements which do not appreciably restrict competition (De Minimis Notice):

> Without wishing to express a view on the exact legal force of such a notice, which constitutes in any event a declaration of intention from which it is possible to deduce the Commission’s policy on implementation and confers on the individuals for whom it is intended certain legitimate expectations, the national court may nevertheless find therein guidance as to how the Commission is applying Article 85(1), which may be of assistance in its assessment.\(^92\)

Advocate General Kokott also highlighted the important legal ramifications of the De Minimis Notice in her Opinion in the Expedia case.\(^93\) The Advocate General stressed that although the Notice does not enjoy binding force \textit{per se}, “it would be a mistake to regard it as of no importance at all in law for proceedings concerning cartels. Publications like the de minimis notice are in the nature of ‘soft law’ the relative importance of which in cartel proceedings, at the European and the national levels, should not be underestimated.”\(^94\) The Advocate General went on to draw a distinction between the legal effects stemming from the Notice at EU level and at Member State level. According to the Advocate General, instruments issued by the Commission relating to its administrative practice create self-binding effects in the light of the general principles of equal treatment and the protection of legitimate expectations.\(^95\) At Member State level however, the Notice, as expressly stipulated therein, is merely intended to give guidance on the application of Art. 101 TFEU and thus, it is not, as such, binding on national courts and competition authorities.\(^96\) At the same time, the Advocate General issued a

stern warning against disregarding informal instruments issued by the Commission in the relevant field. In her view, national courts and competition authorities are bound, on the basis of the duty of sincere cooperation, laid down in Art.4(3) TEU, to take due account of the Commission’s competition policy notices, such as the De Minimis Notice, when exercising their enforcement powers under Regulation 1/2003. The Court largely endorsed Advocate General Kokott’s position. It found that the purpose of the De Minimis Notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the de minimis notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations … Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.

Informal instruments may also have legal effects to the extent that they are used to assist interpretation of other legal acts. As Hartley notes: “legal effect is not an all-or-nothing characteristic: an instrument may have some legal effects but not others – for example, an instrument may not have direct legal consequences in its own right, but may affect the interpretation of another instrument and thus have indirect legal consequences.” In Kasikili/Sedu, the ICJ expressly acknowledged the relevance of informal instruments for the interpretation of treaty provisions. Similarly, in Diallo, the Court opined that, in interpreting the International Covenant on Civil and Political Rights, great weight should be ascribed to the non-binding findings of the Human Rights Committee, since the latter “was established specifically to supervise the application of that treaty.” The CJEU has also acknowledged that non-binding instruments may play an important role in the interpretation of other binding acts. In Antonissen the Court held that a Council declaration recorded in the minutes at the time of the adoption of a legislative act can be used for interpretative purposes provided that

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97 Ibid., para. 38.
98 Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others [2012], ECLI:EU:C:2012:795, para. 28.
102 Case concerning Ahmadou Sadio Diallo, ICJ Reports 2010, p. 639, para. 66.
“reference is made to the content of the declaration in the wording of the provision in question.”

Furthermore, in The Queen v The Licensing Authority the Court showed its willingness to use Council declarations as an interpretation aid for the purpose of establishing the meaning of a legislative act.

In Grimaldi, the Court went even further by ascribing the quality of a mandatory interpretation aid to recommendations. The case concerned the legal effects of two recommendations on occupational diseases. The Court considered that the measures in question, whilst not formally binding,

cannot be regarded as having no legal effects. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions.

The CJEU confirmed this position in the Deutsche Shell case. The case concerned a recommendation adopted on the basis of an international agreement. According to the Court such instruments are to be taken into consideration since they form part of the EU legal order. The Court went on to reaffirm that:

Although the recommendations … cannot confer upon individuals rights which they may enforce before national courts, the latter are nevertheless obliged to take them into consideration in order to resolve disputes submitted to them, especially when, as in this case, they are of relevance in interpreting the provisions of the Convention.

Finally, it is worthwhile mentioning that the Court uses informal acts in order to confirm an interpretation already reached on the basis of binding law. Thus, in Auer it

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103 Case C-292/89 The Queen v The Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen [1991], ECR I-745, para. 38. Note however that the Court has consistently refused to take into account similar declarations issued by Member States. See for example Case 143/83 Commission v Denmark [1985], ECR I-427, para. 12.
104 Case C-368/96 The Queen v The Licensing Authority [1998], ECR I-7967, para. 27. See also A. Arnulf, The European Union and its Court of Justice, (Oxford: oxford University Press, 1999), pp. 521-522.
105 Case C-322/88 Salvatore Grimaldi v Fonds des Maladies Professionelles [1989], ECR I-04407. See also A. Peters, supra note 51, at p. 36.
106 Ibid., para. 18. According to Arnulf, the interpretative obligation formulated by the Court in Grimaldi is “reminiscent of Von Colson, where the European Court said that national courts were required to interpret their national legislation in the light of the wording and purpose of relevant directives.” A. Arnulf, European Court (Second Chamber) Judgment of December 13, 1989, Case C-322/88 Salvatore Grimaldi v Fonds des Maladies Professionelles, 15 E. L. Rev. 318 (1990), at p. 319.
107 Case C-188/91 Deutsche Shell Aktiengesellschaft v Hauptzollamt Hamburg – Hamburg [1993], ECR I-363.
108 Ibid., para. 17.
109 Ibid., para. 18.
held that its conclusion regarding the *ratione personae* field of application of the provisions on free movement of services and the right of establishment

was fully confirmed by a declaration concerning the definition of the persons covered by the directives, which was recorded in the minutes of the meeting of the Council during which the directives relating to the mutual recognition of diplomas and the co-ordination of provisions laid down by law, regulation or administrative action in respect of the activities of veterinary surgeons were adopted.¹¹⁰

Similarly, in the *Egle* case, the Court used a joint declaration of the Commission and the Council, contained in the minutes of the session in which the directive was adopted, in order to confirm its own interpretation thereof.¹¹¹

5. Conclusion

What does this brief overview of the CJEU’s treatment of informal law mean for the doctrine of international law-making? The CJEU’s practice, and more particularly its substance-over-form approach in the context of law-ascertainment as well as its broad understanding of normativity, lends normative and explanatory force to the bright line school of thought. More broadly speaking, this means that we can only neglect this practice at our own peril: the Court’s case-law confirms the existence of a wide array of tools for ‘digesting’ social reality - while leaving the traditional architecture of international law unscathed. On the flip side, what does the judicial recognition of the possible legal ramifications of informal instruments imply for the EU legal order and, more specifically, for the project of European integration? The Parliament, in its 2007 Resolution, seems to be of the view that the increasing use of informal instruments is hampering the overall integration process: recourse to informality may be a symptom of underlying tensions and lack of consensus.¹¹² On the other hand, it could be argued that the judicial recognition of the fact that, while the threshold between law and non-law is something real and important, norm-creation is not merely a question of threshold is an indicator of the advanced stage of the integration process. As Peters argues:

In fact, the existence of a strong and broad political, social and cultural consensus in a polity may … paradoxically render hard regulation unnecessary in some domains, because the societal consensus facilitates the functioning of soft rules. This also means that stable

¹¹⁰ Case 136/78 *Ministère Public v Auer* [1979], ECR 437, para. 25.
¹¹¹ Case C-310/90 *Nationale raad van de Orde van Architecten v Egle* [1992], ECR I-177, para. 12.
polities that are built on a solid political and cultural consensus can afford soft law better than unstable ones.\textsuperscript{113}

This view is confirmed by the 2003 Report from the Commission on European Governance.\textsuperscript{114} According to the Commission, domains that are less secure and less transparent “are in greater need of ‘hard law’ providing the necessary security and transparency.”\textsuperscript{115} \textit{A contrario}, this implies recognition of the fact that the EU legal order is ‘advanced’ enough to sustain the co-existence of binding and non-binding acts. If this is true, then international law and EU law may have more in common than commonly assumed: both are mature legal orders that can afford the co-existence of binding and non-binding regulatory mechanisms without this undermining their normative power.

\textsuperscript{113} A. Peters, \textit{supra} note 51, p. 43.


\textsuperscript{115} \textit{Ibid.}, p. 26.