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**Soft Norms, Strong Impact: The
Significance of Soft Law in the Legal Order
of the European Union with Special
Consideration of the Work of the Venice
Commission**

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General Note about the Content

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Abstract

Soft law is characterized by its non-binding nature, its flexibility in compliance and the possibility of achieving a compromise more easily. Even though soft law is not a novel concept, its definition and importance are still up for debate.

In the legislation of the European Union (EU), soft law is quite important. For instance, non-binding opinions and recommendations have evolved into a common regulatory tool, especially for the European Commission or the Council of Europe. Since the generation of soft law is less demanding than the generation of hard law, also the European Court of Justice (CJEU), among other institutions, uses soft law in a range of settings.

Furthermore, the opinions of the Venice Commission, which is officially called *the European Commission for Democracy through Law*, play a vital role concerning soft law. As an advice-giving institution concerning constitutional difficulties of the Council of Europe, primarily operates within the realm of soft law. The Venice Commission offers legal guidance to the 61 member states, with an emphasis on bringing institutional and legal frameworks into compliance with the rule of law, human rights as well as European and international standards. In addition, the Venice Commission helps with resolving conflicts, works with constitutional courts, and assists in elections and referendums by adopting opinions on draft laws concerning elections and by organizing yearly conferences of electoral management bodies. The Venice Commission makes use of both hard law and soft law for setting its standards.

Table of contents

- 1. Introduction..... 1**
- 2. Soft law – Definition of terms 2**
 - 2.1 The border between soft law and hard law 3**
 - 2.2 The border between soft law and non-legal norms 4**
- 3. The benefits and features of soft law..... 4**
 - 3.1 Costs 5**
 - 3.2 Rapidity 5**
 - 3.3 Flexibility 6**
- 4. Soft law in European Union law..... 7**
 - 4.1 The manifestations of soft law 8**
 - 4.1.1 Legal preparatory soft law..... 9
 - 4.1.2 Legal accompanying soft law 9
 - 4.1.3 Legal substitutive soft law 10
 - 4.2 The principle of conferral 10**
 - 4.2.1 The principle of conferral and its application to soft law 13
- 5. Soft law regarding the work of the Venice Commission 14**
 - 5.1 The structure of the Venice Commission 14**
 - 5.2 The working method of the Venice Commission 17**
 - 5.3 The role of the Venice Commission 17**
 - 5.3.1 Democracy and fundamental rights 18
 - 5.3.2 Constitutional justice 19
 - 5.3.3 Political parties, elections, and referendums..... 21
 - 5.4 Studies and opinions of the Venice Commission..... 22**
 - 5.5 Legal Sources..... 24**
 - 5.5.1 Hard law as a standard 25
 - 5.5.2 Soft law as a standard 25
 - 5.6 Legitimization 26**
- 6. Summary and Conclusion 27**
- 7. References 31**

List of abbreviations

Art	Article
CE	Council of Europe
Cf.	confer (“compare”)
CJEU	Court of Justice of the European Union
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
Ed.	Editor/Editors
EP	European Parliament
EU	European Union
JCCJ	Joint Council on Constitutional Justice
Mr.	Mister
Ms.	Miss
OAS	Organization of American States
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-Operation in Europe
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

1. Introduction

Soft law, a term created in the legal discourse, embodies a paradox that underscores its importance in regulatory frameworks: The juxtaposition of the seemingly rigid and binding effect of *law* with the inherent flexibility and non-binding nature of soft creates a nuanced terrain of legal norms. Although there are still disagreements and debates about many aspects of these extraordinary regulations, soft law acts have established themselves as important regulatory tools for the institutions of the European Union (EU).

The primary issue to address in the following chapters is the definition of soft law as the opinions diverge. One of the main reasons for these definitional issues is that soft law, which was created by states or other subjects of international law, lacks a defined objective and an intelligible content, which opens up a lot of room for interpretation. Notwithstanding the conflicting viewpoints expressed in the literature, an attempt is made in the beginning of this paper to define soft law, which will serve as the foundation for the further chapters. Especially by comparing soft law and hard law, the main characteristics of soft law will be presented.

The subsequent chapters of this work will further examine the functions of soft law in European Union law, with a special emphasis on the Venice Commission, an advisory body of the Council of Europe. For this reason, several soft law documents of European Union law are being examined and the purpose of soft law is further investigated as a result. The different types of soft law will be observed and also the principle of conferral and its application to soft law will be discussed. Further, the aim of this work is to highlight the unique features that arise from the implementation of soft law in the operations of the Venice Commission.

2. Soft law – Definition of terms

The expression *soft law* has been used for many years, but its exact meaning remains controversial.¹ So as to arrive at a clear definition which will be used in this thesis, the following section will explore the various viewpoints on this matter.

A fundamental principle underlying the concept of soft law is that it is non-binding. Consequently, the absence of legal quality and the non-binding nature of soft law prevent the imposition of legally binding obligations on the parties.² *Müller* posits that soft law is of limited legal enforceability and encompasses those orders issued by the executive, that result in either direct or indirect legal implications. Nevertheless, these orders do not establish any obligations or rights themselves.³ *Shelton* also acknowledges the existence of soft law and defines it as normative provisions contained in non-binding texts.⁴ *Terpan*, however, maintains that a legal space exists, defined by the coexistence of judicially controllable and legally binding regulations on the one hand and non-legal acts on the other. At the center of this space are instruments which are called *soft law*.⁵ In contrast, *Weil* cautions against excessively blurring the lines regarding normative and non-normative acts.⁶ Similarly, *Abbott* and *Snidal* express skepticism concerning the notion of binding force, recommending that most international law can be considered *soft* to some extent.⁷ Nevertheless, there are legal scholars who deny the existence of soft law in its entirety. *Klabbers*, for instance, asserts that soft law is redundant

¹ cf. *Shaffer/Pollack*, Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance, *Minnesota Law Review* 2010, 712.

² cf. *Cassese*, *International Law*² (2005) 196.

³ cf. *Müller*, *Soft Law im europäischen Wirtschaftsrecht -unionsverfassungsrechtliche Grundfragen*, JRP 2014, 114.

⁴ cf. *Shelton*, *Commitment and Compliance* (2003) 292.

⁵ cf. *Terpan*, *Soft Law in the European Union – The Changing Nature of EU Law*, *European Law Journal* 2015, 68.

⁶ cf. *Weil*, *Towards Relative Normativity in International Law?* *American Journal of International Law* 1983, 413.

⁷ cf. *Shaffer/Pollack*, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013) 197.

because, from a legal positivist perspective, law can be classified as either hard law or not as *law*. Consequently, soft law is, in his opinion, unnecessary within the legal system.⁸

There is divergence in the legal literature concerning the evaluation of soft law. Some scholars suggest that soft law should not be accorded any legal status at all, while others declare soft law to be indispensable. However, for the purposes of this thesis the definition of Knauff will be employed, which defines soft law as sovereignly enacted acts which are not inherently legally binding yet exerting non-legal behavioral influence as social norms through their factual and legal effects.⁹

2.1 The border between soft law and hard law

Abbott and Snidal establish three criteria for defining legal norms, all of which must be met for a norm to qualify as hard law. The three criteria that must be fulfilled are *obligation*, *precision*, and *delegation*. A norm is considered obligatory if it encompasses a request for a specific action or omission. Those to whom the norm is addressed are legally obligated to comply, subjecting their behavior to the control of the regulations and rules of national or international law.¹⁰ Hard law thus implies an obligation for the state to take on the responsibility for the violation of hard law, regardless of the sanction this violation entails.¹¹ Precision in a norm is determined by its clarity and unambiguity regarding the prescribed action or omission. The final factor, namely delegation, refers to third parties, for instance courts, which are granted the authority to interpret, enforce and apply these regulations.¹² If any of the three variables is insufficiently fulfilled, it is no longer considered to be hard law but rather soft law. Consequently, a multitude

⁸ cf. *Klabbers*, The Redundancy of Soft Law, *Nordisk Journal of International Law* 1996, 167.

⁹ cf. *Knauff*, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem (2010) 228.

¹⁰ cf. *Abbott/Snidal*, Hard and Soft Law in International Governance, *International Organization* 2000, 421.

¹¹ cf. *Lichtenstein*, Hard Law v. Soft Law: Unnecessary Dichotomy?, *The International Lawyer* 2001, 1433.

¹² cf. *Shaffer/Pollack*, Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance, *Minnesota Law Review* 2010, 718.

The Significance of Soft Law in the Legal Order of the European Union

of levels of soft and hard law are possible through the combination of varying strengths of these criteria.¹³

To illustrate, the Treaty of the European Union (TEU) is legally binding (*obligation*) in Austria and is clearly formulated in its requirements (*precision*). It is subject to judicial review by courts and legal bodies (*delegation*), and therefore constitutes hard law.

2.2 The border between soft law and non-legal norms

The Court of Justice of the European Union (CJEU) considered in its seminal *Grimaldi judgement* that soft law cannot be regarded as having no legal effect.¹⁴ As a consequence, soft law regulations have a legal effect but do not go as far as hard law.¹⁵ To distinguish soft law from norms that do not qualify as legal acts, the aforementioned criteria, namely obligation, precision and delegation, can be employed.¹⁶ In order for a legal act to be considered as soft law, it must have at least a partially binding element.

3. The benefits and features of soft law

The utilization of soft law instruments should not be regarded as an emergency solution.¹⁷

Instead, it brings a number of benefits, such as reduced costs, quicker generation, and enhanced

¹³ cf. *Abbott/Keohane/Moravcsik/Slaughter/Snidal*, The Concept of Legalization, International Organization 2000, 401.

¹⁴ cf. CJEU 13. 12. 1989, C-322/88, *Grimaldi*.

¹⁵ cf. *Guzman/Meyer*, International Soft Law, Journal of Legal Analysis 2010, 174.

¹⁶ cf. *Abbott/Snidal*, Hard and Soft Law in International Governance, International Organization 2000, 421.

¹⁷ cf. *Knauff*, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem (2010) 248.

flexibility:¹⁸

3.1 Costs

Contrary to hard law, the drafting of soft law, is correlated to cost advantages.¹⁹ This may be attributed to the fact that less thoroughness is required when drafting and negotiating soft law.²⁰ These reduced requirements for diligence could result from significantly lower costs associated with a breach of soft law compared to a breach of hard law. Additionally, when drawing up a contract, so-called sovereignty costs are also incurred. These are the costs incurred by the state in contract conclusion. The use of soft law can result in reduced sovereignty costs, as it employs for instance rather political mechanisms. Besides, the involvement of expensive legal experts in the drafting process can be avoided.²¹

3.2 Rapidity

In contrast to hard law, soft law doesn't require integration into national law. This eliminates the need for national procedures and the involvement of the legislature. For soft law, the executive is in charge of drafting it.²² By circumventing the national procedures, the implementation of soft legislation can be expedited, thereby facilitating a faster pursuit of the objectives encompassed by this agreement. Bypassing the national process may further facilitate the formation of a soft law arrangement between governments or the negotiation of

¹⁸ cf. *Palmer*, New Ways to Make International Environmental Law, *The American Journal of International Law* 1992, 269.

¹⁹ cf. *Eliantonio/Stefan*, Soft Law Before the European Courts: Discovering a 'common pattern'?, *Yearbook of European Law* 2018, 457.

²⁰ cf. *Sheppard*, Norm Supercompliance and the Status of Soft Law, *Buffalo Law Review* 2014, 790.

²¹ cf. *Shaffer/Pollack*, Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance, *Minnesota Law Review* 2010, 719.

²² cf. *Guzman*, The Design of International Agreements, *The European Journal of International Law* 2005, 592.

such an agreement between the parties.²³ Moreover, a consensus can often be reached more quickly, and the negotiated contents are often very detailed and precisely formulated.²⁴ The absence of rigorous penalties for non-compliance with soft law-contracts distinguishes them from conventional contracts.²⁵ Besides, the process of negotiating a contract can be time-consuming, with the success of the contract only becoming apparent at a later stage. In contrast, the recognition of the success of soft law can occur more rapidly.²⁶

Furthermore, the process of drafting soft law is less complex than that of a hard law treaty, even when there are conflicting national interests, and therefore, allows for the balancing of political interests. Soft law can be selected as a means of achieving a compromise between two interest groups, one of which supports the conclusion of a treaty and the other of which generally opposes it. Consequently, soft law permits the interests of both groups to be considered in a weakened form.²⁷

3.3 Flexibility

Soft law, being less formal and easily adaptable, permits states to operate with greater efficiency²⁸ and respond more swiftly to uncertain future circumstances.²⁹ In addition, soft law agreements come with less serious political and economic consequences, which increases the agreement's efficiency.³⁰ The difficulty in concluding a hard law-agreement exposes governments to potential risks since unforeseen expenses or other unfavorable outcomes could

²³ cf. *Shaffer/Pollack*, Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance, *Minnesota Law Review* 2010, 720.

²⁴ cf. *Guzman*, The Design of International Agreements, *The European Journal of International Law* 2005, 591.

²⁵ cf. *Boyle*, Some Reflections on the Relationship of Treaties and Soft Law, *International and Comparative Law Quarterly* 1999, 903.

²⁶ cf. *Boyle*, Soft Law in International Law-Making, in *Evans* (Ed.), *International Law*⁵, 125.

²⁷ cf. *Guzman*, The Design of International Agreements, *The European Journal of International Law* 2005, 592.

²⁸ cf. *Chinkin*, The Challenge of Soft Law: Development and Change in International Law, *International and Comparative Law Quarterly* 1989, 852.

²⁹ cf. *Boyle*, Some Reflections on the Relationship of Treaties and Soft Law, *International and Comparative Law Quarterly* 1999, 903.

³⁰ cf. *Abbott/Snidal*, Hard and Soft Law in International Governance, *International Organization* 2000, 445.

arise³¹ and hence, states frequently choose not to conclude an agreement.³² States are therefore more inclined to reach an agreement if they anticipate little uncertainty and believe the deal can be modified more easily.³³

4. Soft law in European Union law

Article 288 of the Treaty on the Functioning of the European Union (TFEU)³⁴ contains a list of the tools available for the institutions of the European Union to exercise their competences: This list encompasses regulations, directives, decisions, recommendations, as well as opinions. These legal acts can be divided into obligatory and noncompulsory acts: While regulations, directives and decisions are legally binding, recommendations or opinions do not have binding force for their addressees and can also be referred to as *soft law*.

Soft law is unquestionably not a new phenomenon in European Union law.³⁵ Soft law emerged in the early 1980s in European community law and has continued to develop ever since.³⁶ In the European Union nowadays, there is a wide range of soft law regulations that have established themselves as important regulatory tools for the institutions of the European Union, particularly for the European Commission. Additionally, the European Court of Justice (CJEU) as well as the member states are open to soft law.³⁷

³¹ cf. *Koremenos/Lipson/Snidal*, The Rational Design of International Institutions, International Organization 2001, 793.

³² cf. *Hilgenberg*, A Fresh Look at Soft Law, European Journal of International Law 1999, 502.

³³ cf. *Shaffer/Pollack*, Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance, Minnesota Law Review 2010, 719.

³⁴ cf. Treaty on the Functioning of the European Union, BGBl. III Number 86/1999, Article 288.

³⁵ cf. *Gundel*, Rechtsschutz gegen „Soft Law“-Regulierungsmaßnahmen der Union mit dem Instrument der Gültigkeitsvorlage (2021) 317.

³⁶ cf. *Senden*, Soft Law in European Community Law (2004) 109.

³⁷ cf. *Knauff*, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem (2010) 299.

The Significance of Soft Law in the Legal Order of the European Union

There are plenty of factors that contribute to the rapid development and significant practical relevance of soft law: First, the creation of soft law is flexible and rather easy and soft law further offers adaptability over time and in fluctuating conditions.³⁸ As such, it can be rapidly and efficiently utilized wherever it is required. Furthermore, the lack of strong formalities results in claims being modified rather effortlessly compared to hard law.³⁹ In addition, due to political controversies, many institutions of the European Union are often using soft law as it is easier to deal with the different interests of the member states. Soft law is commonly used throughout the European Union in a variety of contexts, including telecommunications, state aid policies or environmental protection. The European Court of Justice (CJEU) typically employs soft law to support its interpretations or arguments about hard law or case law of the European Court of Justice.⁴⁰

4.1 The manifestations of soft law

There is a wide range of distinctive types of soft law in the European Union, including guidelines, recommendations, communications, green and white papers, codes of conduct, joint declarations, council conclusions, council resolutions and co-regulations.⁴¹ Article 288 (5) of the Treaty on the Functioning of the European Union (TFEU)⁴² declares that recommendations and opinions shall not be binding. Nevertheless, especially the recommendations given by the European Commission are of particular significance: The European Commission expresses its

³⁸ cf. *Rošic Feguš*, EU soft law: Validity, normativity and ‘bindingness’ reviewed, in *Láncos/Xanthoulis/Arroyo Jiménez* (Eds.), *The Legal Effects of EU Soft Law*, 53.

³⁹cf. *Shaffer/Pollack*, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, *Minnesota Law Review* 2010, 720.

⁴⁰ cf. *Knauff*, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010) 248.

⁴¹ cf. *European Parliament*, 14.2.2007, Working Document on institutional and legal implications of the use of “soft law” instruments, europarl.europa.eu/meetdocs/2004_2009/documents/dt/653/653346/653346en.pdf (retrieved on 24.3.2024).

⁴² cf. Treaty on the Functioning of the European Union, BGBl. III Number 86/1999, Article 288.

opinion in statements, while the recommendations are intended to guide the behavior of the member states.⁴³

There are many ways on how to organize soft law. On the one hand, soft law can be subdivided into resolutions, meaning recommendations and decisions of international organizations, and non-binding agreements between states.⁴⁴ On the other hand, *Senden* separates *preparatory and informative instruments, interpretative and decisional instruments, formal steering instruments and non-formal steering instruments*.⁴⁵ However, for this thesis, it might be advantageous to segregate soft law by its functions.

4.1.1 Legal preparatory soft law

Legal preparatory soft law are regulations that evaluate the potential for enforceable rights while maintaining the same regulatory framework, thereby preparing the actual legal implementation.⁴⁶ Green and white papers are in the category of legal preparatory soft law.⁴⁷

4.1.2 Legal accompanying soft law

Regulations of the legal accompanying soft law proceed to define the already existing law further.⁴⁸ Among the legal accompanying soft law, the most significant share is probably attributable to the so-called *administrative soft law*.⁴⁹ Administrative soft law encompasses all soft law acts that have been adopted by an institution of the European Union⁵⁰ in the exercise

⁴³ cf. *Knauff*, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010) 301.

⁴⁴ cf. *Thürer*, *Grundidee Gerechtigkeit Band 2: Völkerrecht als Fortschritt und Chance* (2009) 163.

⁴⁵ cf. *Senden*, *Soft Law in European Community Law* (2004) 123.

⁴⁶ cf. *Knauff*, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010) 379.

⁴⁷ cf. *Peters/Pagotto*, *Soft Law as a New Mode of Governance: A Legal Perspective* (2006) 16.

⁴⁸ cf. *Knauff*, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010) 384.

⁴⁹ cf. *Peters/Pagotto*, *Soft Law as a New Mode of Governance: A Legal Perspective* (2006) 17.

⁵⁰ cf. *Müller*, *Soft Law im europäischen Wirtschaftsrecht - unionsverfassungsrechtliche Grundfragen*, JRP 2014, 114.

of executive authority.⁵¹ Consequently, it is frequently employed by the European Commission as a means of enforcing compliance.⁵² Legal accompanying soft law contributes to a greater legal certainty by clarifying and unifying the application of European Union law. This category includes guidelines as well as opinions and recommendations of the European Commission.⁵³

4.1.3 Legal substitutive soft law

Soft law, that pursues the creation of not just temporary but permanent regulations, belongs to the category of legal substitutive soft law.⁵⁴ Examples of this category include opinions, codes of conduct,⁵⁵ council resolutions as well as council conclusions.⁵⁶

4.2 The principle of conferral

According to Article 288 of the Treaty on the Functioning of the European Union (TFEU),⁵⁷ the EU institutions are permitted to adopt secondary legislation within the scope of their respective competencies. Article 288 TFEU has to be understood in conjunction with Article 5 paragraph 2 of the Treaty on European Union (TEU),⁵⁸ where the principle of conferral is being established.⁵⁹ This regulation standardizes the vertical distribution of competences between the European Union and the member states.⁶⁰ Conforming to Article 5 paragraph 2 TEU, the European Union is only allowed to exercise the competences that have been transferred to it by

⁵¹ cf. *Schwarze*, *Soft Law im Recht der Europäischen Union* (2011) 10.

⁵² cf. *Müller*, *Soft Law im europäischen Wirtschaftsrecht - unionsverfassungsrechtliche Grundfragen*, JRP 2014, 114.

⁵³ cf. *Senden*, *Soft Law in European Community Law* (2004) 138.

⁵⁴ cf. *Knauff*, *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem* (2010) 384.

⁵⁵ cf. *Senden*, *Soft Law in European Community Law* (2004) 155.

⁵⁶ cf. *Peters/Pagotto*, *Soft Law as a New Mode of Governance: A Legal Perspective* (2006) 17.

⁵⁷ cf. *Treaty on the Functioning of the European Union*, BGBl. III Number 86/1999, Article 288.

⁵⁸ cf. *Treaty on European Union*, BGBl. III Number 85/1999, Article 5.

⁵⁹ cf. *Stocker/Vcelouch in Jaeger/Stöger*, *EUV/AEUV Article 288 AEUV Marginal Number 5*.

⁶⁰ cf. *Lienbacher in Schwarze*, *EU-Kommentar*⁴ Article 5 Marginal Number 1.

The Significance of Soft Law in the Legal Order of the European Union

the member states.⁶¹ Furthermore, it stipulates that all competences that have not been transferred to the European Union in the Treaties⁶² remain with the member states. Conversely, the *competence-competence*, meaning the ability to decide on the allocation of new competences or the revocation of existing competences remains with the member states, thereby reinforcing their position as *masters of the treaties*⁶³ as stipulated in Article 1 paragraph 1 of the Treaty on European Union.⁶⁴ The competences transferred to the European Union⁶⁵ are set out in Articles 2 to 6 of the Treaty on the Functioning of the European Union,⁶⁶ which distinguish between exclusive competence of the EU, shared competence of the European Union and the member states, and competences to support, coordinate and supplement.⁶⁷ In opposition, Article 13 paragraph 2 of the Treaty on European Union⁶⁸ regulates the horizontal division and therefore defines the relationship between the institutions of the European Union⁶⁹ and determines the scope of competences assigned to them.⁷⁰

At first it seems like there is a clear division between the competencies of the European Union and the competencies of the member states, as set out in Article 5 paragraph 2 of the Treaty on European Union. However, this can be relativized in two aspects:⁷¹

Firstly, the *implied powers doctrine*, utilized by the Court of Justice of the European Union (CJEU) in its early stages,⁷² suggests that the European Union possesses competences that are not

⁶¹ cf. *Callies in Callies/Ruffert*, EUV, AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta⁶ Article 5 Marginal Number 8.

⁶² The TEU and the TFEU amount to *the Treaties*.

⁶³ cf. *Lienbacher in Schwarze*, EU-Kommentar⁴ Article 5 Marginal Number 8.

⁶⁴ cf. Treaty on European Union, BGBl. III Number 85/1999, Article 1.

⁶⁵ cf. *Borchardt*, Die rechtlichen Grundlagen der Europäischen Union : eine systematische Darstellung für Studium und Praxis⁷ (2020) Marginal Number 465.

⁶⁶ cf. Treaty on the Functioning of the European Union, BGBl. III Number 86/1999, Articles 2-6.

⁶⁷ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 10.

⁶⁸ cf. Treaty on European Union, BGBl. III Number 85/1999, Article 13.

⁶⁹ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 3.

⁷⁰ cf. *Haratsch/Koenig/Pechstein*, Europarecht¹³ (2023) Marginal Number 179.

⁷¹ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 6.

⁷² cf. CJEU 29.11.1956, C-8/55, *Fédération Charbonnière de Belgique*.

explicitly outlined in the respective competence norm, but whose regulation by the European Union appears more reasonable due to their factual connection between an existing competence and the matter to be regulated.⁷³ In the appearance of the so-called *annex competences*,⁷⁴ the *implied powers doctrine* was particularly relevant in the context of the European Union, as it facilitated the establishment of external competences of the EU institutions.⁷⁵ Since the Treaty of Lisbon, the external competences of the EU have been explicitly regulated⁷⁶ in Article 216 (1) of the Treaty on the Functioning of the European Union.⁷⁷ Nowadays, the implied powers are only of minor importance.⁷⁸

Secondly, if the competences laid down in the Treaties are not sufficient to achieve the objectives of the European Union, the *flexibility clause*⁷⁹ set out in Article 352 (1) of the Treaty on the Functioning of the European Union⁸⁰ provides for the possibility of supplementing competences. The competences of the *implied powers doctrine* derive from existing competences, while actions of the European Union institutions regarding the *flexibility clause* follow from the objectives laid down in the treaties.⁸¹ The *flexibility clause* is subsidiary⁸² to the implied powers and is of little practical significance,⁸³ as it requires the consent of both the Council of Europe and the European Parliament.⁸⁴

⁷³ cf. *Schima* in *Jaeger/Stöger*, EUV/AEUV Article 5 EUV Marginal Number 17.

⁷⁴ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 6.

⁷⁵ cf. *Winkler* in *Grabnitz/Hilf/Nettesheim*, Das Recht der Europäischen Union 3⁷⁹ Art 352 AEUV Marginal Number 81.

⁷⁶ cf. *Herdegen*, Europarecht²⁴ (2023) Marginal Number 61.

⁷⁷ cf. Treaty on the Functioning of the European Union, BGBl. III Number 86/1999, Article 216.

⁷⁸ cf. *Haratsch/Koenig/Pechstein*, Europarecht¹³ (2023) Marginal Number 186.

⁷⁹ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 7.

⁸⁰ cf. Treaty on the Functioning of the European Union, BGBl. III Number 86/1999, Article 352.

⁸¹ cf. *Borchardt*, Die rechtlichen Grundlagen der Europäischen Union : eine systematische Darstellung für Studium und Praxis⁷ (2020) Marginal Number 480.

⁸² cf. *Streinz* in *Streinz* (Ed.), EUV/AEUV³ Article 352 Marginal Number 9.

⁸³ cf. *Schroeder*, Grundkurs Europarecht⁶ § 7 Marginal Number 7.

⁸⁴ cf. *Streinz*, Europarecht¹² (2023) Marginal Number 540.

4.2.1 The principle of conferral and its application to soft law

Are soft law acts also subject to the principle of conferral? This question has been subject of considerable debate in doctrine.⁸⁵

In accordance with Article 5 paragraph 2 of the Treaty on European Union (TEU),⁸⁶ the European Union is only permitted to act within the scope of its competencies. *Müller*,⁸⁷ *Bast and Von Bogdandy*⁸⁸ as well as *Brohm*⁸⁹ affirm the applicability of Article 5 paragraph 2 TEU to soft law. They argue that the enactment of non-binding norms is contingent upon the relevant competencies. Nevertheless, there are also compelling arguments that challenge the applicability of Article 5 paragraph 2 of the Treaty on European Union to soft law: *Callies'* perspective is that only the enactment of legally binding law is regulated by Article 5 paragraph 2 TEU.⁹⁰ Additionally, *Biervert* posits that there is no requirement for the enactment of recommendations.⁹¹ Moreover, *Knauff* contends that the use of soft law would be inappropriate if its creation was contingent upon the existence of an authorization basis as especially the flexibility and the rapidity are the main advantages of soft law, which could get lost when authorization was needed.⁹² The European Parliament has also commented on this matter, stating that soft law is encountered where hard law is not sufficient. However, it is important to observe the principles of democracy and the rule of law, which is why the institutions should

⁸⁵ cf. *Schima* in *Jaeger/Stöger*, EUV/AEUV Article 5 EUV Marginal Number 19.

⁸⁶ cf. Treaty on European Union, BGBl. III Number 85/1999, Article 5.

⁸⁷ cf. *Müller*, Soft Law im europäischen Wirtschaftsrecht - unionsverfassungsrechtliche Grundfragen, JRP 2014, 117.

⁸⁸ cf. *Bast/Von Bogdandy* in *Grabnitz/Hilf/Nettesheim*, Das Recht der Europäischen Union 3⁷⁹ Article 5 EUV Marginal Number 26.

⁸⁹ cf. *Brohm*, Die „Mitteilungen“ der Kommission im Europäischen Verwaltungs- und Wirtschaftsraum (2012) 124.

⁹⁰ cf. *Callies* in *Callies/Ruffert*, EUV, AEUV: Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta⁶ Article 5 Marginal Number 10.

⁹¹ cf. *Von der Groeben/Schwarze/Hatje*, Europäisches Unionsrecht 4 Article 288 AEUV Marginal Number 36.

⁹² cf. *Knauff*, Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem (2010) 403.

not exceed the institutional framework to which they are entitled.⁹³ On the one hand, the institutions benefit from the flexibility and rapidity of soft law, on the other hand this can also lead to democratic deficits. So, in conclusion, the need for soft law regulations in the legal system of the European Union is undoubtedly given.

5. Soft law regarding the work of the Venice

Commission

The following chapter will deal with the structure of the Venice Commission, its working method, and its role. Further, the opinions and studies of the Venice Commission will be discussed as well as its relation to hard law and soft law.

5.1 The structure of the Venice Commission

The Venice Commission, which is officially called the *European Commission for Democracy through Law*, is an advisory body on constitutional matters of the Council of Europe. It was established by 18 member states of the Council of Europe on May 10th 1990, following the fall of the Berlin Wall when Central and Eastern Europe desperately needed constitutional support. The Venice Commission is located in Venice, Italy, and consists of independent specialists in the field of constitutional law, with the current president being Ms. Claire Bazy-Malaurie.⁹⁴

⁹³ cf. *European Parliament*, 14.2.2007, Working Document on institutional and legal implications of the use of “soft law” instruments, europarl.europa.eu/meetdocs/2004_2009/documents/dt/653/653346/653346en.pdf (retrieved on 24.3.2024).

⁹⁴ cf. *Venice Commission*, For democracy through law, venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN (retrieved on 4.4.2024).

The Significance of Soft Law in the Legal Order of the European Union

The current director/secretary of the Venice Commission is Ms. Simona Gratana-Menghini,⁹⁵ the secretariat is in Strasbourg, France.⁹⁶

61 countries are part of the Venice Commission – the 46 member states of the Council of Europe and 15 other countries (among others Israel, the Republic of Korea, Canada, Brazil, or the United States of America)⁹⁷ as since 2002 non-European countries can become full members too.⁹⁸ Four countries (namely Argentina, the Holy See, Japan, and Uruguay) enjoy the observer status. Additionally, the Palestinian National Authority and South Africa have a superior co-operation position.⁹⁹ Furthermore, the European Union (EU), the Organization for Security and Co-Operation in Europe (OSCE) with its principal institution, the Office for Democratic Institutions and Human Rights (ODIHR), and the Organization of American States (OAS) are participants in the plenary sessions of the Venice Commission,¹⁰⁰ which take place four times a year.¹⁰¹

The member states and the countries with special status are depicted in the illustration below, with the member states being displayed in dark blue, the observer states being portrayed in light blue and the countries that hold a special co-operation status being pictured in turquoise.

⁹⁵ cf. *Venice Commission*, Simona Granata-Menghini, [venice.coe.int/files/CV_SGM_short_2021_EN.pdf](https://www.venice.coe.int/files/CV_SGM_short_2021_EN.pdf) (retrieved on 7.4.2024).

⁹⁶ cf. *Venice Commission*, For democracy through law, [venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN](https://www.venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN) (retrieved on 4.4.2024).

⁹⁷ cf. *Venice Commission*, For democracy through law, [venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN](https://www.venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN) (retrieved on 4.4.2024).

⁹⁸ cf. *Venice Commission*, CDL-UDT(2011)017, “The Council of Europe and the European Union: Shared Values and Standards”, [venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT\(2011\)017-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-UDT(2011)017-e) (retrieved on 6.4.2024).

⁹⁹ cf. *Venice Commission*, Members of the Venice Commission, [venice.coe.int/WebForms/members/countries.aspx?lang=EN](https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN) (retrieved on 5.4.2024).

¹⁰⁰ cf. *Venice Commission*, Members of the Venice Commission, [venice.coe.int/WebForms/members/countries.aspx?lang=EN](https://www.venice.coe.int/WebForms/members/countries.aspx?lang=EN) (retrieved on 5.4.2024).

¹⁰¹ cf. *Venice Commission*, For democracy through law, [venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN](https://www.venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN) (retrieved on 4.4.2024).

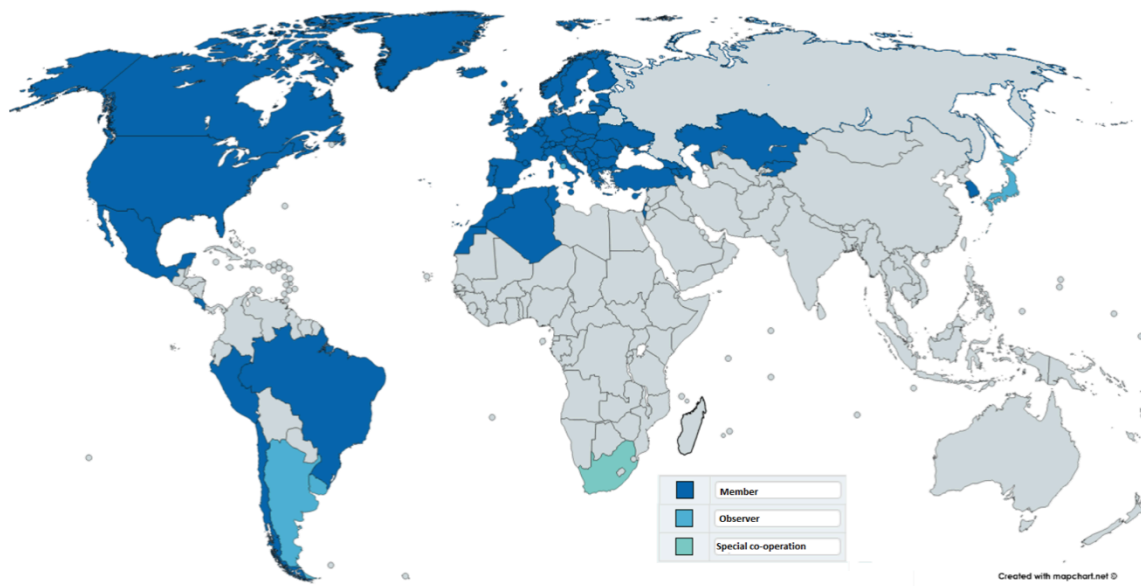


Figure 1: Members of the Venice Commission

The individual members make up politicians of national parliaments, judges of the supreme and constitutional courts, university professors of public law and international law and civil servants. The member nations appoint them for a period of four years, but the individual members act independently.¹⁰²

Austria is represented by Mr. Christoph Grabenwarter, the president of the Austrian constitutional court and professor for public law, business law and public international law at the Vienna University of Economics and Business Administration,¹⁰³ and the substitute member Ms. Katharina Pabel, a professor of public law and international law at the same university.¹⁰⁴

¹⁰² cf. *Venice Commission*, For democracy through law, venice.coe.int/WebForms/pages/default.aspx?p=01_Presentation&lang=EN (retrieved on 4.4.2024).

¹⁰³ cf. *Venice Commission*, Christoph Grabenwarter, venice.coe.int/WebForms/pages/?p=cv_43 (retrieved on 6.4.2024).

¹⁰⁴ cf. *Venice Commission*, Univ. Prof. Dr. Katharina Pabel, venice.coe.int/WebForms/pages/?p=cv_3898 (retrieved on 6.4.2024).

Mr. Christoph Grabenwarter was the Vice-President of the Venice Commission from 2015 to 2017¹⁰⁵ and is now the holder of the chair of the sub-commission for constitutional justice.¹⁰⁶

5.2 The working method of the Venice Commission

The solutions outlined in the Venice Commission's opinions are not intended to be imposed. Instead, it takes a non-directive, dialogue-based approach and shares the experiences and practices of the member nations. A working group travels to the relevant nation in order to meet with the different stakeholders and conducts an impartial assessment of the situation.¹⁰⁷ The authorities have further the option to provide the Venice Commission with feedback on the draft opinions. The countries involved normally take notice of the prepared opinions. Additionally, the Venice Commission's opinions are frequently cited by media outlets or international courts.¹⁰⁸

5.3 The role of the Venice Commission

The Venice Commission's purpose is to advise its member states on legal matters. It focuses on assisting nations that want to align their institutional and legal frameworks with international norms pertaining to democracy, human rights, the rule of law as well as European standards.¹⁰⁹

¹⁰⁵ cf. *Verfassungsgerichtshof*, Christoph Grabenwarter, vfgg.gv.at/verfassungsgerichtshof/verfassungsrichter/christoph_grabenwarter.de.html (retrieved 15.4.2024).

¹⁰⁶ cf. *Venice Commission*, Positions at the Venice Commission, venice.coe.int/WebForms/pages/?p=01_01_Offices&lang=EN (retrieved on 15.4.2024).

¹⁰⁷ cf. *Venice Commission*, 614/2011, Draft Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary, [venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2011\)016-e](http://venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2011)016-e) (retrieved on 19.4.2024).

¹⁰⁸ cf. *Iancu*, Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur, *Hague Journal on the Rule of Law* 2019, 190.

¹⁰⁹ cf. *Malinverni*, The Contribution of the European Commission for Democracy Through law (Venice Commission), *The Prevention of Human Rights Violations* 2002, 123.

The Significance of Soft Law in the Legal Order of the European Union

Moreover, the Venice Commission plays an important role in conflict resolution, contributes to the dissemination and development of a collective constitutional heritage.¹¹⁰

The three main areas of the Venice Commission are the following:

5.3.1 Democracy and fundamental rights

One of the key responsibilities of the Venice Commission is to support the states in the areas of legislation as well as constitutionalism to guarantee the democratic operation of their institutions and the preservation of fundamental rights.¹¹¹ In this regard, the opinions, studies and publications of the Venice Commission concern overall constitutional reforms and specific constitutional problems, such as the balance and the relation between the different branches of power, minority protection, emergency powers, decentralization or federalism and regionalization. The Venice Commission prepares those reports upon request from the member states, organs of the Council of Europe and other international organizations.¹¹² Especially in Central and Eastern Europe, the Commission has contributed immensely to the development of constitutional law.¹¹³

In accordance with applicable European and international standards,¹¹⁴ particularly the European Convention on Fundamental Rights and Freedoms and the case law of the European

¹¹⁰ cf. *Iancu*, *Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur*, *Hague Journal on the Rule of Law* 2019, 190.

¹¹¹ cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, 61.

¹¹² cf. *Granata-Menghini/Ninatti*, Chapter 10: *The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission*, in *Violini/Baraggia* (Ed.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 214.

¹¹³ cf. *Iancu*, *Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur*, *Hague Journal on the Rule of Law* 2019, 190.

¹¹⁴ cf. *Granata-Menghini/Ninatti*, Chapter 10: *The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission*, in *Violini/Baraggia* (Ed.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 218.

The Significance of Soft Law in the Legal Order of the European Union

Court of Human Rights, the Venice Commission has also been closely involved in the states' efforts to provide and enhance constitutional and legal guarantees for the protection of fundamental rights and freedoms.¹¹⁵ Among others, it looked at constitutional provisions concerning the freedom of association and peaceful assembly,¹¹⁶ issues pertaining to minorities,¹¹⁷ or the freedom of religion.¹¹⁸

Apart from offering guidance to individual states regarding their domestic laws, the Commission has also conducted in-depth analyses of human right concerns and established guidelines for lawmakers, attorneys or courts on laws and procedures regulating fundamental rights, together with the Organization for Security and Co-Operation in Europe (OSCE). Besides, regarding institutional matters, the opinions and findings of the Venice Commission center on how political institutions operate, the distribution of powers among the principal state organs, their respective roles and cooperation. As part of its work on democratic institutions, the Commission has also helped state authorities with reforms linked to the legislative and institutional framework of their national judicial systems.¹¹⁹

5.3.2 Constitutional justice

For Constitutionalism, or the view that all state action should be restricted to the parameters given by the constitution, to work, collaboration with constitutional courts is needed, according

¹¹⁵ cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, UC Irvine Journal of International, Transnational, and Comparative Law 2017, 61.

¹¹⁶ cf. *Venice Commission*, 290/2004, Opinion on the Law on Conducting Meetings, Assemblies, Rallies and Demonstrations of the Republic of Armenia, [venice.coe.int/webforms/documents/?pdf=CDL-AD\(2004\)039-e](http://venice.coe.int/webforms/documents/?pdf=CDL-AD(2004)039-e) (retrieved on 18.4.2024).

¹¹⁷ cf. *Granata-Menghini/Ninatti*, Chapter 10: The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission, in *Violini/Baraggia* (Ed.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 214.

¹¹⁸ cf. *Granata-Menghini/Ninatti*, Chapter 10: The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission, in *Violini/Baraggia* (Ed.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 219.

¹¹⁹ cf. *Venice Commission*, *Democratic institutions and fundamental rights*, venice.coe.int/WebForms/pages/?p=01_Const_Assistance (retrieved on 20.4.2024).

to the Venice Commission. A key factor in guaranteeing that all parts of government uphold the constitution is the existence of constitutional courts and comparable organizations, such as supreme courts and constitutional councils.¹²⁰

The Venice Commission seeks to support constitutional courts by offering numerous services and by supporting them directly when they come under undue pressure. This cooperation is directed by the *Joint Council on Constitutional Justice* of the Venice Commission, which influences the tools supplied by the Venice Commission facilitating information exchange. These tools are the *CODICES database*, the *e-Bulletin on Constitutional Case-Law*, and the *Venice Forum*.¹²¹ Despite being a European organization, the Venice Commission offers some of these services to constitutional courts outside of its member states. In addition, the Venice Commission provides *amicus curiae* acts upon request from the courts, which offer advice regarding issues on constitutional and international law.¹²²

Besides, the Joint Council on Constitutional Justice (JCCJ) was founded by the Venice Commission to govern the collaboration with constitutional courts and to keep them informed about its operations. The Joint Council on Constitutional Justice consists of members of the Venice Commission as well as liaison officers appointed by constitutional courts.¹²³ The JCCJ has a double presidency, where one of the chairs belongs to a member of the Venice Commission, the other one to a liaison officer. They hold this position for two years each.¹²⁴

¹²⁰ cf. *Granata-Menghini/Ninatti*, Chapter 10: The evolving paradigm of human rights protection as interpreted and influenced by the Venice Commission, in *Violini/Baraggia* (Ed.), *The Fragmented Landscape of Fundamental Rights Protection in Europe*, 218.

¹²¹ cf. *Venice Commission*, Constitutional justice – Cooperation between the Venice Commission and Constitutional Courts, [venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice](https://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice) (retrieved on 8.4.2024).

¹²² cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, 62.

¹²³ cf. *Venice Commission*, Constitutional justice – Cooperation between the Venice Commission and Constitutional Courts, [venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice](https://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice) (retrieved on 8.4.2024).

¹²⁴ cf. *Mehmetaj*, *The Venice Commission and its impact on the justice system* (2019) 4.

The Significance of Soft Law in the Legal Order of the European Union

The European Court of Human Rights, the Court of Justice of the European Union, the Inter-American Court of Human Rights, and all member states of the Venice Commission, as well as observer entities or states holding a superior cooperation status, are participants in the JCCJ. The Joint Council on Constitutional Justice convenes once a year, at a participating court's invitation.¹²⁵

Moreover, the Venice Commission supports constitutional courts when they are under unjustified pressure: Constitutional courts occasionally face unwarranted pressure from political entities for their judgements, which can result in budget cuts for the court, refusal to appoint judges, blocking the work of the court or even abolishment in rare cases. Under such circumstances, declarations or statements denouncing these acts may be adopted by the Venice Commission.¹²⁶

5.3.3 Political parties, elections, and referendums

The Venice Commission is involved in the electoral process by adopting opinions on draft laws pertaining to elections, as well as by organizing yearly conferences of electoral management bodies, scientific electoral expert debates, codes of good practice, guidelines, and general documents. The Commission further provides legal advice to members of the Parliamentary Assembly who carried out observation tasks.¹²⁷ Besides, the Office for Democratic Institutions and Human Rights (ODIHR) and the Commission collaborate closely. These two organizations collaborate to draft the majority of opinions about electoral legislation.¹²⁸

¹²⁵ cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, UC Irvine Journal of International, Transnational, and Comparative Law 2017, 62.

¹²⁶ cf. *Venice Commission*, *Constitutional justice – Cooperation between the Venice Commission and Constitutional Courts*, [venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice](https://www.venice.coe.int/WebForms/pages/?p=01_Constitutional_Justice) (retrieved on 8.4.2024).

¹²⁷ cf. *Venice Commission*, *Elections and referendums, political parties*, [venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums](https://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums) (retrieved on 12.4.2024).

¹²⁸ cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, UC Irvine Journal of International, Transnational, and Comparative Law 2017, 63.

The principles of the European electoral heritage were developed by the Venice Commission and the Council of Democratic Elections, primarily through the drafting of the *Code of good practice in electoral matters* and the *Code of good practice on referendums*, with the aim of providing stability to electoral laws and advancing the construction of the European electoral heritage. These are official reference materials of the Council of Europe. Opinions from the Venice Commission, reports from other international organizations, and rulings from the European Court of Human Rights all frequently refer to them. They have a big influence on how national laws are implemented in Europe and other countries.¹²⁹ In fact, the development of cooperation programs and the admission of a number of non-European nations as full members of the Venice Commission have helped to disseminate the Venice Commission's standards and expertise throughout the world, particularly in Latin America, the Southern Mediterranean, as well as Central Asia.¹³⁰

5.4 Studies and opinions of the Venice Commission

The Venice Commission employs opinions and studies within the aforementioned areas of action.¹³¹ The main responsibility of the Venice Commission is to offer member states some legal guidance in the form of *legal opinions* concerning draft legislation or existing law that is being presented to the Commission for assessment. It also generates papers and studies on current affairs. The secretariat assists member countries in preparing draft opinions and research, which are subsequently reviewed and approved during plenary meetings of the

¹²⁹ cf. *Venice Commission*, Elections and referendums, political parties, [venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums](https://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums) (retrieved on 12.4.2024).

¹³⁰ cf. *Venice Commission*, Elections and referendums, political parties, [venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums](https://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendums) (retrieved on 12.4.2024).

¹³¹ cf. *Yolcu*, Constitutional Courts' Helpdesk: The Venice Commission's Advisory Role in Constitutional Adjudication, *Vienna Journal on International Constitutional Law* 2022, 422.

committee.¹³² An opinion can be requested on the one hand by the parliaments, governments, or head of states of the member states and on the other hand as well by some institutions of the Council of Europe, for example the Parliamentary Assembly, the Secretary General, the Committee of Ministers or the Congress of Local and Regional Authorities. At the same time, also international organizations, like the European Union (EU), the Office for Democratic Institutions and Human Rights (ODIHR) or the Organization of American States (OAS) are allowed make a request upon an opinion of the Venice Commission.¹³³

An opinion is prepared by first referencing the Commission of a (draft) constitutional or legislative text by a national or international body or the Council of Europe. This is followed by the setting up of a group comprising experts assisted by the secretariat. The group then formulates a critique about the text's adherence to international standards and suggests changes. A visit to the nation is then planned in order to hold discussions with the government, civil society, and other relevant parties.¹³⁴ Subsequently, before the plenary session, a final draft opinion is developed and distributed to every member of the Venice Commission. Next, a sub-commission discusses the proposed opinion, and if needed, the national authorities do too.¹³⁵ Ultimately, the draft opinion is discussed and adopted or endorsed at the plenary session before being submitted to the body that requested it. The opinion's final text can be found at www.venice.coe.int, the website of the Venice Commission.¹³⁶

¹³² cf. *Iancu*, Quod licet Jovi non licet bovi?: The Venice Commission as Norm Entrepreneur, *Hague Journal on the Rule of Law* 2019, 194.

¹³³ cf. *Venice Commission*, The Commission's activities, [venice.coe.int/WebForms/pages/?p=01_activities&lang=EN](http://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN) (retrieved on 13.4.2024).

¹³⁴ cf. *Mehmetaj*, The Venice Commission and its impact on the justice system (2019) 6.

¹³⁵ cf. *Craig*, Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, 60.

¹³⁶ cf. *Venice Commission*, Recent and Current Events, [venice.coe.int](http://www.venice.coe.int) (retrieved on 26.4.2024).

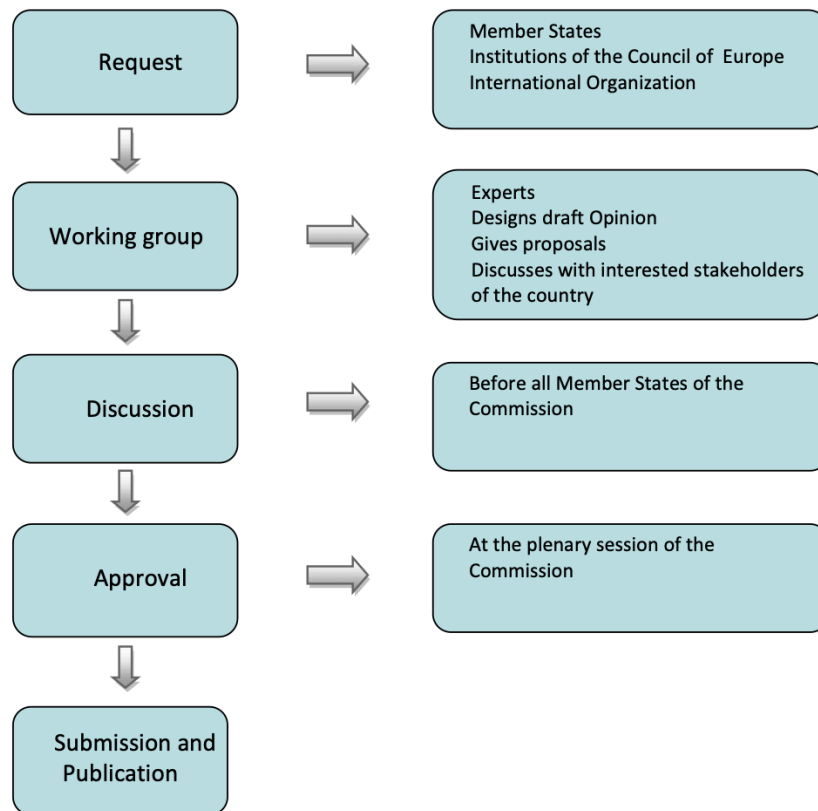


Figure 2: Opinion Approval Stages

5.5 Legal Sources

All of the opinions of the Venice Commission have the same characteristic of not being enforceable by law. At most, they are a soft law.¹³⁷ In order to provide legal advice to its member states, the Venice Commission uses not only its own legal materials but also judicial documents of other institutions. Sometimes, the commission does not explicitly refer to the standards upon which it has based its analyses. Nevertheless, there are two legal approaches that can be distinguished: hard law on the one hand and soft law on the other hand.¹³⁸

¹³⁷ cf. *Hoffmann-Riem*, *The Venice Commission of the Council of Europe – Standards and Impact* (2014) 580.

¹³⁸ cf. *Craig*, *Transnational Constitution-Making: The Contribution of the Venice Commission on Law and Democracy*, *UC Irvine Journal of International, Transnational, and Comparative Law* 2017, 77.

5.5.1 Hard law as a standard

Incredibly often, the Venice Commission makes use of the European Convention on Human Rights (ECHR) for justifying its decisions.¹³⁹ However, in order to precisely verify a particular conclusion, the Venice Commission also mentions, apart from the ECHR, additionally the explanation and application of the European Court of Human Rights (ECtHR).¹⁴⁰ The European Convention on Human Rights serves as the absolute minimum standard for the Venice Commission.¹⁴¹ The legal standards outlined in the European Convention on Human Rights for opinions by the Venice Commissions are, to some extent, implicitly accepted by countries that are not a part of the Council of Europe as these standards are also applied to them.¹⁴² Moreover, the Venice Commission also focuses on other documents related to international law, such as the Universal Declaration of Human Rights.¹⁴³ Furthermore, the Venice Commission refers to international legal agreements, that have only been signed between a small number of states.¹⁴⁴

5.5.2 Soft law as a standard

According to Article 1 of the Revised Statute of the European Commission for Democracy through Law, the Venice Commission's responsibility is to promote democracy while balancing the legal systems of the member states.¹⁴⁵ As there are other institutions of the Council of

¹³⁹ cf. *Venice Commission*, CDL-PI(2022)051, Compilation of Venice Commission Opinions and Reports Concerning Vetting of Judges and Prosecutors¹, [venice.coe.int/webforms/documents/?pdf=CDL-PI\(2022\)051-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)051-e) (retrieved on 14.4.2024).

¹⁴⁰ cf. *Venice Commission*, CDL-PI(2022)004, Compilation of Venice Commission Opinions and Reports Concerning Legal Certainty¹, [venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI\(2022\)004-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-PI(2022)004-e) (retrieved on 14.4.2024).

¹⁴¹ cf. *Venice Commission*, 489/2008, Opinion on the Constitutional and Legal Provisions Relevant to the Prohibition of Political Parties in Turkey, [venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2009\)006-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)006-e) (retrieved on 14.4.2024).

¹⁴² cf. *Hoffmann-Riem*, The Venice Commission of the Council of Europe – Standards and Impact (2014) 581.

¹⁴³ cf. *Venice Commission*, CDL-PI(2002)029, Compilation of Venice Commission's Opinions and Reports Concerning Freedom of Association¹, [venice.coe.int/webforms/documents/?pdf=CDL-PI\(2002\)029-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2002)029-e) (retrieved on 14.4.2024).

¹⁴⁴ cf. *Venice Commission*, CDL-PI(2020)008, Compilation of Venice Commission Opinions and Reports Concerning Freedom of Expression and Media, [venice.coe.int/webforms/documents/?pdf=CDL-PI\(2020\)008-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2020)008-e) (retrieved on 14.4.2024).

¹⁴⁵ cf. Revised Statute of the European Commission for Democracy through Law, Article 1.

Europe that produce soft law documents as well, the Venice Commission takes recommendations of the Parliamentary Assembly or the Committee of Ministers into account.¹⁴⁶ Nevertheless, the Venice Commission also develops standards independently and then incorporates them into other choices.¹⁴⁷ Furthermore, the Venice Commission has particularly much freedom when it comes to the development of best practices.

In conclusion, the Venice Commission makes therefore use of both hard law sources and soft law sources for setting its standards.¹⁴⁸ While taking the European Convention on Human Rights into consideration, the Venice Commission also reflects on non-binding documents of other institutions.

5.6 Legitimization

The Venice Commission was established by the Committee of Ministers of the Council of Europe. In accordance with the Article 2 of the Revised Statute of the Venice Commission, each member state is required to designate an expert and a representative to act on behalf of the nation in the Venice Commission.¹⁴⁹ This implies that the respective governments of the member states are responsible for appointing the members. Nevertheless, it is not a prerequisite to have a legal background in order to become an individual member of the Venice Commission. The Venice Commission is constituted in accordance with Article 2 Paragraph 1 of the Revised Statute of the Venice Commission as an impartial body of experts who have gained prominence either through their contributions to legal and political research or democracy. As much diversity is achieved by assembling professionals from a variety of

¹⁴⁶ cf. Statute of the Council of Europe, Article 15b and Article 20.

¹⁴⁷ cf. *Hoffmann-Riem*, The Venice Commission of the Council of Europe – Standards and Impact (2014) 582.

¹⁴⁸ cf. *Buquicchio/Granata-Menghini*, The Venice Commission Twenty Years on Challenge Met but New Challenges Ahead, in *Van Roosmalen/Vermeulen/Van Hoof/Oosting* (Ed.), *Fundamental Rights and Principles*, 244.

¹⁴⁹ Revised Statute of the European Commission for Democracy through Law, Article 2.

domains, the Venice Commission is able to draw upon a substantial corpus of knowledge and principles.¹⁵⁰

From a democratic perspective, the fact that the respective governments of the member states appoint the individual members could be perceived as problematic, as the people do not directly elect the representatives. However, this slight democratic legitimacy gap is not that alarming if one keeps in mind that the Venice Commission lacks the authority to make legally binding decisions. It should be noted that the opinions made will not become legally binding until they have been ratified in each of the member states.¹⁵¹

Moreover, only a majority of votes is typically required to support an opinion. However, in reality, the members of the Venice Commission are almost always in agreement, which is undoubtedly facilitated by the fact that opinions are not legally binding. In order to achieve a consensus, each member must also believe in the collective obligation, which is specifically regarded as allegiance to the mission of the Venice Commission. Furthermore, each member must refrain from promoting interests that are insensitive to the complexities of the issue at hand and must instead act in accordance with the collective interests of the Venice Commission.¹⁵²

6. Summary and Conclusion

Although *soft law* is not a new concept, there is an ongoing debate regarding its definition and significance. While researchers like *Shelton* and *Müller* recognize soft law and emphasize on its non-binding nature, other authors, like *Weil* warn that the borders between normative and

¹⁵⁰ cf. *Hoffmann-Riem*, *The Venice Commission of the Council of Europe – Standards and Impact* (2014) 582.

¹⁵¹ cf. *Hoffmann-Riem*, *The Venice Commission of the Council of Europe – Standards and Impact* (2014) 582.

¹⁵² cf. *Hoffmann-Riem*, *The Venice Commission of the Council of Europe – Standards and Impact* (2014) 583.

non-normative regulations might get blurred. However, in order to demarcate soft law from hard law, the criteria proposed by *Abbott* and *Snidal*, namely obligation, precision, and delegation, can be used. Soft law is missing at least one of the three variables, leading to various degrees of soft law. Moreover, the flexibility in compliance, the rapid recognition of success, the reduced costs, and the possibility of achieving a compromise more easily are just a few examples of the vast number of advantages of soft law.

This thesis further discusses the prevalence and significance of soft law in European Union law. For example, recommendations and opinions, which have no binding force, have become a common regulatory tool, particularly for the European Commission. The European Court of Justice (CJEU), among other institutions, makes use of soft law in a variety of contexts, including environmental issues or state aid policies, as the generation of soft law is less demanding as opposed to binding acts. Additionally, soft law can be organized in different ways, including by its three functions, namely in legal preparatory soft law, which evaluates the potential for enforceable rights, legal accompanying soft law, which defines the already existing law further, and legal substitutive soft law, which aims to create permanent regulations.

Besides, this thesis elucidates the principle of conferral in European Union law, which is being established in article 5 paragraph 2 of the Treaty on European Union (TEU),¹⁵³ outlining the distribution of competences between the European Union and the member states. Further, the application of the principle of conferral to soft law in the European Union, which has been a topic of debate in the legal doctrine, is being discussed: While some researchers argue that soft law acts must comply with article 5 paragraph 2 of the Treaty on European Union, others declare that only binding acts are subject to this provision.

¹⁵³ cf. Treaty on European Union, BGBl. III Number 85/1999, Article 5.

The Significance of Soft Law in the Legal Order of the European Union

In addition, special consideration is given to the Venice Commission, an advisory body on constitutional matters of the Council of Europe. Concretely, it serves to advise the 61 member states on legal matters, particularly focusing on aligning institutional and legal frameworks with international norms related to democracy, human rights, and European standards. The Venice Commission also helps with resolving conflicts, it collaborates with constitutional courts to ensure adherence and helps with elections and referendums. The opinions of the Venice Commission are mainly soft law. For justifying its decisions, the Venice Commission makes use of both hard law (for instance, the European Convention of Human Rights) as well as soft law (for example, recommendations of the Parliamentary Assembly or the Committee of Ministers).

In conclusion, the significance of soft law within the European Union coupled with the importance of institutions such as the Venice Commission in offering guidance and promoting adherence in constitutional matters, emphasize the dynamic interaction between legal norms and regulatory practices. The ongoing debate surrounding the limits and implications of soft law underscores the critical need to approach these densities with a sophisticated comprehension of its function in simplifying collaboration, increasing adaptability, and preserving democratic principles in today's dynamic legal landscape.

A look towards the future suggests that the utilization of unconventional regulatory instruments will increase. Soft law can fulfil a role that traditional hard law cannot, as it provides the Venice Commission and other EU institutions with an accessible and elastic method of expressing their opinions on a variety of topics: As it lacks many formal requirements, it can be easily amended and offers flexibly in response to changing circumstances. The establishment of soft law as an

The Significance of Soft Law in the Legal Order of the European Union

important instrument of regulation in the European Union is already well-established and will continue to do so.

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List of figures

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Figure 2: Opinion Approval Stages. Source: Mehmetaj, 2019, p.6.....24