



Soft-law and the regulation of emerging technologies

Theory and case study on the AI Act

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A brief foray into soft-law theory

Hallmark of soft law for lawyers: no binding effect **OR** no sanctions in the traditional sense (State enforcement)?

- What does 'binding effect' mean then?

Many lawyers are still puzzled by soft law and deny its legal nature

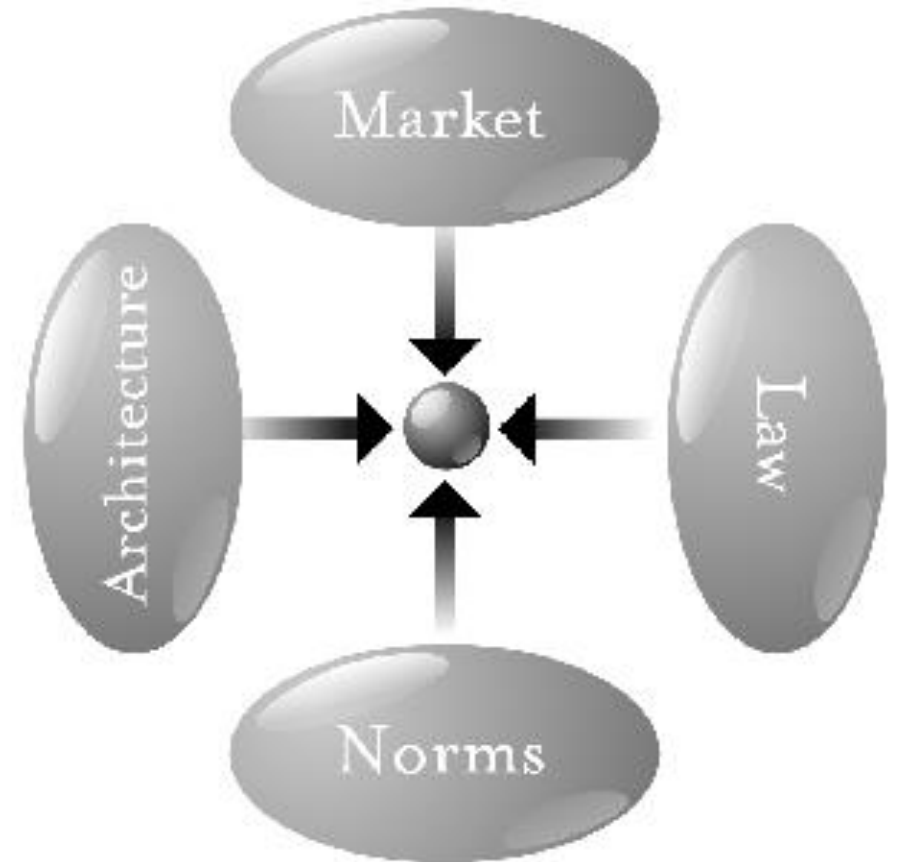
- Hard to reconcile with contemporary state of legal theory

Unfortunately, formalistic view of law still lives in the perception of engineers and scientists

A brief foray into soft-law theory

A more sophisticated theory:

- Law is about the normative realm, i.e. influencing the conduct of actors on account of a normative account of what they *should* do
- That realm is populated by more than just law in the traditional sense (“hard law”): Lessig
- Soft law is law – it deals with norms of conduct – but it borrows its “binding force” from one of the four forces on the scheme



Source: Lawrence Lessig, CC BY-SA 2.5

A brief foray into soft-law theory

Useful distinctions, leading to fundamental issues

- Where “binding force” comes from
 - Market pressure (disclosure and transparency, standardization)
 - Social norms (naming and shaming, comply or explain)
 - Architecture (standardization)
 - Law (enforcement and interpretation guidelines, etc. → shadow of the law)

→ **Effectiveness**
- Who issues the instrument: State entity or private actor(s) (transnational private regulation)

→ **Legitimacy**
- What is its relationship to hard law: pre-, post- or para-law function (Senden)

→ **Legality**

Case study: Soft law under the AI Act

Provision	Instrument	Responsible institution
6(5), 96(1)(f)	Guidelines on implementation of definition of high-risk AI system	Commission
15(2)	Benchmarks and measurement methodologies for AI accuracy and robustness	Commission
40	Harmonized standards	ESOs/Commission
50(7)	Codes of Practice on AI generated or manipulated content	AI Office
56	Codes of Practice on GPAI model requirements under Art. 53 and 55	AI Office
63(1)	Guidelines on QMS implementation in microenterprises	Commission
66(e)	Recommendations and opinions (in general)	European AI Board
66(g)	Benchmarks (in general)	European AI Board
67(8)	Recommendations and opinions (in general)	Advisory Forum
95(1)	Codes of Conduct on non-high-risk AI Systems	AI Office or MSt
95(2)	Codes of Conduct on ethics, environmental impact, literacy, inclusion, accessibility	AI Office or MSt
96	Guidelines – general power	Commission
96(1)(a)	Guidelines on requirements for high-risk AI systems	Commission
96(1)(b)	Guidelines on prohibited practices under Art. 5	Commission
96(1)(c)	Guidelines on substantial modifications	Commission
96(1)(d)	Guidelines on transparency obligations of Art. 50	Commission
96(1)(e)	Guidelines on relationship between AIA and instruments listed in Annex I	Commission

Case study: Soft law under the AI Act

Guidelines: Commission can issue Guidelines on almost any topic

- Legitimacy: circumvention of political difficulties
- Legality: departure from AI Act, binding effect on Commission, national authorities, EU/national judiciary
- Effectiveness: pre-, post- and para-law will play a large role

Harmonized standards: endowed with some legal effects

- Legality: departure from AI Act
- Legitimacy: serious challenges regarding representativeness and balance, given substance of standard
 - Change the standard-setting procedure or increase *ex post* scrutiny?
 - How important is global consensus?
- Effectiveness

Case study: soft law under the AI Act

Codes of Practice: alternative to harmonized standards: quicker, more legitimate?

- Legality: arguments are raised
- Legitimacy: improvement over the standard-setting process, if any, is not obvious
- Effectiveness: extremely tight timeline
 - Flight into formal compliance model