10

The Approach of Hungarian Authorities to Soft Law

On the Road to Where?

PETRA LEA LÁNCOS*

I. INTRODUCTION

The present chapter analyses the application of EU soft law in Hungary, with a particular focus on the fields of competition law and environmental law.[1] The analysis of the reception of EU soft law in Hungary shows a mixed picture. The application of EU competition soft law in Hungary may be considered a success, owing chiefly to the system of EU competition law enforcement and the proactive stance of the Hungarian Competition Authority (Gazdasági Versenyhivatal).[2] Meanwhile, the application of EU environmental soft law is problematic, and the gathering of reliable data is hampered by the dismantling and fragmentation of environmental authorities in Hungary.

Apart from the specific policy contexts of soft law application, it is necessary to recall the dualist traditions of the post-socialist State to understand the status of EU soft law in the national legal order and the approach of Hungarian courts and authorities to these norms. This tradition, coupled with text-positivism, continues to exert its influence on the use of what are considered 'external' legal sources. Besides considering such lingering traditions, the system governing the transposition of EU soft law is also examined. The finding is that the transposition of EU soft law is non-systematic, a situation that is complicated further by the fact that implementing legal acts do not necessarily refer to their EU origin through a 'harmonisation clause'. This lack of transparency conceals the EU

* I am indebted to the judges and public officials participating in the research for their invaluable help.

[1] Due to space constraints, financial regulation and social policy are not covered.

[2] Gazdasági Versenyhivatal, the competition authority of Hungary entrusted with enforcing antitrust and consumer protection rules, as well as the prohibition of unfair market practices.

origins of implementing domestic norms. An awareness about soft norms is also low: judges in general have little knowledge of the existence and applicability of EU soft law, while there are huge differences in the awareness and application of soft norms among national authorities.

The hypothesis is that all of the above factors influence the status of EU soft law and its reception by national courts and authorities. To test the hypothesis, a mixed research methodology was used. To gauge the attitude of Hungarian courts and public authorities towards EU soft law, I conducted a survey among the National Office for the Judiciary,[3] the Hungarian Constitutional Court and individual judges among my personal contacts, as well as the Deputy Commissioner Responsible for Future Generations (hereinafter 'the Green Ombudsman'), the regional authorities responsible for environmental protection and the Hungarian Competition Authority. Besides the survey, a total of six expert interviews were also conducted with different public authorities. The survey and the interview questions were based on the European Network of Soft Law Research (SoLaR) template. Finally, a keyword search analysis was conducted using the two different public databases containing Hungarian court judgments. On the basis of the data, I tried to determine the status of EU soft law in the Hungarian legal order, their overall perception by domestic courts and authorities, as well as their possible contribution to legal certainty and transparency.

This chapter also illustrates the difficulties in conducting research into judicial attitudes and case law, and, in particular, into the practice of administrative authorities. These difficulties are in part related to the organisational changes that have taken place in the past few years, but also the searchability of, or even lack of, relevant electronic databases.

In what follows, I describe the general approach to soft norms in Hungary, based on legal traditions and the implementation of EU law. Next, I describe the research methodology I applied to gathering the data on the application of EU soft law in Hungary. Then I turn to the sectoral analysis of EU soft law application, investigating the use of guidelines, communications, guidance documents etc in the context of competition law (excluding State aid law) and the protection of the environment. Finally, I draw some tentative conclusions on the role of EU soft law in Hungary.

II. FACTORS INFLUENCING THE PERCEPTION AND AWARENESS OF SOFT LAW IN HUNGARY

Before delving into the actual application of EU soft law, it is worth looking into the domestic soft law and the research concerning the perception of soft

[3] Országos Bírósági Hivatal, entrusted with the administration of the Hungarian judicial system. Oversight over the National Office for the Judiciary is exercised by the National Judicial Council.

law norms by Hungarian courts and authorities.[4] Two important factors are at play: the tradition of State-centred text-positivism and the system of EU law implementation, which both strongly influence the perception and awareness of soft norms in Hungary.

A. Perception of International and EU Soft Law Norms in Hungary

While domestic soft law exists in the Hungarian legal system, issued primarily by authorities, courts and rarely and more recently by ministries, these recommendations, opinions, protocols and ethical codes are not part of university curricula, nor are there scholarly works detailing their taxonomy or application. Where soft norms are issued by national authorities, the courts are quick to underline the non-binding nature of these norms.[5] Meanwhile, where soft law, usually in the form of recommendations, stems from the Curia (the Supreme Court of Hungary), lower courts refer to it and comply with its substance.[6]

The story is more complex for 'external' soft law. Hungary follows a dualistic system requiring the transposition of 'external sources' before they become part of Hungarian law (with the exception of *ius cogens*).[7] This dualist mindset significantly impacts legal practice because norms not transposed into Hungarian law are rarely considered by national courts and authorities. Among other things, commentators trace this judicial approach back to text-positivism,[8] according to which referring to external sources of jurisprudence is uncustomary.[9] Text-positivism is a characteristic of socialist legal practice, where legal interpretation was to be merely declaratory, reflecting the exact will of the legislator, but it also reflects strong State-centredness: 'sovereignty was perceived as international independence which also applied against international human rights treaties' and international sources in general.[10] In addition, judges in the socialist legal order felt it was safe for them to stick to the letter of the national positive law enacted by the single-party legislature.[11]

[4] Supreme Court Kfv.IV.37.138/2010/4. E Csatlós (n 113), 480.

[5] eg Decision No Kf.VI.38.198/2018/6 of the Curia; Decision No 19.Gf.40.284/2019/9 of the Metropolitan Regional Court.

[6] Decision Nos 10.Gf.40.601/2019/16, 19.Gf.40.236/2019/19 and Gf.III.30.025/2020/5 of the Metropolitan Regional Court; Gf.III.30.025/2020/5.

[7] *cf* art Q, para 3 of the Fundamental Law; T Molnár, 'A nemzetközi jog és a magyar jog viszonya', ijoten.hu/szocikk/a-nemzetkozi-jog-es-a-magyar-jog-viszonya (Online Legal Encyclopaedia).

[8] *cf* A Jakab, 'A közigazgatási jog tudománya és oktatása Magyarországon' in A Jakab and A Menyhárd (eds), *A jog tudománya* (Budapest, Hvg Orac, 2015) 193 ff.

[9] T Bán, '(Fórum) Strasbourg és a magyar joggyakorlat' (2005) 1 *Fundamentum* 47, 47.

[10] A Jakab and J Fröhlich, 'The Constitutional Court of Hungary' in A Jakab, A Dyevre and G Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge, Cambridge University Press, 2017) 395, 397.

[11] As Csaba Varga observed, Central and Eastern European legal practice were pervaded by 'legal positivism, a mainstream organising idea that once transfigured from continental pre-WWII textual or rule-positivism into so-called Socialist normativism in the entire region. It is a syndrome called "textocentrism" that originates from it. This resulted in "perverted forms of mechanical

A survey of domestic court judgments conducted by Csatlós arrives at the conclusion that courts only 'exceptionally refer to a non-binding decision of an international organization in their reasoning'.[12] Where they do, Hungarian courts usually refer to a relevant decision of the Constitutional Court citing international soft law. Moreover, there seems to be a persistent conviction amongst judges of ordinary courts that they are only bound by 'national law',[13] which has not entirely subsided. Meanwhile, some good practices are emerging at the level of higher courts: judges of the Curia (ie, the Hungarian Supreme Court)[14] reported that in the event of legal gaps or problems of interpretation, they will consciously search for documents, legal practices or model laws for guidance.[15] In fact, EU law may require the application of international soft norms. An example would be the EU insolvency regulation,[16] which refers to international soft law, helping national judges to expand the scope of the applicable measures in the case before them. Owing to the position of Curia judgments in the legal order, lower court judges will pick up references in areas covered by Curia decisions, with the result that in certain narrow areas of the law, references to international non-binding sources may gradually become routine.

While in general, one may conclude that references in Hungarian court judgments to what were once considered 'external sources' are increasing,[17] the same cannot be said of EU soft norms. One reason for this seems to be the low awareness of EU soft law owing to the non-systematic implementation of non-binding EU measures in Hungary.[18]

jurisprudence: applying law according to its letter"'; see C Varga, 'Inertia or Pattern Following? Phase Lag of and Defiance by the Judiciary: A Central and Eastern European Overview' (international conference on Europeanization and Judicial Culture in Contemporary Democracies, Lucian Blaga University Faculty of Law, Sibiu, 10–12 October 2013) 11–12. See also A Sajó, 'New Legalism in East Central Europe: Law as an Instrument of Social Transformation' (1990) 17 *Journal of Law and Society* 331 ff.

[12] E Csatlós, 'A Kúria (Legfelsőbb Bíróság) gyakorlata és a nemzetközi jog' in L Blutman, E Csatlós and I Schiffner (eds), *A nemzetközi jog hatása a magyar joggyakorlatra* (Budapest, HVG Orac, 2014) 480.

[13] M Weller, '(Fórum) Strasbourg és a magyar joggyakorlat' (2005) 1 *Fundamentum* 59, 59.

[14] *Kúria* is the highest court in the judicial system with the task to ensure the uniformity of the application of law by lower courts and to make uniformity decisions which shall be binding on them.

[15] An example mentioned was the IBA Guidelines on Conflicts of Interest in International Arbitration 2014 in the ambit of arbitration rules.

[16] See Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings [2015] OJ L141/19, preamble recital (48). Such best practices include the European Communication and Cooperation Guidelines for Cross-border Insolvency Developed under the aegis of the Academic Wing of INSOL Europe ('CoCo principles') and the EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles').

[17] On the reception of 'Strasbourg case law' in Hungary, see PL Láncos, 'The Innocuous Impact of Pan-European General Principles of Good Administration on Hungarian Law and Legal Practice' in U Stelkens (ed), *Pan-European General Principles of Good Administration* (Oxford, Oxford University Press, forthcoming).

[18] The symptomatic non-consideration of soft law norms in Hungary stands in stark contrast to the fact that one of the very first scholars to identify and describe international soft law was the Hungarian László Buza, who termed them 'program-like norms', which are legal commitments without giving rise to enforceable rights. See L Búza, *A törvényesség és az igazságosság elve a nemzetközi jogban* (Acta Universitatis Szegediensis, Acta Juridica et Politica, Tomus III Fasc 1 Szeged, 1957) 19.

B. The (Non-systematic) Implementation of EU Soft Law in Hungary

To map the practice of implementing EU norms in Hungary, I interviewed two officials of the Legal Harmonization Department and the EU Legal Compliance Department of the Hungarian Ministry of Justice, the latter being responsible for coordinating the national implementation of EU law.[19] I compared the data obtained with the statutory rules on harmonisation and the information available in the so-called Harmonization Database.

In Hungary, the responsibility for coordinating the national implementation of EU law lies with the Ministry of Justice. The central piece of legislation guiding implementation is the Harmonization Decree setting out the procedure to be followed and the tasks of the different government bodies.[20] While the Decree does not differentiate between hard and soft EU measures, the system described in the Decree is not necessarily followed when implementing EU soft law. According to the system of the Decree, the Legal Harmonization Department of the Ministry of Justice monitors EU legislation to identify possible legislative tasks of implementation. Apart from directives and other binding norms requiring implementation, it is up to the Department's staff to decide whether or not they consider a particular soft norm to give rise to 'legislative tasks'. This means that it is up to the Department whether or not to specifically call the ministries' attention to soft norms. The Legal Harmonization Department transfers the norm to the competent ministry, and the latter may put forward a harmonisation proposal,[21] which is entered into the so-called Harmonization Database,[22] where implementing norms can be tracked. Departing from the system foreseen under the Decree, ministries monitoring EU legislation may also come to the conclusion that they wish to initiate implementing legislation concerning an EU soft norm. In this case, they either submit a harmonisation proposal to the legislator or they simply implement the norm without arranging for it to be entered into the Harmonization Database. Finally, where corresponding Hungarian legislation already exists and no implementation is necessary, a reference to the

[19] The interviews were conducted on 9 March 2018 and 8 October 2018.

[20] Government Decree No 302/2010 (XII 23) on the fulfilment of legislative preparatory tasks necessary for compliance with European Union law (Harmonization Decree).

[21] Article 3, para 1 of Government Decree No 302/2010 (XII 23).

[22] *Jogharmonizációs Adatbázis*, jogharmonizacio.im.gov.hu. The Hungarian Ministry of Justice operates a database offering insight into the progress made in implementing EU legislation since November 2005. The operation of the Harmonization Database is now governed by the Harmonization Decree. Article 7 provides that the Minister of Justice is to record and publish in the database tasks pertaining to implementation as well as data relating to draft legislation and final acts. In the open-access version of the database, search queries may be made, with results including the full data of the EU act referred to and the status of the related national implementing tasks. In essence, the Harmonization Database is not a notification tool, but rather a national instrument facilitating the coordination of harmonisation tasks as well as ensuring the (restricted) transparency of the national legal system. See PL Láncos, 'The Phenomenon of "Directive-Like Recommendations" and Their Implementation: Lessons from Hungarian Legislative Practice' in P Popelier et al (eds), *Lawmaking in Multi-level Settings* (Baden-Baden, Nomos, 2019).

EU norm must always be entered into the Harmonization Database. Hence, there is no single solution for managing the implementation of EU soft norms in Hungary.[23]

The harmonisation clause is an important indicator of the EU origins of a norm and a tool for guaranteeing transparency within the national legal order. The Decree on the drafting of legal acts[24] foresees a range of exceptional cases where the implementing measure does not have to carry a harmonisation clause, such as implementation by means of a fundamental principle laid down in a comprehensive legal code or where the legislative duty emanates from a decision of the Court of Justice of the European Union (CJEU). While this means that national measures implementing soft law are not exempted from including the harmonisation clause, in practice, the majority of soft law implementation occurs without indication to its EU origins. This is a departure from the system laid down by the Decree on the drafting of laws,[25] making it difficult to identify EU origins of national implementing measures, thereby reducing transparency for those applying the law.[26]

In sum, apart from regulations, EU law is rarely considered by Hungarian courts and authorities if it is not transposed into national law. However, while EU directives are routinely transposed, the transposition of norms other than directives (ie, soft law) follows no apparent pattern. If soft law is transposed, the national implementing provisions often lack the so-called harmonisation clause that would indicate the EU norm behind the national implementing provision. This is problematic, since even where the courts and authorities are in fact applying norms of EU origin, they rarely recognise this, thereby missing the chance of consulting and referring to the original norm as well.

Owing to the uncertainties surrounding EU soft law implementation, an awareness of EU soft norms, even when they have been implemented, is low. This may be one of the reasons why the courts and authorities have the impression that they are simply applying domestic law and, due to the lack of a harmonisation clause, fail to recognise, consult and refer to the EU soft law measure.

III. ORGANISATION OF THE RESEARCH AND GENERAL FINDINGS

In what follows, I will first present some general results regarding the application and perception of EU soft law by judges and public officials, without refining these results for the specific policy fields of competition law and environmental

[23] The only authority from among the authorities active in State aid, competition law and environmental law that feature applicable EU soft norms on their website is the Office for Controlling State Aid (an area I am not analysing here).

[24] Article 90 of Decree No 61/2009 (XII 14) on the drafting of legal acts.

[25] Articles 88–90 of Decree No 61/2009 (XII 14).

[26] See also O Ştefan, ch 19 in this volume.

law. I will discuss these policy fields in section IV. As a whole, the data seems to confirm the hypothesis that the perception of EU soft law as an 'external' source and the low awareness of these norms contribute to the non-application of EU soft law in Hungary.

The mixed research methodology relied on a survey and interviews to gather empirical data, as well as database research to collect data on the application of EU soft law by the courts and authorities. For the purposes of the survey, I translated the SoLaR questionnaire into Hungarian and sent it to the Office for the National Judiciary. I also sent out the same SoLaR questionnaire to individuals working at different levels of the Hungarian judiciary to whom I had access. In light of the fact that my focus was on the application of EU soft law in competition matters and environmental protection, I also sent out the SoLaR questionnaire to the Hungarian Competition Authority and the 'Green Ombudsman', as well as individuals in the Hungarian ministries working in the field of environmental law. In total, out of 40 questionnaires I sent out, I received 18 filled-in questionnaires: three questionnaires having been sent back by the National Office for the Judiciary, one by the Hungarian Competition Authority, three by the 'Green Ombudsman', one by a ministerial official, and the rest by judges and Constitutional Court *référendaires*. Finally, I conducted interviews with the Hungarian Competition Authority and the 'Green Ombudsman'.

The ongoing centralisation and fragmentation processes in the Hungarian judicial system and the administrative organisation complicated the empirical research. For example, I was compelled to turn to the National Office for the Judiciary[27] with my questionnaire instead of contacting the individual courts themselves. While this mainstreaming of requests and dataflow may be beneficial in reducing the workload of those trying to receive empirical data from the courts, I only received three filled-in questionnaires from the National Office for the Judiciary. To resolve this problem, I contacted individuals through my personal contacts on different levels of the judiciary. These included judges and their *référendaires* from the Constitutional Court, the Curia and regional as well as district courts. A similar problem arose with the Departments for Environmental Protection and Nature Preservation located at the different regional Government Offices. These departments are responsible for environmental administration at the regional level. In contrast with the centralisation of the Hungarian court system, these authorities experienced incremental fragmentation.[28] None of these Departments answered my inquiries or returned filled-in questionnaires.

[27] The National Office for the Judiciary is responsible for the administration of the Hungarian courts. It can issue recommendations, decisions and codes governing the judiciary.

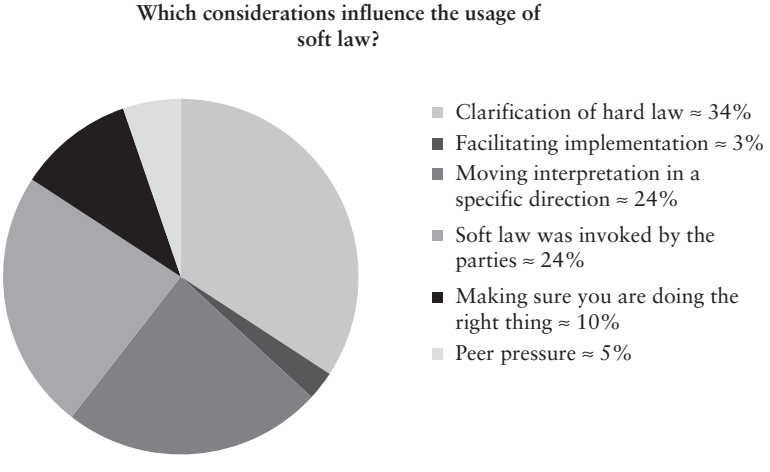
[28] The reluctance of subjects to fill in the questionnaire claiming that they were never faced with the task of applying soft law was also an issue. To obtain empirical evidence that gave a realistic picture of EU soft law application in Hungary, I had to convince them that no experience with soft law application was relevant data for my research.

A. Empirical Evidence from the Survey

Based on a total of 18 responses received, the general finding is that, with the exception of the field of competition law, Hungarian judges and public officials rarely, if ever, deal with soft law instruments. In particular, respondents working in the field of constitutional law, civil law and criminal law reported a lack of contact with EU soft norms. Judges pointed out that due to their excessive workload, they do not have the time to research EU soft norms that might possibly be relevant to their cases. If EU soft law is used at all, it is invoked by parties and considered an interpretative aid to facilitate the application of hard law. While accepting that soft law may be the appropriate device to fill in legal gaps and clarify problems of interpretation, soft law will generally only be applied to reinforce an argument. If the judge does not agree with the thrust of the soft norm, he or she will not refer to it or will underline the measure's non-binding nature. The respondents agreed that, save for competition cases, there is absolutely no culture of EU soft law application in domestic courts or public authorities.

Finally, the perception of soft law with all its possible advantages and disadvantages varied widely from one respondent to the other, with opinions ranging from a total rejection of soft law as non-legitimate to calls for more an extensive consideration and application of these norms.

Figure 10.1 Pie chart depicting the proportion of motivating factors reported for the usage of soft law by Hungarian courts and public authorities



B. Evidence from Electronic Databases

To glean data on the application of EU soft law by national courts and public authorities, I relied on various publicly available electronic databases. As a

preliminary remark, it is worth noting that the gathering of data was not without its difficulties. As far as searches in databases are concerned, the lack of open access databases in the case of administrative authorities, the non-systematic referencing used by courts and the Competition Authority, and the poor search functions made data collection tedious or simply impractical.

In Hungary, judicial practice may be traced with the help of the electronic database called the Compendium of Court Decisions, which is operated by the National Office for the Judiciary.[29] To measure the number of references to EU soft law in general, and EU competition and environmental soft law in particular, I conducted a keyword search in the Compendium focusing on the list of specific SoLaR instruments in the field of competition law and environmental law. With certain exceptions, the Compendium includes anonymised judgments, decisions and opinions of the Hungarian courts, including the Curia, since 1 July 2007. With the database now spanning a decade's worth of judgments, changes in the judicial frequency of referencing EU soft law may also be traced.

The Compendium does not allow for refined searches of multiple keywords. The fact that there are no standard rules for citing EU law in Hungarian court judgments and orders further complicates the use of keyword search. In order to overcome difficulties, I devised different strategies. I first carried out specific searches for the title of the soft law act included in the SoLaR list for environmental law and competition law. These searches yielded no results because Hungarian court decisions rarely give a full citation of the EU act they refer to. I then conducted another search combining document numbers and more general terms such as 'Commission communication'. These searches returned a total of 13 hits, including all kinds of EU soft law measures, not only SoLaR soft law. The results from the Compendium included 11 references to competition cases and two decisions citing environmental soft law. These judgments either made an incomplete reference to the soft law measure concerned or completely lacked the title and document number. In the latter cases, I had to infer the specific soft law measure by considering the context and substance of the judgment.

In order to triangulate the findings, I also conducted a keyword search in another database, operated by the Hungarian Competition Authority. This database[30] only comprises court decisions rendered in competition law matters between 1994 and 2017. Based on the hits generated through this database, the Curia and the Budapest Court of Appeal referred 13 times to various EU guidelines and communications in the context of competition law. As the search in the Compendium returned only 11 hits in the competition law, the database search in the Compendium missed at least two court decisions referring to soft law.

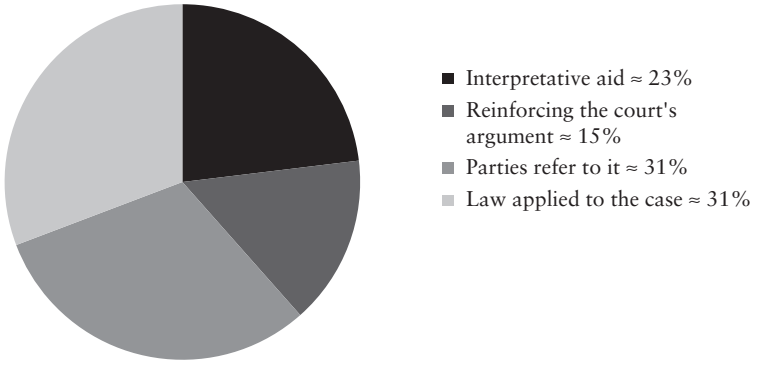
The keyword searches confirm that the Hungarian courts only sporadically refer to EU soft law measures. The fact that a decade's worth of judgments yielded a rough average of only one reference to EU soft law per year means that

[29] *Bírósági Határozatok Gyűjteménye*, birosag.hu/birosagi-hatarozatok-gyujtemenye.
[30] https://www.gvh.hu/dontesek/birosagi_dontesek.

even though there is a possibility that due to the non-systematic referencing of such measures in court judgments, some references may have been missed, there is no tradition of referring to EU soft law by the Hungarian courts.

Looking more closely at the judgments, the courts refer to EU soft law for various reasons. The grounds for citing EU soft law range from references made by parties, but left unconsidered by the court,[31] through bolstering the court's findings with further arguments,[32] using them as interpretative aids,[33] to applying them directly to the case.[34] In the rare cases where courts refer to these sources to bolster findings, aid interpretation or solve the case, the non-binding nature of these norms is not emphasised.

Figure 10.2 Pie chart depicting the purpose of referencing soft law in Hungarian courts



IV. SECTORAL ANALYSIS OF SOFT LAW APPLICATION IN HUNGARY

In what follows, I focus my analysis on the application of EU soft law measures in the field of competition law and environmental law by the courts and authorities in Hungary. These two policy fields perfectly illustrate the contradictoriness

[31] eg, Judgment of the Budapest Municipal Court, Judgment No 15.G.40.806/2010/24, citing European Commission, 'Guidelines on Vertical Restraints' [2010] OJ C130/01.

[32] eg, Judgment of the Debrecen Court of Appeal, Judgment No Gf.II.30.106/2015/7, citing European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the on the European Union Strategy for the Protection and Welfare of Animals 2012–2015' COM (2012) 6.

[33] eg, Judgment of the Tatabánya Regional Court, Judgment No 9.G.40.083/2011/20, citing European Commission, 'Communication from the Commission – Notice – Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/08.

[34] eg, Judgment of the Budapest Capital Regional Court, Judgment No 23. G. 41.739/2013/125, citing European Commission, 'Communication from the Commission – Community guidelines on State aid for rescuing and restructuring firms in difficulty' [2004] OJ C244/02.

of soft law application in Hungary: while the field of competition law enforcement may be considered a relative success story of EU soft law application, the area of environmental protection shows a more diverse picture.

Besides the searches conducted in the judicial Compendium, I collected data on the application of EU soft law in the decisions of Hungarian public authorities with a special focus on competition law enforcement and environmental protection. Using the SoLaR template, I also surveyed the stance of public officials in the fields of competition law enforcement and environmental protection towards soft law (supplemented with an in-person interview with two members of the Competition Authority). The survey and the interviewers help in understanding the historical accounts regarding the development and transformation of the organisational background of, and the institutional approach to, these policy areas.

A. The Application of EU Soft Law in the Area of Competition Law: A Relative Success Story

i. Historical and Organisational Aspects

Competition policy, law and enforcement is highly integrated throughout the Member States, including Hungary, owing to the system of competition law enforcement introduced by Regulation 1/2003.[35] This system relies on national competition authorities to proceed in both national and EU-level cases of competition law infringements, compelling Member State authorities to apply EU soft norms adopted by the Commission to facilitate competition law enforcement.

Due to their double-hatted nature and in a bid to increase predictability for undertakings, national competition authorities apply EU soft law not only in EU-level cases, but also in domestic cases. Thus, while EU competition law still leaves some leeway for Member States to pursue their own policy – for example, in leniency and until recently, in fining – the Hungarian Competition Authority chose to harmonise its rules with the soft law of the EU.[36] In fact, in the case of fining rules,[37] the Hungarian Competition Authority chose the path of so-called spontaneous approximation, converging its rules[38] to an EU soft norm

[35] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[36] On Member States' voluntary convergence in the field of competition enforcement, see 'Commission staff working paper accompanying the Communication from the Commission to the European Parliament and Council – Report on the Functioning of Regulation 1/2003 {COM(2009)206 final}, 61–62.

[37] See in detail PL Láncos, 'The Power of Soft Law: Spontaneous Approximation of Fining Policies for Anti-competitive Conduct' (2019) 40 *European Competition Law Review* 541.

[38] Communication No 11/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority on the setting of the amount of fines in case of anti-competitive agreements and concerted practices, the abuse of dominant position and the abuse of significant market power.

that was not designed to induce voluntary harmonisation, but was of a merely informative nature.[39]

The openness of Hungarian competition policy towards European competition law dates back to the transition of the country to democracy[40] and its association agreement with the European Communities concluded in the early 1990s.[41] In fact, Act No LVII of 1996 on the prohibition of unfair and restrictive market practices (Tpvt), the law governing competition rules and enforcement in force today, reproduced in essence the substantive rules of EU competition law. This sameness of Hungarian and EU competition rules has consequences for the interpretation and application of the Tpvt. As the CJEU observed in the *Allianz* case, 'the Tpvt must in fact be interpreted in the same way as the equivalent concepts in Article 101(1) TFEU and that it is bound in that regard by the interpretation of those concepts provided by the Court'.[42]

ii. The Hungarian Competition Authority's Approach

Describing the institutional approach of Hungarian competition policy, Tihamér Tóth noted that '[the] sovereign approach emphasizing the distinctness of competition policy and enforcement in Hungary has never materialized'.[43] Instead, the Hungarian Competition Authority 'has always been open to following EU case law and the practice of the EU Commission. Even when it had no legal obligation to do so, it often relied upon the relevant judgments of the EU courts and the relevant guidelines of the Commission'.[44] Apart from the apparent reflex to follow EU competition law, reasons for spontaneous harmonisation included regulatory economy: as András Tóth, Vice-President of the Hungarian Competition Authority, observed, it is important to look for workable solutions to avoid unnecessary duplication of regulatory efforts. Since the Commission guidelines on fines or the communication on mergers were tried-and-tested

[39] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006] OJ C210/2. Guidelines are informal soft law measures, ie, non-binding acts of the Commission not mentioned in art 288 TFEU enumerating secondary sources of EU law. The CJEU underlined that 'in the absence of binding regulation under European Union law on the subject, [it was up to the] Member States to establish and apply national rules' on issues governed by guidelines. Although guidelines merely bind the author, they are in fact important informative measures. Such is the case with the Commission's guideline on fines, which enables undertakings to estimate possible sanctions to be imposed on them for anti-competitive behaviour.

[40] Cited by T Tóth, 'The Reception and Application of EU Competition Rules in Hungary: An Organic Evolution', Pázmány Law Working Papers, 2013/17, 1.

[41] 'Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Hungary, of the other part' [1993] OJ L347/1.

[42] Case C-32/11 *Allianz Hungaria Biztosító Zrt. and Others v Gazdasági Versenyhivatal* [2013] EU:C:2013:160, paras 21–22.

[43] Tóth (n 40) 1.

[44] ibid 4.

measures, there was no need to come up with a very different national solution for these in domestic cases.[45]

This approach to EU competition law and EU soft law in general was confirmed by the Competition Authority. In its response to the SoLaR questionnaire, the Authority noted that in the event of 'the textual sameness and the identical interpretation of the concepts',[46] it also follows and refers to EU law, including EU soft law norms, for the enforcement of competition law in domestic cases.[47] The interview conducted with Competition Authority staff further substantiated that the use of EU competition soft law was routine practice at the Authority, resulting in an awareness of and openness towards EU soft law unprecedented in courts and other authorities in Hungary. Competition Authority officials stated in the interview that in the majority of cases, they apply EU soft law to interpret hard rules of competition law or to give additional weight to an argument. As such, these norms help increase the transparency of rights and obligations of undertakings, and enhance the predictability of legal consequences in cases of infringement. The Competition Authority's staff also underlined the important role played by EU competition soft law in ensuring the uniformity of competition law application, including the effective enforcement of EU law. Finally, the Competition Authority's staff reported that they perceived EU soft law as a means for avoiding overregulation and to ensure *effet utile*, yet they acknowledged that the lack of legitimacy behind soft sources and the apparent flexibility they ensure may lead to diverging interpretations causing uncertainty.[48]

iii. Court Practice

Based on the search for EU soft law in general in the Compendium of Court Decisions and the results of the survey, on the whole, Hungarian courts rarely refer to such norms. By contrast, in the narrower field of competition law, and as a consequence of the consistent application of soft norms by the Competition Authority,[49] undertakings are well aware of these norms, making frequent

[45] Communication No 11/2017 follows the Commission's guidelines on fines, while Communication No 6/2017 of the President of the Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority discusses, among other things, the application of Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings in domestic merger cases. 'Even in areas where there was no formal law harmonization obligation, the Hungarian legislator, relying on the proposals elaborated by the GVH, imported certain procedural instruments which worked well on the European level. T Tóth, 'The reception and application of EU competition rules in Hungary: an organic evolution'; Pázmány Law Working Papers 2013/7, 4.

[46] Decision Vj/055/2013.

[47] On file with the author.

[48] Interview conducted with staff members of the Hungarian Competition Authority, 2 July 2019.

[49] The application of soft law by the Authority is also discernible from its database containing the Authority's decisions.

references to them in domestic court cases. Consequently, they will then appear in the decisions of the national courts. All of the 11 cases where a reference is made to soft law are competition law cases.[50]

This proliferation of the application of EU competition soft norms in domestic competition law cases prompted the Curia to make an effort to rein in what was considered a perfunctory referencing of soft measures of the EU, such as guidelines. The Curia declared that the 'judicial practice placing a Commission guideline that is not even a legal act of the Union, into the centre of the judgment's reasoning' is mistaken.[51] In a subsequent judgment, it clarified that the courts were compelled to carry out a full judicial review of decisions rendered by the Competition Authority and, in this respect, it does not suffice for the courts to refer to the leeway enjoyed by the Authority and restrict themselves to a formal review of legality.[52]

Based on the interview conducted with two members of the Authority in the field of Hungarian competition policy, law and enforcement, there is a willingness both to borrow EU soft law solutions for domestic implementation, but also to directly apply EU soft law in antitrust or merger decisions. This openness towards EU soft law seems to be the outcome of a number of contributing factors, such as the organisational background of EU competition enforcement resulting in double-hatted national competition authorities, the strive for regulatory economy and transparency as well as the undertakings' awareness and references to EU soft law in their respective cases. The function of EU competition soft law as an interpretative aid is perceived to enhance transparency and predictability and, as such, legal certainty in competition cases.

B. Application of EU Soft Law in the Ambit of Environmental Law: A Mixed Picture

i. Organisational and Historical Aspects

While the Hungarian judicial system is experiencing strong centralisation, the institutional system of environmental protection seems to be suffering centrifugal tendencies with an ongoing fragmentation of institutions and responsibilities. To elucidate the organisational backdrop of environmental protection in Hungary, I will first briefly summarise the progressive institutional decline that

[50] Competition law-related hits in the Compendium: judgments of the Budapest Municipal Court: 7.K.31.116/2007/44, 15.G.40.806/2010/24, 19.K.33/718/2009/42; judgment of the Budapest-Capital Administrative and Labour Court: 5.K.33.512/2014/53; judgments of the Kúria: Kfv.III.37.441/2016/7, Kfv.II.37/110/2017/13, Kfv.VI.38.108/2016/26; judgment of the Budapest Court of Appeal: 2-Lf-27-042/2011/5; judgments of the Budapest-Capital Regional Court: 3.G.40.722/2014/946, 23.G.41.739/2013/125; and judgment of the Tatabánya Regional Court: 9.G.40.083/2011/20.

[51] Kfv.III.37.441.2016/7, para 31.

[52] Kfv.11.37.110/2017/13, para 29.

is currently taking place and will then turn to the practice of the courts and the 'Green Ombudsman' in invoking EU environmental soft law.

The past decade of environmental protection in Hungary has been characterised by a gradual dismantling of the institutional system, which seems to have left its mark on both the awareness and the use of European environmental law sources in Hungary. In 2010, the Ministry for Environmental Protection was abolished and its responsibilities were distributed between other ministries. The re-election of the government in 2014 did not bring about the establishment of a Ministry for Environmental Protection. Instead, the different branches of environmental policy were further dispersed between the different ministries representing conflicting or very different policy issues: water policy was integrated into the Ministry of Internal Affairs, the environmental and nature conservation authorities were put under the supervision of the Ministry for Administration, waste management was allocated to the Ministry for National Development, while the Ministry for Rural Development became responsible for the management of national parks. The year 2018 saw layoffs in the different departments of the Ministry for Agriculture responsible for environmental protection of between 40 and 47.5 per cent, jeopardising the fulfilment of environmental obligations under national and EU law.[53] Hopes for an independent and single governmental representation of environmental affairs also subsided, with Hungary becoming the only EU Member State without a ministry dedicated to the protection of the environment. At a lower level, departments for environmental protection and nature preservation are assigned to the regional government offices, which are responsible for environmental administration at the regional level.

In contrast with the Hungarian court system, the environmental authorities did not experience centralisation, but rather gradual fragmentation. While I sent the questionnaire to these departments, I received no answer, save for one department, which indicated that it is awaiting permission to answer the questions. To gain insight into the practice of public authorities active in the field of environmental law, I relied on my personal contacts at different public authorities involved in managing different aspects of the broad topic of environmental protection.

ii. Assessment of the Ombudsman's Practice and Relevant Court Judgments

The Office of the Commissioner for Fundamental Rights was established in 1993 as a body responsible to the Hungarian Parliament, with the task of protecting citizens against maladministration and promoting fundamental rights protection. Besides the Commissioner for Fundamental Rights, special

[53] greenfo.hu/hir/akik-maradtak-szivnak-a-kornyezetvedelmi-apparatust-megsemmisitettek.

ombudspersons, such as the 'Green Ombudsman', were appointed.[54] The Green Ombudsman, as the institution is referred to in general parlance, investigates issues related to the right to a healthy environment, the right to the preservation of physical and mental health, and the protection of natural values.[55] One of the most important powers of the Green Ombudsman is the power to initiate the constitutional review procedure of the Constitutional Court in relation to legislation that is potentially harmful to the environment.[56]

Based on the interviews conducted with three members of the Office of the Green Ombudsman,[57] the environmental soft law of the EU is considered highly important in their work, in particular for its role in clarifying hard law rules, but also as an inspiration for national environmental protection legislation. As far as the most relevant soft environmental measures of the EU are concerned, the staff of the Green Ombudsman were unanimous in saying that EU documents relating to the Environmental Liability Directive were particularly relevant in designing proposals for improving national legislation. Other instruments cited include the 7th Environment Action Programme[58] and the Council's conclusions on the implementation of the UN's Agenda for Sustainable Development.[59] The interviews highlighted the advantage of soft law in accommodating existing diversity within the Member States, while offering them ambitious commitments to voluntarily undertake.

As far as judicial references to environmental soft law of the EU are concerned, as noted above, the search in the Compendium of Court Decisions yielded only two hits, neither of which referenced the measures enumerated in the SoLaR list.

[54] The General Ombudsman worked alongside the Ombudsman Responsible for National and Ethnic Minorities and the Data Protection Ombudsman before the position of the Ombudsman for the Protection of Future Generations was established in 2007. See in detail L Csink, 'Az Ombudsman' in A Jakab and G Gajduschek (eds), *A magyar jogrendszer állapota* (Budapest, MTA TK JTI, 2016) 600 ff.

[55] According to art P) of the Hungarian Fundamental Law (Constitution): 'Natural resources, in particular arable land, forests and the reserves of water, biodiversity, in particular native plant and animal species, as well as cultural assets shall form the common heritage of the nation; it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations.' Article XX, para (1) of the Fundamental Law stipulates: 'Everyone shall have the right to physical and mental health.' Finally, art XXI, para (1) guarantees that: 'Hungary shall recognise and give effect to the right of everyone to a healthy environment.'

[56] Such initiatives include the initiative for the constitutional review of the Joint Decree No 27/2008 (XII 3) of the Ministry for Environmental Protection and Rural Development and the Ministry of Health on setting the thresholds for environmental noise and vibration pollution (Case No II/00902/2012); the constitutional review of Governmental Decree No 358/2008. (XII 31) on licensing activities for businesses (Case No II/00782/2012) and the initiative for the constitutional review of Act No XXXVII of 2009 on forests, the protection of forests and forest management (II/00201/2019).

[57] 11 June 2019, 20 July 2019 and 3 August 2019.

[58] Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L354/171.

[59] Council of the European Union, 'Towards an ever more sustainable Union by 2030. Council Conclusions' (9 April 2019) 8286/19.

Instead, the Pest County Court referred to the Commission's Communication on waste and by-products,[60] using the communication as an interpretative aid, while the Debrecen Court of Appeal referred to the Commission's Communication on animal welfare[61] to bolster its own argumentation for an interpretation of the national law.

The application and consideration of EU soft norms in the sphere of environmental protection is markedly different from what we have seen in the ambit of competition enforcement. While I received no input from the regional departments responsible for environmental administration, and no access to such administrative decisions was available, there is no evidence that EU environmental soft law is taken into account by authorities, and even the courts only exceptionally refer to such norms. The reason for the lack of references to EU environmental soft law could be, as mentioned earlier, the pervasive conviction that courts are only bound by domestic law. The excessive caseload and the strong language barrier most probably exacerbate the disregard for EU soft law. Meanwhile, when it comes to the office of the Green Ombudsman, the relevant EU soft law is considered thoroughly and is often proposed as a model to be followed by the legislator.

V. CONCLUSION

Based on the findings gleaned from a general assessment of soft law application by the Hungarian courts and authorities, and a more specific analysis of the areas of competition law enforcement and environmental protection, the relevance of EU soft law in the Hungarian legal order is negligible. Save for the isolated field of competition law enforcement and the Office of the Green Ombudsman, there is no culture of, or incentives for, soft law application. This is confirmed by both the results of searches conducted in the Compendium of Court Decisions and the survey responses by judges and public officials.

The majority of respondents considered soft law to be an important source for interpreting hard law rules and reinforcing arguments preferred by the court or the authority. Nevertheless, while only a few respondents emphasised the disadvantages of EU soft law, citing its lack of legitimacy and its possible contribution to uncertainty, most judges and officials do not apply EU soft law routinely in the cases before them. In fact, they are rarely if ever faced with such norms and will generally only engage with soft EU law in cases where it

[60] European Commission, 'Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products' COM (2007) 59; Judgment of the Pest County Court, 2.K.26.424/2009/20.

[61] European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012–2015' COM (2012) 6; Judgment of the Debrecen Court of Appeal, Gf.II.30.106/2015/7.

has been referred to by the parties to the (competition law) case.[62] Besides the excessive caseload of courts or the workload of public officials, this is due to the low awareness of EU soft law and its implementation in national law. Owing to the State-centred disregard for 'external sources', judges and public officials will only refer to measures that had been brought into focus by higher courts applying EU soft law to fill in legal gaps. Overall, the potential of EU soft law to contribute to the uniform application of law and to promote legal certainty through transparency and predictability appears to be restricted to competition law enforcement in Hungary.

[62] *cf* E Polgári, 'The European Convention on Human Rights and the Case law of the European Court of Human Rights in Hungarian Judicial Practice' (2008) 5 *Fundamentum* 74 and 78.