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Adding to the Toolbox: Court Published 'Fact Sheets' in the EU Legal Order

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Abstract

Issued by the Court of Justice of the European Union (CJEU), fact sheets act as communication tool within the EU legal landscape, serving as informative summaries of key jurisprudence on selected topics. They raise intriguing questions about institutional responsibilities and the broader implications for dissemination of information by courts. By combining traditional legal analysis with empirical insights, this study investigates the regulatory framework governing court-issued fact sheets and evaluates their classification as a form of "soft law." The article argues that while fact sheets enhance transparency and reduce information asymmetries, they must balance their informational role with the neutrality and core adjudicatory functions of the CJEU. The research highlights both the potential of these documents to support judicial efficiency and informed discourse, as well as areas where refinement could bolster their reliability and effectiveness in the evolving landscape of EU legal communication.

A. Introduction

Societies and the laws governing them are subject to constant change. New technologies, but also complex problems emerge. For example, people increasingly consume and research news through the internet rather than traditional media outlets.[1] To accommodate these changes, courts increasingly rely on new tools, such as emerging communication channels, to engage and proactively communicate with citizens. In addition to their traditional public relations (PR) activities,[2] encompassing open days, annual reports, and press releases, the German Supreme Court and Constitutional Court use X (previously Twitter) to distribute information about them. The Dutch and English Supreme Courts go even further by also publishing informative materials and blog entries.[3] All over Europe, Supreme Courts use a variety of communication tools, including summaries, commentaries, press releases as well as social media.[4] Thereby, case law summaries are considered an especially efficient method for providing content in understandable legal terms to a broader public without the intervention of mass media.[5]

The trend to use new tools for relaying information to the public is not confined to national courts but also reaches the international level. To enhance public accessibility, many institutions, ranging from nongovernmental organizations (NGOs) to international bodies and regional institutions, create informative materials to facilitate the understanding of regional law. These informative materials are not only comprised of applicable laws and policy documents but also interpretations thereof in the form of judgments by regional or national courts. At the European Union (EU)level, public relations (PR) was initially perceived as a danger to deeper integration and so the European Union's

1 W. Voß, 'Twitternde Gerichte? Öffentlichkeitsstrategien der Ziviljustiz im Informationszeitalter', 7 *Zeitschrift für die gesamte Privatrechtswissenschaft* (2021) 3, 335, 336.

2 Merriam-Webster Dictionary, 'Public Relations', available at https://www.merriam-webster.com/dictionary/public%20relations (last visited 1 October 2024).

3 W. Voß, 'Twitternde Gerichte? Öffentlichkeitsstrategien der Ziviljustiz im Informationszeitalter', 7 *Zeitschrift für die gesamte Privatrechtswissenschaft* (2021) 3, 335, 337.

4 P. Passaglia, 'Institutional Communication as a Means to Strengthen the Legitimacy of Constitutional Courts', in P. Pinto de Albuquerque & K. Wojtyczek (eds), *Judicial Power in a Globalised World* (2019), 359-375.

5 Ibid., 370.

predecessors were hesitant to engage in it.[6] While this understanding gradually changed, the EU's PR efforts were considered 'amateur-like' until well into the 2000's.[7]

While the Court of Justice of the European Union (CJEU, Court) has been no stranger to X, the Court also started to follow suit and increasingly publishes informative materials, fact sheets, on its website in recent years. The curia-website categorizes fact sheets as "documents analyzing the legislation, case-law or state of positive law on a given subject' and 'identify (…) the most relevant points of law from a selection of judgments."[8] Although fact sheets focus on the jurisprudence of the Court, they can also include reviews of summaries, compilations of decisions, and explanatory notes.[9] Overall, however, these court-issued fact sheets pose new questions for researchers and practitioners alike. In contrast to the fact sheets produced by 'outsiders', which were never part of the decision-making process of judgments, these fact sheets emanate from the deciding court. Due to this origin, the public might attach, for example, heightened reliability and enforceability to the cited information. Legal provisions to govern the informative work of any institution remain rare in EU law. Nevertheless, unclarity regarding the practical and legal effects of documents issued by institutions is not a novel issue in the EU. There are various EU documents whose effects are not clear-cut as EU institutions issue a multitude of documents whose status and effects are not explicitly regulated. Drawing inspiration from international public law, EU scholars summarized such documents 'with an uncertain legal status' under the concept of 'soft law'.[10]

6 M. R. Gramberger, *Die Öffentlichkeitsarbeit der Europäischen Kommission 1952-1996: PR zur Legitimation von Integration?* (1997), 274; M. Brüggemann, *Europäische Öffentlichkeit durch Öffentlichkeitsarbeit? Die Informationspolitik der Europäischen Kommission* (2008), 120-122.

7 T. Mast, 'Gute Öffentlichkeitsarbeit und die Europäische Union', 81 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* (2021) 2, 443, 445 [Mast, 'Gute Öffentlichkeitsarbeit'].

8 CJEU, 'Fact Sheets', available at https://curia.europa.eu/jcms/jcms/p1_1043150/en/ (last visited 1 October 2022).

9 *Ibid*.

10 O. Stefan *et al*., 'EU Soft Law in the EU Legal Order: A Literature Review', SoLaR Working Paper 2019, 8; Nevertheless, not all authors agree that the concept is sufficient as umbrella term as some documents are issued by institutions with law-making competences; A. von Bogdandy, F. Arndt & J. Bast, 'Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis', 23 *Yearbook of European Law* (2004) 1, 91, 112.

Accordingly, this paper investigates the place of fact sheets as court-issued informative documents in the EU legal order, specifically the obligations on the issuing institution and its effects. To set a basis for analysis, this paper first outlines the research design, characteristics of fact sheets, and the theoretical framework. Then, the analysis of fact sheets is two-prong: First, it is necessary to investigate what obligations EU law imposes when institutions provide information to the public and the extent to which the established principles apply to fact sheets published by the CJEU. Second, the concept of soft law as a theoretical framework can grant further insights regarding the practical and legal effects of fact sheets. Due to the lack of regulation of both, the discussion surrounding EU soft law provides a suitable theoretical framework for the evaluation of potential effects of fact sheets in the EU legal order.

B. Research Design

I. Research Approach

To evaluate fact sheets in the EU legal order, this research employs a mixed-method approach consisting of doctrinal legal research and a qualitative empirical study. As part of the doctrinal legal research, a literature review builds the foundation of this paper. Doctrinal legal research establishes the state of law, presenting law "in a way that is as neutral and consistent as possible in order to inform the reader of how it actually reads."[11] As the obligation of institutions to serve as information providers and the concept of soft law were predominantly expounded upon in academia, the review of academic literature in addition to the jurisprudence of the CJEU ensures a comprehensive analysis.[12] In addition, the qualitative empirical study supplies explanatory information on the creation and perception of fact sheets through semi-structured expert interviews with CJEU judges and staff. Interviews can reveal considerations that were not expressed in the official sources through informal responses, thereby elucidating how

11 J. M. Smits, *The Mind and Method of the Legal Academic* (2012), 13. Thereby, it constitutes a critical conceptual analysis of all relevant legislation and case law; T. Hutchinson, 'Doctrinal Research: Researching the Jury', in D. Watkins & M. Burton (eds), *Research Methods in Law*, 2nd ed. (2017), 13.

12 For the importance of CJEU judgments, see also V. Trstenjak, 'General Report: The Influence of Human Rights and Basic Rights in Private Law', in V. Trstenjak & P. Weingerl (eds), *The Influence of Human Rights and Basic Rights in Private Law* (2016), 3, 7.

fact sheets operate in context. Consequently, the data collected from interviews counteracts the possibility of gaps in the understanding of the fact sheets.

II. Fact Sheets

The origin of the idea to supply informative overviews through the Court can be traced back to the early 2000's. During this time, the Research and Documentation Directorate (RDD) started to author research notes, which an interviewee considered the precursors to fact sheets.[13] These research notes still exist and provide information on any legal issue to the judges, first of the Court of Justice but later on also of the General Court.[14] The research notes were initially only distributed to judges, their cabinets, and other relevant services within the Court. The public was excluded because of "considerable hesitations" from the Court that the references to national law in the research notes could be used as grounds to fight judgments.[15] This attitude has since shifted and research notes have been published on the Court's website since 2015.[16]

Fact sheets are another extension of the Court's mission to provide the public with informative overviews. They are exclusively published on the website of the curia website under the tab 'Case law' point 'Fact sheets' and are available to anyone with internet access.[17] The curia-website categorizes fact sheets as "documents analyzing the legislation, case-law or state of positive law on a given subject."[18] Although fact sheets focus on the jurisprudence of the Court, they can also include reviews of summaries, compilations of decisions, and explanatory

13 CJEU-FRDD-1, interview by author, 08 March 2022. About 70 lawyers from all national jurisdictions within the EU work at the RDD in three units which are each responsible for a different field of law and the respective fact sheets related thereto. Their tasks encompass the preliminary review of cases, the creation of research notes and summaries of judgments; CJEU, 'Research and Documentation Directorate', available at https://curia.europa.eu/jcms/jcms/Jo2_11968/en (last visited 1 October 2024).

14 CJEU-FRDD-1, interview by author, 08 March 2022.

15 A former staff member of the RDD mused that the roots of these concerns might have been generational. As judges during the time were not familiar with technology, they had a heightened mistrust towards it. The interviewee felt that this attitude shifted as younger generations assumed positions within the Court; CJEU-FRDD-1, interview by author, 08 March 2022.

16 CJEU, 'Judicial Network of the EU: Notes and Studies', available at https://curia.europa.eu/jcms/jcms/p1_2170124/en/ (last visited 1 October 2024).

17 CJEU, 'Fact Sheets', available at https://curia.europa.eu/jcms/jcms/p1_1043150/en/ (last visited 1 October 2024).

18 *Ibid*.

notes.[19] Overall, however, the fact sheets "identify (…) the most relevant points of law from a selection of judgments."[20] Nevertheless, fact sheets address a wide range of legislative instruments of the Union, including directives, the Charter, regulations, framework decisions, council directives, the Statute of the CJEU, and the Treaties. The fact sheets summarize the Court's jurisprudence on different legislative instruments regarding seven topics, including community design, value-added tax (VAT), personal data, electronic commerce, environmental information, the urgent preliminary ruling procedure, and the application of the Charter.[21] The fact sheets carry little importance compared to the RDD's other tasks. This insignificance is evident by the lack of an express mention of the fact sheets on the website describing the RDD. Furthermore, other tasks of the RDD, such as the summaries, are more time-sensitive than the fact sheets, which makes the fact sheets a lesser point of interest for RDD staff.[22]

To further contextualize the fact sheets and build a basis for analysis, this section outlines their choice of topics before turning to the creation process and use in practice. Where data was not publicly available, the information in this section was drawn from interviews conducted by the author with staff of the Court.

The original reasons for the choice of topics are unknown. Regarding the new fact sheet on the fiscal advantages related to state aid, one interviewee noted that, "it's not an important area, but it's a very interesting question."[23] Another interviewee was surprised by the choice of 'public access to environmental information' as there were topics in environmental law that garner more attention in the sense of preliminary references.[24]

19 *Ibid*.
20 *Ibid.*
21 The full titles of the fact sheets are: 'Community Design' (2023), 'The Deduction of Value Added Tax' (2019), 'The Protection of Personal Data' (2021), 'Electronic Commerce and Contractual Obligations' (2020), 'The Field of Application of the Charter of Fundamental Rights of the European Union' (2021), 'Public Access to Environmental Information' (2017), and 'The Urgent Preliminary Ruling Procedure and Expedited Procedure'(2019). As some of these fact sheets have since been updated and are no longer available on the website, the author retrieved them through a request to the Court's archives on 21 January 2022 (documents request No. 0001/2022D). In addition, the RDD is currently working on a fact sheet on the fiscal advantages related to state aid; CJEU-RDDSM-1, interview by author, 24 February 2022.
22 CJEU-RDDSM-1, interview by author, 24 February 2022.
23 *Ibid*.
24 CJEU-AGSM-1, interview by author, 28 January 2022.

This choice of topics is likely connected with the envisaged purpose of the fact sheets. Overall, the aim of the fact sheets is to provide information to national courts and the general public.[25] The fact sheets focus on topics that the EU citizen and companies engage with on a daily basis (electronic commerce, protection of personal data, and deduction of VAT). The fact sheet on public access to environmental information or community design are of further practical use to companies and NGOs in the preparation for judicial disputes. On the one hand, the provision of this information forms part of the larger mission of the Court to be of service to the outside world.[26] The fact sheets therefore facilitate the accessibility of EU law, e.g. in countries where information might otherwise be scarce.[27] As a result, the fact sheets spread awareness on the jurisprudence of the Court.[28] Moreover, the fact sheets provide information which is particularly useful for national courts. The fact sheets on the urgent preliminary ruling procedure and on the scope of application of the Charter, on the other hand, seem to be particularly useful to national courts who have to decide on the application of the Charter or the referral of a question in specific court proceedings. Better informed national courts, in turn, can reduce preliminary references and reduce the CJEU's caseload. Consequently, the efficiency of the Court increases.[29] Fact sheets can further supply background information and updates for judges of the CJEU and the General Court.[30] Hence, the purpose and topic selection of fact sheets allow the conclusion that the main characteristics of facts are their informative value.

The creation process of the fact sheets is more nuanced than the one of the original research notes. At the beginning of the process, a unit recognizes a potential topic for a new fact sheet.[31] Then, a staff member of that unit gathers all the relevant case law on a systematic basis.[32] The author then typically selects a list of the most important cases from the collected case law. While the RDD

25 CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-CJEUJ-1, interview by author, 25 February 2022.
26 CJEU-CJEUJ-1, interview by author, 25 February 2022.
27 *Ibid*.
28 CJEU-RDDSM-1, interview by author, 24 February 2022.
29 It is not clear whether this effect is actually achieved in practice; CJEU-AGSM-1, interview by author, 28 January 2022.
30 CJEU-GCJ-1, interview by author, 08 March 2022.
31 CJEU-RDDSM-1, interview by author, 24 February 2022.
32 The relevance of a case depends mostly on its content, although the type of court resp. tribunal, the existence of an appeal, jurisdiction, and formation of the judgment can constitute indicators for its relevance.

does not prescribe the use of specific criteria, RDD staff are considered experts regarding the case law. The cases are further sorted and classified in a more precise manner with the use of their respective résumés. Thus, the RDD does not consider its actions as interpretative. Rather, the author of a fact sheet states the content of the résumés.[33] Staff of other departments occasionally contributes to the fact sheets.[34] During this process, the fact sheets are approved twice by the office of the president: first, the list of cases and then the final draft. That way, the office ensures that the fact sheet does not distort the case law and that it expresses the intention of the judges.[35] As the interviewee from the RDD succinctly pointed out, the RDD is "just a service, we are not the mouth of the law", and thus approval by the President is required.[36] Finally, the fact sheets are distributed to the judges, other units of the CJEU, and the public through the website. After the initial distribution, judges also continue to receive updates to the fact sheets.[37]

While their reasons vary, none of the interviewed Court staff encountered or used the fact sheet in their day-to-day work. Judges might read the fact sheets as supplements; however, they do not use them in concrete cases due to the availability of other research tools and arguments by the parties.[38] Regarding the RDD, the interviewee added that there was simply no time to consult fact sheets as tasks are often time-sensitive in their day-to-day work.[39]

It is not possible to establish whether fact sheets achieve their informative purpose regarding national courts and the public. While it was indicated by participants of the Max Planck Institute (MPI) Conference on 15 July 2022 that national courts and lawyers regularly refer to the fact sheets in their day-to-day work, such references seem to not be included in the final versions of documents and submissions. To verify this use on national level, it would be necessary to conduct a large-scale survey among the courts as well as the citizens of the EU Member States, which is beyond the scope of this paper.

33 CJEU-RDDSM-1, interview by author, 24 February 2022.
34 A staff member of an AG, for example, was asked to review the fact sheet on public access to environmental access; CJEU-AGSM-1, interview by author, 28 January 2022.
35 CJEU-RDDSM-1, interview by author, 24 February 2022.
36 *Ibid*.
37 One interviewee assumes, however, that the update frequency for judges might be higher as the editing process for the public is more thorough; CJEU-GCJ-1, interview by author, 08 March 2022.
38 *Ibid*.; CJEU-CJEUJ-1, interview by author, 25 February 2022.
39 CJEU-RDDSM-1, interview by author, 24 February 2022.

III. Soft Law as Theoretical Framework

While the Treaties and jurisprudence outline the effects of primary, secondary, and tertiary legal instruments as well as international treaties,[40] informative documents, such as fact sheets, remain unregulated. Unclarity regarding the practical and legal effects of documents issued by institutions is not a novel issue in the EU. A lack of regulation, however, does not necessarily equate to a lack of effects. EU scholars refer to such documents 'with an uncertain legal status' as 'soft law'.[41]

The use of soft law at EU courts generates varied degrees of criticism. First, the recognition of soft law at the Court potentially legitimizes an expansion of competences through EU institutions to the detriment of Member States.[42] Soft law effectuates, for example, a "creeping supranationalization of both *de facto* and *de jure* competence" in the areas of competition law, education, and access to information.[43] In turn, Scott criticizes the absent consideration of soft law regarding environmental matters. As a result, these instruments are not under any judicial scrutiny.[44] Secondly, the use of soft law for judicial proceedings threatens legal certainty.[45] Despite the desirable characteristics of soft law regarding its flexibility and its potential for standard-setting, soft law measures "play havoc with juristic concepts" and "create conceptual uncertainty" through their use in adjudication.[46] Third, the recasting of soft law into 'accepted sources of law' through international tribunals makes it indistinguishable from hard law.[47] This

40 Art. 288 TFEU; Art. 216(2) TFEU, Art. 290 TFEU & Art. 291 TFEU.

41 O. Stefan *et al*., *supra* note 10, 8; nevertheless, not all authors agree that the concept is sufficient as umbrella term as some documents are issued by institutions with law-making competences; A. von Bogdandy, F. Arndt & J. Bast, *supra* note 10, 112.

42 L. Senden, *Soft Law in European Community Law* (2004), 393-397.

43 D. Lehmkuhl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', 28 *Journal of Public Policy* (2008) 1, 139, 157; K. Lenaerts, 'Education in European Community Law After "Maastricht"', 31 *Common Market Law Review* (1994) 1, 7, 9-10; I. Österdahl, 'The CoJ and Soft Law: Who's Afraid of the EU Fundamental Rights Charter?', in U. Mörth (ed.), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis* (2004), 53.

44 J. Scott, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law', 48 *Common Market Law Review* (2011) 2, 329, 342-343.

45 C. Chinkin, 'The Challenges of Soft Law: Development and Change in International Law', *38 International and Comparative Law Quarterly* (1989) 4, 850, 862-865.

46 *Ibid*., 865.

47 J. Klabbers, 'Informal Instruments Before the European Court of Justice', 31 *Common Market Law Review* (1994) 5, 997; J. Klabbers 'The Redundancy of Soft Law', 65 *Nordic Journal of International Law* (1996) 2, 167, 174, 176-177.

transformation can also occur through repeated references to soft law by the CJEU, or Advocate Generals, or by an incorporation of institutional outputs through interactions between the Commission and the CJEU.[48] Furthermore, soft law can harden through the Court's application of the principles of legitimate expectations and of legal certainty.[49] Some scholars, however, see the danger of hardening only in the inclusion in the *ratio decidendi* or in an invocation through Art. 263 TFEU.[50]

Despite the concerns of scholars, the existence and use of soft law in the EU remains a fact recognized by the CJEU and should be acknowledged accordingly. To examine the fact sheets' potential to have legal and practical effects, this study draws on the research surrounding soft law as a foundation for this evaluation. As soft law is a theoretical concept, it is necessary to bear its limits in mind considering theoretical findings could deviate from practice. Therefore, further research is necessary to encapsulate the actual use of fact sheets in practice, i.a. through surveys.

The literature on EU soft law overflows with definitions of the concept. Most definitions focus on defining soft law *in negativo* to hard law, according to which the latter is adopted according to a EU legislative procedure and is legally binding.[51] Though comprehensive, this common denominator is unduly broad and captures any non-legislative document published under the auspices of the EU. Other definitions focus on soft law as rules of conduct or the nature of the obligation and enforcement to categorize a document as soft law.[52]

48 Österdahl, *supra* note 43, 51; F. Snyder, 'Soft Law and Institutional Practice in the European Community', in S. Martin (ed.), *The Construction of Europe: Essays in Honour of Emile Noël* (1994), 197, 204 [Snyder, 'Soft Law and Institutional Practice'].

49 H. C. F. Hofmann, 'Negotiated and Non-Negotiated Administrative Rule-Making: The Example of EC Competition Policy', 43 *Common Market Law Review* (2006) 1, 153, 162-163.

50 K. C. Wellens & G. M. Borchardt, 'Soft Law in European Community Law', 14 *European Law Reporter* (1989) 5, 267, 280-281.

51 F. Terpan, 'Soft Law in the European Union – the Changing Nature of EU Law', 21 *European Law Journal* (2015) 1, 68, 77; Senden, *supra* note 42, 112-113; B. Eberlein & D. Kerwer, 'New Governance in the European Union: A Theoretical Perspective', 42 *Journal of Common Market Studies* (2004) 1, 121, 123; K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421, 422; D. Thürer, 'The Role of Soft Law in the Actual Process of European Integration', in O. Jacot-Guillarmod & P. Pescatore (eds), *L'Avenir du Libre-Échange en Europe: Vers un Espace Économique Européen?* (1990), 132.

52 F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993) 1, 19; Terpan, *supra* note 51, 73.

For the purposes of this research, Senden's definition of soft law is most suitable. She condenses the views of most scholars into a succinct definition by including the focus on rules of conduct, the lack of attribution of legal force, and the production of legal and practical effects.[53] Moreover, she adds more elements to suitably elevate measures into the realm of soft law: the Commission and Council must lay down the measure in instruments and aim to produce practical effects.[54] As such, the focus is on the intention of the issuing institution to produce practical effects.[55] Nevertheless, this intention should not be over-emphasized as a measure may also create expectations irrespective of the intentions of the author. In addition to these criteria, the origin of the measure from an EU institution safeguards the division of competencies. This definition is also reflected in the jurisprudence of the CJEU, who found that the production of legal effects by EU acts depends on the content of the act, its context, and the powers of the adopting institution.[56]

Fact sheets fulfill this definition. Rules of conduct require addressees to adopt a certain behavior or measure and excludes mere political or informative statements.[57] Although fact sheets summarize the jurisprudence of the CJEU on a certain topic, they go beyond the provision of information by indicating how the Court exercises its powers. Therefore, fact sheets provide an overview of how EU laws are interpreted and fall in the category of interpretative and decisional soft law.[58] Moreover, fact sheets originate from the Court, which is the EU institution tasked with the interpretation and application of EU law.[59] Thus, the dissemination thereof is naturally within the competencies of the Court.[60] Although the fact sheets are not attributed any legal force, the intentions to reduce preliminary references and provide information aim at producing

53 Senden, *supra* note 42, 112-113.
54 Senden, *supra* note 42, 112-113.
55 *Ibid*., 113; legal effects, however, can occur independently from the intention of the issuing institution, e.g. through the application of general principles; Stefan *et al*., *supra* note 10, 10.
56 *Belgium v. Commission*, C-16/16 P, Judgment of 20 February 2018, ECLI:EU:C:2018:79, para. 32; *Asociația "Forumul Judecătorilor din România"*, C-83/19, Judgment of 18 May 2021, ECLI:EU:C:2021:393, para. 173.
57 Although Senden adds that the "dividing line might not always be clear", Senden, *supra* note 42, 112.
58 *Ibid*., 120.
59 Art. 19(1) TEU.
60 See also section C.I.1. The Obligations of the CJEU as Information Provider.

practical effects.[61] By fulfilling this definition, the fact sheets can be categorized as a form of soft law for the sake of this paper.

C. Fact Sheets in the EU Legal Order

To place fact sheets within the EU legal order, it is necessary to analyze two aspects. On the one hand, it is necessary to evaluate which obligations EU law places on the CJEU when it acts as an information provider. On the other hand, as there are no specific provisions regulation informative documents such, there are no clear effects attached to fact sheets. To explore the potential effects of fact sheets, this section relies on the concept of soft law as a theoretical framework.

I. The Obligations of the CJEU as Information Provider

Fact sheets inform the public on the jurisprudence of the CJEU regarding specific topics. Yet this informative work, or PR in general, remains a neglected topic in EU law. Neither the Treaties nor secondary law contain specific provisions on how EU institutions must conduct their PR-related activities. Thus, it is unsurprising that no provision in EU primary or secondary legislation attaches explicit effects to fact sheets. Moreover, neither the Statute of the CJEU nor the Rules of Procedure of either court contain articles to govern this informative work.[62] Only art. 2 Statute of the Court of Justice requires judges in general to perform their duties impartially and preserve the secrecy of their deliberations.

Nevertheless, there are several general articles that define a framework to regulate the performance of duties by EU institutions. These articles serve as a guideline to establish the obligations of the CJEU when it provides information to the public. To that end, it is necessary to establish the content of the relevant principle and the requirements it imposes on informative work. The results from the first section are then synthesized and applied to fact sheets.

61 CJEU-CJEUJ-1, interview by author, 25 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-GCJ-1, interview by author, 08 March 2022.

62 Rules of Procedure of the Court of Justice OJ 2012 L 265/1; Rules of Procedure of the General Court OJ 2015 L 105/1.

1. Obligations under EU law

Before the Lisbon Treaty, EU primary law did not cover the PR activities of EU institutions. As a result, PR was either understood as an implied power and, thus, an annex to competencies of the EU,[63] or as necessity within the meaning of art. 352(1) TFEU.[64] Despite the continuous lack of explicit provisions relating to PR, several articles require the institutions to conduct their work in an open and transparent manner: art. 1(2) TEU (decisions should be taken as openly as possible), art. 10 (3) TEU (open decision-making), art. 15 (1) (open work environment), (3) (right to access files) TFEU, art. 298 TFEU (EU institutions should have the support of an open, efficient, and independent European administration), art. 41(2)(b) CFR (right to access of one's file), and art. 42 CFR (right of access to documents).[65] Although most commentaries on these articles stress their relevance regarding the EU administration,[66] Gellermann rightly points out that the wordings are usually sufficiently broad to cover any acts by EU institutions rather than just administrative ones.[67]

The most relevant articles are art. 15 TFEU and art. 11 TFEU. Art. 15 TFEU mandates the EU institutions to "conduct their work as openly as possible".[68] While this article is mostly understood as an expression of the principle of transparency, its overall aim is to promote the participation of citizens. Fact sheets stimulate this participation by reducing information asymmetries and ensuring EU citizens understand EU law and its application by the CJEU. The most explicit reference, however, is by art. 11(2) TEU, which requires EU institutions to engage in "open, transparent, and regular dialogue" with the public. Art. 11(2) TEU supplements the other articles with the proactive element

63 S. Kadelbach, 'Art. 5 EUV', in H. von der Groeben, J. Schwarze & A. Hatje (eds), *Europäisches Unionsrecht*, 7th ed. (2015), para 11.

64 The necessary objective to attain could, for example, be democracy, Art. 2 TEU; Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 460; Brüggemann, *supra* note 6, 129.

65 For the principle of openness as *Leitmotiv* in EU law, see also: T. von Danwitz, 'Öffentlichkeit, Transparenz und Vermittlung von Rationalität in der Rechtsprechung des Gerichtshofes der Europäischen Gemeinschaften', in I. Pernice & L. S. Otto (eds), *Europa Vermitteln im Diskurs* (2011), 29, 31.

66 M. Klamert, 'Art. 15 TFEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019), para. 2; B. W. Wegener, 'Art. 15', in C. Callies & M. Ruffert (eds), *EUV, AEUV*, 6th ed. (2022), para. 2.

67 M. Gellermann, 'Art. 15', in R. Streinz (eds), *EUV/AEUV,* 3rd ed. (2018), para. 2.

68 Art. 15 TFEU.

of starting a dialogue rather than just passively allowing access to documents.[69] As the article does not give further instruction, EU institutions freely decide when they engage in this dialogue.[70] There is, however, no discretion regarding the question of 'whether' to engage in PR, considering Art. 11(2) TEU requires a 'regular dialogue' and this implies a consistent supply of information in whatever form.

The principles of transparency and openness also carry important procedural implications. On the one hand, the principles heighten the public insight into the decision-making and opinion-forming process of EU institutions.[71] Overall, the aim is to increase the involvement of the public and to foster the legitimacy of EU decisions.[72] On the other hand, the principles allow the responsibility of the EU administration and institutions towards citizens when PR activities attribute political standpoints and actions to specific persons resp. institutions. Furthermore, the ability to trace decisions heightens the clarity of decision-making by defining the standpoints of each institution.[73]

Furthermore, EU law generally regulates the way in which institutions discharge their obligations. The requirements are of procedural as well as substantive nature. In terms of procedure, the EU's lack of a *Kompetenz-Kompetenz* is a basic tenet of EU law.[74] Consequently, any EU action requires a legal basis conferring the institutions the power to act.[75] A legal basis further has a substantive and formal dimension by defining the content and form of measures.[76] While some scholars dispute the applicability of the principle of conferral to documents not listed in art. 288 TFEU,[77] art. 13(2) TEU clearly

69 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 461.

70 *Ibid*., 472.

71 M. Nettesheim, 'Art. 10 EUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *Das Recht der Europäischen Union: EUV/AEUV*, 75th ed. (2022), para. 93.

72 *Kuijer v. Commission*, T-211/00, Judgment of 7 February 2002, EU:T:2002:30, para. 52; *Schecke GbR and Eifert v. Land Hessen*, joined cases C-92/09 and C-93/09, Judgment of 9 November 2010, EU:C:2010:662, para. 68.

73 T. Mast, *Staatsinformationsqualität* (2020), 336 [Mast, *Staatsinformationsqualität*].

74 *Kompetenz-Kompetenz* refers to the concept that a sovereign state is able to assume competences on its own initiative; M. Große Hüttmann, 'Kompetenz-Kompetenz', available at https://www.bpb.de/kurz-knapp/lexika/das-europalexikon/177087/kompetenz-kompetenz/ (last visited 1 October 2024).

75 Art. 5(1) in connection with Art. 5(2) TEU.

76 J. Bast, 'Art. 5 EUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *supra* note 71, para. 17.

77 It is already disputed as to whether the non-legislative documents listed in Art. 288 TFEU fall under the principle of conferral; Mast, 'Gute Öffentlichkeitsarbeit', *supra*

stipulates that every institution "shall act within the powers conferred to it". Such an extension is logical considering even informative documents may have steering functions.[78] Moreover, the function of PR to further legitimacy and democracy can only be fulfilled when institutions stay within their transferred competences and confine themselves to informing the public by making their work visible.[79] Thus, the principle of conferral limits the issuance of informative documents to conferred subject-matters.

Another formal requirement is the clear attribution of documents to an EU institution to ensure their accountability. Although it is not necessary to be able to trace decisions to individuals on a committee, the public should be informed of the end results and decisions.[80] When a statement or explanation is not published in the Official Journal, the document should still be recognizable as a Union act through the inclusion of the official EU logo in the header of chosen media format. In addition, the document should mention the authoring institution or department within that institution to allow for further inquiries or questions by the public.

Substantive requirements relate to the desirable level of quality of informative documents requiring them to be transparent, correct, clear, and comprehensive.[81] Depending on the institution, context, and situation, however, the quality of PR may differ.[82] Thus, it should not be held to an unrealistically high standard.[83]

First, drawing upon the concept of human dignity, Mast defines transparency as incorporating the possibility for self-criticism and reflection. As dialogue occurs between individuals on eye-level, transparency secures one's ability to form an informed opinion, which constitutes an expression of the

note 7, 462.

78 Kadelbach, *supra* note 63, para. 12; M. Nettesheim, 'Art. 288 AEUV', in E. Grabitz, M. Hilf & M. Nettesheim (eds), *supra* note 71, para. 200, 206.

79 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 463.

80 *Ibid*., 472.

81 See overview by Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 443.

82 W. Hoffmann-Riem & W. Schulz, 'Politische Kommunikation – Rechtswissenschaftliche Perspektiven', in: O. Jarren, U. Sarcinelli & U. Saxer (eds), *Politische Kommunikation in der Demokratischen Gesellschaft* (1998), 154, 161.

83 C. Hillgruber, 'Verfassungsrecht Zwischen Normativem Anspruch und Politischer Wirklichkeit', 67 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2008), 7, 10-13.

individual's human dignity.[84] Similarly, transparency excludes any attempts at manipulating information or the way it is presented *a priori*.[85]

Second, the presented information should be correct. While requiring a standard of objective truth in informative documents is unrealistic and too high a threshold, institutions should not knowingly spread incorrect information and ensure the subjective correctness based on the information that is available to them at the time.[86] Misinformation should be corrected as soon as it comes to light and through the same media channels to reach its initial audience.

Third, the information needs to be presented in a clear manner. Due to its plethora of official languages and differences in translation, clarity is often a problem in the EU. While this problem will always persist to a certain extent, EU institutions can ensure the involvement of the public by using accessible language and formulations suited for the level of expertise of the intended audience. Drawing on the principle of public accessibility, Haag understands the use of accessible language as an obligation of EU institutions.[87] A necessity for this close involvement can also be drawn from art. 1 and 10 TEU which stipulate the right of the public to participate in Union matters.[88]

Fourthly, the requirement of comprehensiveness cautions against over-simplification. Although EU matters often involve complex legal and practical situations, oversimplifying them carries the danger of distorting the information.[89] Thus, while it is tempting to repackage information to appeal to a broader audience, EU institutions need to strike a careful balance so that simplification does not devolve into distortion of information.

2. Application to Fact Sheets

This section investigates to what extent fact sheets adhere to the established principles. While the institutional design of the CJEU features a press unit, it is not involved in the creation of fact sheets, which is the responsibility of the RDD.[90] Considering the content of the fact sheets is the simplification of legal

84 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 465.
85 *Ibid*., 463.
86 *Ibid*., 466.
87 M. Haag, 'Art. 10 EUV', in H. von der Groeben, J. Schwarze & A. Hatje (eds), *EUV/AEUV*, 7th ed. (2015), para. 18.
88 *Ibid*., para. 17.
89 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 468.
90 CJEU, 'Press and Media: Services for the Media', available at https://curia.europa.eu/jcms/jcms/Jo2_7053/en/ (last visited 1 October 2024).

information, it is prudent to relay the responsibility to the RDD as legal experts. Nonetheless, expert-based approaches carry dangers, including an over-reliance on the Court for information.

In terms of formal limits, the Court must ensure the principle of conferral, its core duties, and the clear attribution of authors. Although there is no explicit basis for informative work, a connection to a conferred task or subject matter suffices to satisfy the principle of conferral. Thus, the informative work of the CJEU needs to be grounded in the tasks conferred to it by the Treaties. Art. 19(1) TEU appoints the CJEU as the institution responsible for the 'interpretation and application of the Treaties.' The dissemination of information related to these interpretations can be considered an area of responsibility for the Court. As the topics of the fact sheets designate the important cases on a topic and the Court's interpretation thereof, it falls within the mandate of the CJEU. Furthermore, the Court as an institution must ensure that its informative work does not impact on its core duties. For the CJEU, its core obligation is to adjudicate disputes concerning EU law. Its ability to adjudicate disputes would be compromised were the Court to not be perceived as an impartial institution or if it infringes on the secrecy of its deliberations.[91] This neutrality could be compromised if the Court, for example, comments on its cases or includes references to commentary by third parties. Hence, as long as the fact sheets continue to only include summaries of the cases, the CJEU stays within its limits.

Lastly, informative work should be clearly attributed to an author. While it would be sufficient to refer to the issuing institution, the fact sheets go beyond this requirement. They not only feature the logo of the CJEU in their header but also the RDD as the responsible sub-unit within the Court.

With regard to substantive limits, several elements ensure an acceptable level of quality. Transparency entails an openness to self-criticism and not manipulating information through dramatization or distortion. The fact sheets avoid manipulation by providing the original sources through the ECLI-identifiers of the summarized cases. Nevertheless, greater transparency would be achieved through the inclusion of a fact sheet's current edition number and an archive containing older versions. In a further step to spread awareness, updates should be included in newsletters or press releases.

Correctness requires courts to not knowingly spread incorrect information and to ensure subjective correctness based on the available information. At the very least, courts need to produce claims with procedural diligence. The procedure to create fact sheets contains several instances to ensure their correctness. First, the

91 Art. 2 Statute of the CJEU.

creation process is overseen by the office of the president. The summaries used by the RDD were, furthermore, approved by the respective judge rapporteurs. Second, readers can access the sourced cases. If the fact sheets contain incorrect information, it would be prudent to correct this information immediately using the same communication channels as for the initial dissemination.

Clarity and comprehensiveness are two closely connected requirements. They necessitate balancing the use of accessible language and formulations with not distorting complex issues through oversimplification. Although the fact sheet's use of legal and formal language reduces clarity, this level of language is necessary to avoid oversimplifications of complex legal issues. As summaries, fact sheets still heighten the intelligibility by providing concise information and inviting the public to read further on the issues. In practice, the clarity and comprehensiveness are enhanced by presenting the important parts of a judgment. Accordingly, the Court identifies important judgments for a subject matter and the decisive parts therein. Dividing the cases into categories and sub-headings also facilitates the public's understanding.

In conclusion, the CJEU largely adheres to the obligations regarding informative publications under EU law. First, the CJEU stays within the tasks conferred to it by the Treaties as fact sheets are a dissemination of information related to the interpretation and application of the Treaties. As long as fact sheets continue to rely on summaries of judgments, there is also no impact on the CJEU's core duties. Lastly, the fact sheets are clearly attributed to the CJEU and especially the RDD as the author. In terms of adhering to substantive obligations, the fact sheets provide overall correct, clear, and comprehensive information. With regard to transparency, it lacks a clear archive of previous versions and includes edition numbers only in the fact sheets themselves.

II. Effects of Fact Sheets

EU law does not explicitly attach effects to informative documents, such as fact sheets. Thus, to evaluate the legal and practical effects of fact sheets, this research uses the lens of soft law.[92] Using soft law as a theoretical framework, this subsection extrapolates the practical and legal effects soft law has been attributed and evaluates to what degree these arguments can be extended to fact sheets.

92 See B. III. Soft Law as Theoretical Framework.

1. Practical Effects

In terms of practical effects, soft law can effect changes in the discourse surrounding subject matters as well as in the behavior of stakeholders. A change in the discourse refers to the understanding of concepts and the perception of issues. Thereby, soft law contributes to the knowledge of stakeholders and 'meaning making'.[93] Through systems of peer pressure resp. praise, benchmarking and peer reviewing, stakeholders find a common 'good' policy.[94] Such processes define values, which in turn can shift policy and public discourse.[95] In a study on the open method of coordination, Jacobsson confirms the "strong sociological character" of these mechanisms and their ability to effect (subtle) policy changes.[96] She deems the creation of a common discourse and symbols through repeated meetings, the mobilization of actors, and the iterative process even more important than the soft law measure itself.[97]

In addition to the discourse, soft law measures can also influence the behavior of actors regarding their policies and actions. During the creation of new (hard) laws, soft law documents inform stakeholders, such as lobby groups, about the development and ensure their involvement.[98] Through the circumvention of majority thresholds in legislative procedures, soft law measures heighten the influence of minority groups to effectuate change in their favor.[99] Connecting to the sociological character of soft law, the socialization during its creation

93 Stefan *et al*., *supra* note 10, 22; I. P. Ionescu & M. Eliantonio, 'Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective', 17 *Journal of Contemporary European Research* (2021) 1, 43, 48.

94 M. Tsakatika, 'A Parliamentary Dimension for EU Soft Governance', 29 *Journal of European Integration* (2007) 5, 549, 551; S. Kröger, 'The End of Democracy as We Know It? The Legitimacy Deficits of Bureaucratic Social Policy Governance', 29 *Journal of European Integration* (2007) 5, 565, 566; E. Radulova, 'The OMC: An Opaque Method of Consideration of Deliberative Governance in Action?', 29 *Journal of European Integration* (2007) 3, 363, 365.

95 J. Jacobsson, 'Between Deliberation and Discipline: Soft Governance in the EU Employment Policy', in U. Mörth (ed.), *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (2004), 82, 89 [Jacobsson, 'Between Deliberation and Discipline']; S. Borrás & T. Conzelmann, 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn', 29 *Journal of European Integration* (2007) 5, 531, 535.

96 Jacobsson, 'Between Deliberation and Discipline', *supra* note 95, 82, 89.

97 *Ibid*., 90-98.

98 F. Beveridge & S. Nott, 'A Hard Look at Soft Law', in P. Craig & C. Harlow (eds), *Lawmaking in the European Union* (1998), 293.

99 *Ibid*., 295-296.

processes exert a positive influence on stakeholders and institute consultation procedures as common practice.[100] States might translate this external input into their legal orders through these consultations.[101] The internalization of norms through discourse or peer pressure can even culminate in 'normative effects' which result in specific behavioral changes.[102] Hence, soft law measures not only influence policy but also transform the behavior of stakeholders such as the EU Member States and the EU institutions themselves.[103] While soft law has been said to become gradually "politically, socially and morally binding for actors involved",[104] its effectiveness remains questionable.[105] Nevertheless, the creation of networks to manage implementation through soft law reduces judicial action due to a lowered need for doctrinal clarification.[106] Furthermore, the provision of information and administrative resources through soft law increases the effectiveness of eventual infringement procedures.[107]

2. Legal Effects

While the treaties do not attribute express effects to fact sheets, soft law affects legal relationships and thereby has legal effects. Snyder accumulated a comprehensive list of these effects.[108] With regard to the realm of cooperation between states, soft law can provide a framework for future negotiations, bind the parties to an international agreement, and concretize the requirements of

100 R. Dehousse & J. H. H. Weiler, 'EPC and the Single Act: From Soft Law to Hard Law?', in M. Holland (eds), *The Future of European Political Cooperation* (1991), 121, 132.

101 Stefan *et al.*, *supra* note 10, 22; Ionescu & Eliantonio, *supra* note 93, 48.

102 D. Ashiagbor, 'Soft Harmonisation: The Open Method of Coordination in the European Employment Strategy', 10 *European Public Law* (2004) 2, 305, 314-315.

103 Stefan *et al.*, *supra* note 10, 22, 24.

104 K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy', 14 *Journal of European Social Policy* (2004) 4, 355, 359.

105 A. Bouveresse, 'La Portée Normative de la Soft Law', *Revue de l'Union européenne* (2015) 588, 291, 298; F. Berrod, 'L'Utilisation de la Soft Law Comme Méthode de Conception du Droit Européen de la Concurrence', *Revue de l'Union Européenne* (2015) 588, 283, 287-288; Stefan *et al.*, *supra* note 10, 24.

106 E. Korkea-aho, 'Watering Down the Court of Justice? The Dynamics Between Network Implementation and Article 258 TFEU Litigation', 20 *European Law Journal* (2014) 5, 649, 666.

107 *Ibid*.

108 F. Snyder, 'Interinstitutional Agreements: Forms and Constitutional Limitations', in G. Winter (eds), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (1996), 463 [Snyder, 'Interinstitutional Agreements'].

the duty of international cooperation. Soft law measures can further shape the legal relationships between actors. On the one hand, soft law measures generate expectations regarding the behavior of the institution. On the other hand, it influences the rights and expectations of third parties and imposes a standstill effect on non-conforming conduct. In its informative function, the provided information and transparency can ameliorate the relations between actors.[109] For example, the communications of the Commission form a source of doctrine and clarify the rights and obligations of national administrations as well as individuals.[110] The SoLaR report found that soft law predominately binds the Commission as an issuing institution with limited effect on national legal systems, while Cini adds the ability to limit discretion and to encourage consistent decisions to the features of soft law measures.[111] The self-binding effect thereby serves to guard the legitimate expectations of recipients of measures. As a consequence of this self-binding effect, the issuing institution may only derogate from soft law by providing "sufficient and acceptable legal reasons."[112] A publication of the soft law measure is not always necessary to achieve this self-binding effect because a consistent practice can also create legitimate expectations and, as such, a *de facto* binding obligation.[113] Lastly, soft law can have legal effects through its influence on hard law. Soft law can constitute an expression of general principles of the EU legal order or the *acquis communautaire*. Moreover, soft law can serve as an interpretative aid for hard law provisions in court. Besides, parties may invoke soft law in litigation as a basis for judicial review.[114]

The legally binding force can be further cemented by the use of soft law in courts either as interpretation aid or as a basis for adjudication.[115] Although Chinkin argues that the subjective and discretionary content of soft law

109 The phenomenon is also referred to as 'regulation by publication' or as 'regulation by information'; Snyder, 'Soft Law and Institutional Practice', *supra* note 48, 199-201; Hofmann, *supra* note 49, 169-170.

110 Stefan *et al*., *supra* note 10, 25.

111 M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', 8 *Journal of European Public Policy* (2001) 2, 192, 194.

112 Ionescu & Eliantonio, *supra* note 93, 48.

113 A. Beckers, 'The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Soft Law Can Transform Into Hard Law', 37 *Yearbook of European Law* (2018) 1, 569, 580, 595.

114 Snyder, 'Interinstitutional Agreements', *supra* note 108, 463.

115 *Salvatore Grimaldi v. Fonds des Maladies Professionnelles,* C-322/88, Judgment of 13 December 1989, EU:C:1989:646 [*Grimaldi*]; Senden, *supra* note 42, 138; Ionescu & Eliantonio, *supra* note 93, 48.

disqualifies it for usage in court, soft law plays a role in EU courts.[116] As a matter of fact, the CJEU considers soft law in its deliberations and likewise requires national courts to take it into account.[117]

With regard to using soft law as a basis for adjudication, it is clear that the annulment procedure does not apply to purely informative actions or measures.[118] This result stems mostly from the Court's rigid understanding of legal effects necessary under art. 263 TFEU.[119] In order to trigger a direct judicial review of soft law under art. 263 TFEU, the act needs to produce legal effects. To determine the production of legal effects by an act, the CJEU initially followed a 'substance over form approach', where the effect on third parties trumped considerations like the nature or form of the measure.[120] In contrast, the CJEU focuses on the intention and powers of the issuing authority in the recent judgments.[121] Thereby, the CJEU finds it "necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act."[122] Considering its recent application of these criteria, the CJEU's approach has been characterized as adopting a 'formalistic' understanding of the notion of legally binding effects of EU soft law.[123] Thus, the intention of the author of an act as well as its form gain importance in the consideration of legal effects.[124] In contrast, the wording and context of an act are less important in the determination of legal

116 Chinkin, *supra* note 45, 862.
117 *Grimaldi, supra* note 115.
118 T. Rademacher, *Realakte im Rechtsschutzsystem der Europäischen Union*, (2014).
119 Senden, *supra* note 42, 112-113.
120 *Commission v. Council (ERTA)*, C-22/70, Judgment of 31 March 1971, ECLI:EU:C:1971:32, para. 42. Confirmed in *Commission v. Council*, C-25/94, Judgment of 19 March 1996, ECLI:EU:C:1996:114.
121 Overview by G. Gentile, 'Ensuring Effective Judicial Review of EU Soft Law via the Action for Annulment Before the EU Courts: A Plea for a Liberal-Constitutional Approach', 16 *European Constitutional Law Review* (2020) 3, 466, 477. [Gentile, 'Ensuring Effective Judicial Review'].
122 *Belgium v. Commission*, *supra* note 56, para. 32.
123 Gentile, 'Ensuring Effective Judicial Review', *supra* note 121, 14.
124 *Ibid*., 11; *Mallis and Malli v. Commission and ECB*, Joined Cases C-105/15 P to C-109/15 P, Judgment of 20 September 2016, ECLI:EU:C:2016:702, para. 58; *NF and Others* v. *European Council*, C-208/17 P to C-210/17 P, Judgment of 12 September 2018, ECLI:EU:C:2018:705; *Czech Republic v. Commission*, C-575/18 P, Judgment of 9 July 2020, ECLI:EU:C:2020:530, para. 51; *FBF*, C-911/19, Judgment of 15 July 2021, CLI:EU:C:2021:599, para. 48.

effects.[125] As soft law rarely has the required form, it has become less likely to be considered as having legal effects in the sense of art. 263 TFEU. Nevertheless, a soft law declared invalid through the preliminary reference procedure can form the basis for a claim of damages in national proceedings. The CJEU argued in relation to national proceedings that "individuals harmed by the breach of Union law established by such a (invalid) recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question."[126]

Although the CJEU does not systematically review soft law under art. 263 TFEU, soft law functions as an interpretation aid through art. 267 TFEU with increasing frequency.[127] The CJEU discussed the effects of soft law through the preliminary reference procedure of art. 267 TFEU as early as 1989. The judgment did not garner much attention initially as neither the CJEU nor scholars understood *Grimaldi* to be a landmark judgment.[128] It involved a preliminary reference on the question whether a recommendation by the Commission, like the European schedule on occupational diseases, was capable of having direct effect.[129] Firstly, the Court confirmed its jurisdiction to give preliminary rulings with regard to any type of institutional act.[130] Secondly, the CJEU explained that, while not granting legally enforceable rights, recommendations have legal effects. Therefore, national courts are required "to take recommendations into consideration" when interpreting the implementing national provisions or when the national measure supplements binding EU laws.[131] In recent cases, the CJEU differentiates between different categories of effects: legal effects and persuasion resp. exhortation effects.[132] There is, however, little guidance on how

125 *Mallis and Malli v. Commission and ECB, supra* note 124; *Czech Republic v. Commission, supra* note 124.

126 *Balgarska Narodna Banka*, C-501/18, Judgment of 25 March 2021, ECLI:EU:C:2021:249, para. 81.

127 Senden, *supra* note 42; O. Ştefan, *Soft Law in Court: Competition Law, State Aid and the Court of Justice of the European Union* (2013).

128 *Grimaldi, supra* note 115; E. Korkea-aho, 'National Courts and European Soft Law: Is Grimaldi Still Good Law?', 37 *Yearbook of European Law* (2018), 470.

129 *Grimaldi, supra* note 115, para. 5.

130 *Ibid*., para. 8.

131 *Ibid*., para. 18.

132 *Balgarska Narodna Banka, supra* note 126, para. 79; *FBF*, supra note 124, para. 69; G. Gentile, 'To Be or not to Be (Legally Binding)? Judicial Review of EU Soft Law After BT and Féderation Bancaire Francaise', *Revista de Derecho Comunitario Europeo* (2021) 70, 981, 994 [Gentile, 'To Be or not to Be'].

to distinguish these effects. In the BT-Judgment, the Court decided without further analysis that a recommendation does not have binding force under Art. 288 TFEU.[133] In the FBF-judgment, the fact that the guideline authorizes national authorities to depart by giving reasons means it only has persuasion and exhortation effects.[134] Due to the lack of guidance by the CJEU, it has become hard to distinguish between the different categories of legal effects for national courts, which in turn makes it unclear what the CJEU concretely means by 'taking into account'.[135] At the same time, the CJEU reinforces the obligation of national courts and authorities to take soft law into account and to not jeopardize the results prescribed by it by relying on the principle of sincere cooperation.[136]

Whereas the Court clearly accepts the ability of non-legal documents to have legal effects, scholars attach different meanings and consequences to the phrasing of the Court.[137] Despite attesting a hardening of soft law from a voluntary to a mandatory interpretation aid, Senden advocates a restrictive application which requires national courts to only take soft law into account.[138] In contrast, Arnull argues that *Grimaldi* obliges national authorities to interpret national law in light of EU law akin to the duty of consistent interpretation.[139] While Korkea-aho concludes that a dictionary interpretation of the wording accommodates both interpretations, her review of the CJEU's follow-up jurisprudence illuminates the nuances in the Court's jurisprudence.[140] On the one hand, national courts are required to fully take EU soft law into account when it is foreseen in EU legislative acts and issued by an EU institution.[141] Deviations are possible as long as national authorities provide 'specific, detailed

133 *Balgarska Narodna Banka, supra* note 126, para. 79.
134 *FBF*, *supra* note 124, para. 43.
135 *Balgarska Narodna Banka, supra* note 126, para. 79; *FBF*, *supra* note 124, para. 69; Gentile, 'To Be or not to Be', *supra* note 132, 999.
136 *Asociaţia "Forumul Judecătorilor din România"*, *supra* note 56, paras 176-177; it has previously also been argued by Advocate Generals that authorities are obliged to take EU soft law into account due to the principle of sincere cooperation under art. 4(3) TFEU: *Tadej Kotnik and Others v. Državni zbor Republike Slovenije*, C-526/14, Opinion delivered on 18 February 2016, EU:C:2016:102, para. 38; *Tadej Kotnik and Others v. Državni zbor Republike Slovenije,* C-526/14, Judgment of 19 July 2016, EU:C:2016:570.
137 Senden, *supra* note 42, 240, 267; Korkea-aho, 'National Courts and European Soft Law', *supra* note 128, 476.
138 Senden, *supra* note 42, 402-407, 473.
139 A. Arnull, 'The Legal Status of Recommendations', 15 *European Law Review* (1990), 318, 319.
140 Korkea-aho, 'National Courts and European Soft Law', *supra* note 128, 476-477.
141 *Ibid*., 486.

and substantively valid reasons'.[142] On the other hand, without foresight, national courts enjoy more discretion regarding the inclusion of soft law as long as they do not endanger the goals of an EU soft law.[143] Moreover, while the Court recognizes that Commission guidelines may have 'some effect' on the practice of national authorities, these effects do not bind national courts.[144] While national authorities might have to take such recommendations into consideration when acting, the case law is still unclear with regard to which documents have legal and which have persuasive effects. To this point, it seems that the Court favors national procedural autonomy over the creation of expectations and legal certainty for third parties through EU soft law.[145]

Nevertheless, soft law has a self-binding effect on the issuing institution. As institutions limit their discretion through soft law, a departure constitutes a breach of general principles, such as the principle of equal treatment or of legitimate expectations.[146] With regard to the use of soft law as an interpretation aid at the CJEU itself, soft law does not constitute 'a significantly authoritative source'.[147] Similarly, the CJEU rarely refers to 'free-standing' soft law.[148] Due to the difference in treatment of soft law required from national courts respecting the lenient practice by the CJEU itself, Eliantonio and Stefan rightly refer to this contradiction as a double standard.[149]

3. Application to Fact Sheets

Most soft laws gain practical effects through social processes stemming from their multilateral creation. It is unclear to what extent fact sheets can achieve practical effects similar to those of other types of soft law considering their unilateral creation. Even though fact sheets are exclusively authored by

142 *Ibid*., 494.
143 *Ibid*.; *Asociația "Forumul Judecătorilor din România"*, *supra* note 56, para. 176.
144 *Tadej Kotnik and Others v. Državni zbor Republike Slovenije,* EU:C:2016:570, *supra* note 136.
145 *Pfleiderer AG v. Bundeskartellamt*, C-360/09, Judgment of 14 June 2011, EU:C:2011:389, para. 23; *Expedia Inc. v. Autorité de la Concurrence and Others*, C-226/11, Judgment of 13 December 2012, EU:C:2012:795, para. 32.
146 *Dansk Rørindustri and Others v. Commission*, C-189/02 P, Judgment of 28 June 2005, EU:C:2005:408, para. 211.
147 M. Eliantonio in relation to the interpretation of environmental hard law through the CJEU, M. Eliantonio & O. Stefan, 'Soft Law Before the European Courts: Discovering a "Common Pattern"?', 37 *Yearbook of European Law* (2018) 7, 457, 462.
148 Free-standing soft law lacks a basis in hard law, *ibid*., 462.
149 *Ibid*., 463.

the RDD, the fact sheets are based primarily on judgments. These judgments originate from a process with multilateral elements: the parties to a dispute bring forward their arguments, the Advocates General can also contribute their legal analysis through their opinions, and the RDD supplies legal analysis at the request of judges. The exchange of arguments can either be through the submission of documents in a written procedure or through oral hearings. Despite the involvement of several stakeholders, the judges of the Court make the final decision. Moreover, not all relevant stakeholders are involved in a court proceeding, which is limited to the parties to a certain case. Thus, notwithstanding the multilateral elements of a court procedure, the judgment as the end product is unilaterally imposed, which underlines the fact sheets' status as unilaterally created documents.

Due to the lack of socialization during the creation process, fact sheets are unlikely to effect changes in the discourse or behavior of stakeholders. Fact sheets can, however, provide doctrinal clarification to increase the effectiveness of judicial proceedings at the CJEU. The interviews could not corroborate these effects in practice. Consequently, a confirmation would require a follow-up study to investigate the effects within national courts and with national stakeholders, such as environmental NGOs or consumer protection organizations.[150]

In terms of legal effects, fact sheets are neither a basis for adjudication nor an obligatory interpretation aid.

Soft laws rarely form the basis for adjudication under EU law. Generally, for soft law to be considered to have legal effects in the sense of art. 263 TFEU, the CJEU analyzes its intention, form, wording, and context. Thereby, fact sheets quite clearly do not fall into the category. Although the Court issues binding judgments, documents beyond a judgment, such as fact sheets, might be considered persuasive but not binding.[151] This is further underlined by the fact that the author of the fact sheets is a lawyer from the RDD, a research service, and not judges of the Court. Moreover, it is unlikely that the CJEU will declare a fact sheet invalid through a preliminary reference under art. 267 TFEU. Unlike other soft law, fact sheets neither prescribe certain actions nor set requirements to adhere to. Thus, it is hard to imagine that informative documents could have negative repercussions on the parties which could lead to damage claims in national proceedings.

150 To confirm, for example, the effects of the fact sheets on public access to environmental information or on electronic commerce and contractual organizations.

151 Only the judgments are conferred binding power by the Treaties.

The creation of fact sheets is not foreseen in any EU hard law and thus fact sheets do not develop legal effects which require national courts to take them into account as interpretation aid. During the interviews, there was a consensus that fact sheets do not have any legal effects or a higher legitimacy than other sources of information.[152] As the RDD only provides a service, the judges remain 'the mouth of the law'.[153] Within the Court, fact sheets are also likened to the work of editors which should not receive special legitimacy through its publication by the Court as it is "just information".[154] In addition, the principle of sincere cooperation does not mean requiring national courts to take into account fact sheets as these do not prescribe any specific aims or results.

Authority and legal effects might be found, nevertheless, in the cited judgments. First, the judgments might indicate that the jurisprudence is 'éclairé' regarding a specific point.[155] The acte-éclairé-doctrine then lifts the obligation of a national court to refer under art. 267 TFEU when "the question raised [by the referring court] is materially identical with a question which has already been the subject of a preliminary ruling in a similar case".[156] This change in the national court's obligations constitutes a legal effect. Nevertheless, as with every source of information, it is still necessary to approach the fact sheets with caution as their comprehensiveness might depend on the specific author's expertise.[157] While the acquisition of information always requires a certain amount of caution, the fact sheets retain a heightened reliability as the list of important cases is approved by the Cabinet of the President and the staff members of the RDD are experts in their respective fields.[158] Second, the collection of judgments might impose a self-binding effect on the Court. Whereas the Court confirmed this self-binding effect regarding other EU institutions based on the principles of equal treatment and legitimate expectations, the concept of self-binding effect of judgments is disputed.[159] Such a system of precedent originates from the Anglo-Saxon legal

152 CJEU-CJEUJ-1, interview by author, 25 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022; CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-GCJ-1, interview by author, 08 March 2022.

153 CJEU-RDDSM-1, interview by author, 24 February 2022; CJEU-AGSM-1, interview by author, 28 January 2022.

154 CJEU-CJEUJ-1, interview by author, 25 February 2022.

155 CJEU-AGSM-1, interview by author, 28 January 2022.

156 *Da Costa en Schaake NV and Others v. Administratie der Belastingen*, C-28-30/62, Judgment of 27 March 1963, EU:C:1963:6.

157 CJEU-AGSM-1, interview by author, 28 January 2022.

158 CJEU-RDDSM-1, interview by author, 24 February 2022.

159 CJEU-CJEUJ-1, interview by author, 25 February 2022.

systems. Although EU law borrows terminology, such as *precedent*, *stare decisis*, *ratio decedendi* and *obiter*, from these systems, the EU system does not imitate the Anglo-Saxon systems of precedent.[160] Neither the Treaties nor the Statue of the Court of Justice or the respective Rules of Procedure impose the obligation to follow previous jurisprudence.[161] Nevertheless, the principles of legal certainty and legitimate expectations require a 'consistent and clear case law'. As a result, the Court rarely deviates from its 'well established case law,' although there exists no obligation to follow its previous decisions.[162] Consequently, the judges retain their independence regarding their decisions in cases before them.[163] The inclusion of judgments in fact sheets does not compromise the independence of this decision-making process or create a self-binding effect. Thus, the fact sheets neither derive a legally binding effect from the judgments referenced therein nor impose a self-binding effect on the Court.

D. Conclusion

Courts on the national and regional levels increasingly communicate directly with the public. In addition to traditional PR activities, they use modern communication technologies as tools to publish informative materials regarding their work and adjudicated cases. This article investigated the place of one of those new communication tools, fact sheets, in the EU legal order. As informative documents with the character of interpretative and decisional soft law, fact sheets aim to ensure transparency and reduce information asymmetries. By furthering the understanding of EU law by the public, fact sheets also contribute to ensuring democracy in the working procedures of the EU. Despite this important role, fact sheets seem to have neither legal nor practical effects in the EU legal order based on the findings thus far.[164]

160 T. Szabados, '"Precedents" in EU Law – The Problem of Overruling', *ELTE Law Journal* (2015) 1, 125, 127-128.

161 Treaty of the European Union, Treaty on the Functioning of the European Union, Statute of the Court of Justice, Rules of Procedure of the Court of Justice, Rules of Procedure of the General Court.

162 Szabados, *supra* note 160, 129-130.

163 Also stressed by CJEU-CJEUJ-1, interview by author, 25 February 2022.

164 As mentioned above, however, the scope of this research is limited. As soft law, however, is a theoretical concept, the theoretical findings might deviate from practice. Further research is necessary to encapsulate the actual use of fact sheets in practice, i.a. through surveys. Thus, to fully explore the effects of fact sheets, more research into their use and relevance at the national level is warranted.

As unilaterally created judgments constitute the main content of the fact sheets, the latter have limited practical effects regarding their influence on the discourse and behavior of actors. While the CJEU attributes legal effects to soft law in certain circumstances, these effects cannot be translated to fact sheets as a basis for adjudication or an interpretation aid. As EU law has neither a basis for the creation of fact sheets in hard law nor a system of precedence for judgments, fact sheets also do not have legal effects.

Authority might be found in the cited judgments which could relieve a national court from its obligation to refer under art. 267 TFEU through the 'acte éclairé' doctrine. For this purpose, fact sheets can be regarded as especially authoritative due to the expertise of their authors and the involvement of the Cabinet of the President. In contrast to soft law issued by the Commission, however, the fact sheets do not impose a self-binding effect on the judges of the General Court and the CJEU due to the principle of independence of judges. Despite these limitations, fact sheets remain an important starting point for citizens to foster their understanding of EU law.

To ensure the reliability of fact sheets as a tool for communicating with the public, it is important that caution is exercised during the creation process of fact sheets. Although EU law remains silent on the procedure to issue information materials, several general principles could be drawn from EU law and national systems to ensure their quality. In terms of formal requirements, institutions should only publish materials that remain in their conferred competencies and do not compromise their core duties. Furthermore, any document should be attributed explicitly to an author or the authoring institution. Substantive quality requires transparent, correct, clear, and comprehensive content. Informative documents further transparency, legitimacy, and democracy if these conditions are fulfilled. Overall, the fact sheets published by the Court adhere to these requirements and are a valuable asset to reduce information asymmetries regarding the interpretation and application of EU law.

There is, as always, room for further improvement to heighten the perception of fact sheets by the public. Although the Court understands the fact sheets to feature 'just information', nonprofessionals might not have a sufficient understanding of legal materials to make that distinction. While the inclusion of the CJEU's header is desirable in terms of attributability of documents to authors, it might give laypeople the impression of a heightened reliability and enforceability of the cited information.[165] This misunderstanding

165 In relation to notes issued by the French Conseil d'État, Passaglia stresses that, despite their lack of authoritative value, the notes have an 'extremely high degree of reliability'

can, for example, be easily avoided through the inclusion of a disclaimer that the summaries provided in the fact sheets are not legally binding. In addition, transparency could be increased by clearly designating updates of the fact sheets and making the outdated versions available in an archive.

On an institutional level, guidelines or even regulations regarding formal and substantive criteria for informative work by the Court (or even the institutions in general) would further legal certainty.[166] The value and importance of fact sheets should further be reflected in ensuring the allocation of sufficient funds for quality control.[167] Funds could also be used to establish courses that train staff with legal expertise in how to relay information to nonprofessionals. Moreover, EU law features other potential control mechanisms which could remedy the lack of judicial enforcement as quality control. The Commission, for example, could issue a quality report similar to its report on the state of the rule of law. Additionally, the European Ombudsman has expertise regarding the creation of guidelines by already having produced guidelines on good administration.[168] Under art. 228 TFEU, the Ombudsman also has a complaint mechanism in place. Lastly, Mast correctly points out that the recipients of materials constitute a control mechanism by remaining critical and questioning the information received.[169]

E. Annex

I. Interview Background Information

The interviews conducted were semi-structured. Open-ended questions allowed respondents to address matters that the researcher might not have originally considered while also streamlining data collection and guaranteeing the acquisition of necessary information. With the consent of the participants, the interviews were recorded and transcribed. In case of concerns from the interviewee regarding the recording, the interviewer switched to note-taking

simply by being prepared within the institution; Passaglia, *supra* note 4, 368.

166 This could be realized, for example, by amending the Court's rules of procedure; Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 475.

167 Brüggemann, *supra* note 6, 286.

168 S. Magiera, 'Art. 41', in J. Meyer & S. Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union,*
5th ed. (2019), para. 16.

169 Mast, 'Gute Öffentlichkeitsarbeit', *supra* note 7, 476.

to prevent a negative influence on the participants through self-censure.[170] The interviews were transcribed non-verbatim by eliminating filler words, grammatical inconsistencies, and false starts. Where the interviewee did not consent to a recording and transcription, notes were taken manually combined with a verbatim from memory added directly after the end of the interview. The interviews are anonymized through the assignment of codes and stored according to current data protection guidelines.

An ideal sample size for interviews is acknowledged to be between 5% to 10% of the studied group.[171] For the CJEU, the number of interviewed experts thus ranged between six and ten, divided into the working units of the Court which include the Research and Documentation Directorate, the judges, and the Advocate Generals.[172] Considering the aim of the interviews was to support the primary method of doctrinal research rather than to provide statistically relevant data, a small number of interviews was sufficient. The reliability of the information is ensured, as far as possible, by interviewing diverse actors at the Court. The questionnaire was developed during the doctrinal legal research stage. As the interviews were semi-structured, they only contained a rough guideline in terms of topics to be touched upon. Although this method reduces the comparability between interviews, it grants flexibility to include questions that arise during the interview.[173] The number of interviewed persons was seven.[174]

There are various ways to analyze the qualitative data collected from these interviews. As the use of the data is anecdotal and the aim of the interviews was to provide context for the creation of fact sheets and elicit latent meanings, a hermeneutic method was best suited to achieve this aim.[175] The hermeneutic method chosen was the thematic analysis, where the researcher inductively

170 Y.-C. Gagnon, *The Case Study as Research Method: A Practical Handbook* (2009), 61.

171 G. Psacharopoulos, 'Questionnaire Surveys in Educational Planning', 16 *Comparative Education* (1980) 2, 159-165.

172 For the Courts, the number of interviewed judges should be between six and eight. Out of the eleven AGs, one should be interviewed. The staff members of the Research and Documentation Directorate should be between two and three.

173 Gagnon, *supra* note 170, 61.

174 For an overview, see Annex II. 'Interview Codes'.

175 D. Goodrick & P. Rogers, 'Qualitative Data Analysis', in K. E. Newcomer, H. P. Hatry & J. S. Wholey (eds), *Handbook of Practical Program Evaluation*, 4th ed. (2015), 566; Hermeneutic research focuses on the subjective interpretation of phenomena by individuals rather than establishing objective facts; Koppa, 'Hermeneutic Analysis' (2010), available at https://koppa.jyu.fi/avoimet/hum/menetelmapolkuja/en/methodmap/data-analysis/hermeneutic-analysis (last visited 1 October 2024).

organizes the material into categories during the review. A preliminary list of categories was developed during the initial literature review. Repeating these categorizations allowed the researcher to develop them from descriptive categories into more abstract concepts.[176] This method is considered appropriate to review rich data, such as interview transcripts, and provided the advantage of fuller coverage of the data while maintaining the depth and detail of the original transcripts.[177] As software for this categorization resp. coding process, this research relied on the software Atlas-TI, which provides a reliable structure for organizing, classifying, and storing data as well as extracted information.

II. Interview Codes

Institution	Department	Position
CJEU	CJEU (Court of Justice)	J (Judge)
CJEU	AG (Advocate General)	SM (Staff Member)
CJEU	GC (General Court)	J (Judge)
CJEU	GC (General Court)	SM (Staff Member)
CJEU	RDD (Research and Documentation Directorate)	SM (Staff Member)
CJEU	FRDD (formerly part of the RDD)	SM (Staff Member)

III. Interview Template

The interviews were only semi-structured. Thus, while the following template presents an overview of the discussed topics, the interviews did not necessarily address all questions, nor were the questions presented in the order in which they appear here.

1. Introduction: Researcher, Reasons for selection of interviewee, Use of data

2. Information on interviewee: professional background and current position

176 Goodrick & Rogers, *supra* note 175, 566.
177 *Ibid*., 580.

3. General information on work tasks of interviewee

4. Do you use fact sheets in your work?
    - Are the fact sheets helpful in completing your work tasks?
    - How frequently do you consult CJEU fact sheets?
    - In what kind of situations do you deal with CJEU fact sheets?

5. Can you describe the process that led to the decision to (not) use these instruments?

6. What are the practical/legal effects of the fact sheets?

7. Conclusion
    - Is there anything I forgot to ask that is important in this context?
    - Any other people you would recommend to talk to?

8. Only RDD: Creation of FS
    - What was the impetus for developing the fact sheets?
    - What aim(s) do you pursue with the fact sheets?
    - How do you choose topics on which you create fact sheets?
    - Can you describe the process of creating the fact sheets?
    - What type of authors
    - Working steps
    - How to choose cases (Specific criteria?)