

The Infrastructure of Normative Legitimacy in Domestic Soft Law – Sketching the Field

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1 Introduction

Although the concept of soft law usually is associated with norms in an international context, the concept has always been an important element of domestic Swedish law. My research field – insurance law and financial markets law – is and has always been regulated to a considerable extent by various models of soft law. As a lawyer practising law within these fields, it is not enough to consider traditional hard law; one must also pay attention to recommendations, guidelines, complaint board decisions, statements on good conduct, and codes of conduct issued by authorities and agencies, industry organizations, alternative dispute boards or professional associations. Soft law norms are not binding in traditional terms. Nevertheless, the various branches and industries pay attention to the norms, respect them, follow them, use them to solve legal problems, refer to them in legal disputes, teach them to their employees and adjust their operations according to the norms. The guidelines, recommendations, codes of conduct, etc., are indeed law beyond the state. The fact that domestic soft law often has a normative impact on everyday legal affairs is unarguable.

Although soft law “rules” are not binding like hard law, the soft-law makers often use the symbolism of hard law. Recommendations by alternative dispute resolution boards look like judgments from the courts. Guidelines or codes of conduct look like pieces of legislation. However, that does not mean that the guidelines or the recommendations are automatically complied with by the industry (for instance the insurance industry). For a lawyer who is an expert within a certain industry it is possible to assess, based on experience, whether or not a guideline “ought to” be complied with, and the lawyer knows the risks associated with non-compliance. However, if one is a stranger to an industry, it is difficult to evaluate the normative legitimacy of a guideline or a recommendation. In one legal field (for instance the insurance law field) there might be a great variation of soft law, issued by different actors. Technically, the guidelines or recommendations might look the same. In practice, however, they differ in normative impact; some can be safely ignored, while non-compliance with others involves certain risks.

In this article I sketch, in somewhat general terms, a model of the infrastructure of domestic soft law – a model that can be used to evaluate whether a specific guideline, code of conduct, recommendation, etc. typically has normative legitimacy, i.e. is likely to be respected by the actors within the industry, complied with by the actors, referred to in legal disputes, taught to new employees of the industry, are expected to be followed by other actors within the industry, etc. In the next section I discuss the institutional framework that needs to be in place in order to produce soft law. I then describe the constituent components of normative legitimacy of soft law. Finally, I discuss which infrastructures that are within and which are outside the control sphere of soft-law-making actors.

2 Institutional Framework

The making of soft law requires that a certain institutional framework is in place. An analysis of some of the private Swedish organizations and associations involved in creating soft law with a high degree of normative legitimacy shows that these groups have some basic features in common.

Firstly, the business or industry must *feel compelled* to cooperate and create common standards. The initiative for almost every Swedish soft-law-making organization comes from within the business or industry (insurance companies, auditors, stock markets, banks etc.). However, in Sweden, there are examples of businesses, industries and professions where the actors lack a strong sense of fellowship, which means that the preconditions for cooperation through a unifying organization are missing. For instance, there have been attempts to organize professions such as “lawyers” (persons with a law degree who are not solicitors) or “board members”, but with no success, due to the lack of common interests among actors operating within these groups.

Secondly, the organization must *target* persons or companies that identify themselves as members of a group. Often, but not always, the targets are persons or companies with permission or authority to conduct a certain business (insurance companies, banks, accountants, solicitors, traffic insurance companies). If the organization has the potential to target *everyone* that might be a member of that group, it is beneficial. In Sweden, there are cases where an industry has not been able to agree on forming a single association. Instead there are two (or more) parallel associations targeting the same group of actors. For instance, in Sweden there are two competing professional associations for real estate brokers, and most real estate brokers are members of one or the other. Only one of these associations has a code of conduct. Both have boards that settle disputes between brokers and their clients, but only one publishes the statements on good conduct for real estate brokers on its website. This somewhat unusual landscape makes the soft law produced by one of them (the code of conduct and the statements) less important for non-members, simply because they are most likely members of the competing organization.

Thirdly, a basic institutional element is that the organization must have an *apparatus* that creates the norms, supervises compliance with the norms and issues sanctions in case of non-compliance. To *issue* a guideline and publish it on a website is not very complicated, and does not require an advanced apparatus within the organization. Naturally, the task requires knowledge of the legal field in which the organization operates, and also certain competence to create a well-functioning norm structure. There are examples of organizations that publish “guidelines” *and* “codes of conduct” *and* “recommendations” on their website, in a quite confusing way. Naturally, if it is not possible for the average person to understand the hierarchy or interaction of the norms, these norms will most likely be ignored.

Supervising compliance with norms is a more demanding task. Usually the supervision of compliance with guidelines and recommendations takes place as a result of complaints by clients and customers purchasing the goods and services, and the complaints are tried in disciplinary boards or dispute resolution boards. Maintaining a disciplinary board, or a dispute resolution board, requires a skilled

administration as well as legal knowledge and experience. It also requires time; it may take weeks, months or even years for disputes to be brought before the board instead of the courts. Maintaining a *sanction system* also requires knowledge and administrative efforts. The broad spectrum of possible sanctions – ranging from merely publishing a statement on the website, to excluding someone from the organization, to filing a report to a supervisory authority – requires different institutional frameworks.

Finally, there must be *channels of communication* for the norms. Today, soft law is published on the organizations' websites, but other forms of distribution are sometimes used as well. For instance, organizations can circulate new statements or sets of norms to the persons or the companies that they classify as stakeholders.

Consequently, if there is no organization in place at all, or if the existing organization has not sprung from the industry's efforts to create common standards – thus lacking obvious targets and the internal organizational structure required to maintain supervision and sanctions – it is unlikely that any soft law will be produced.

3 Constituent Components of Normative Legitimacy

However, for soft law to gain normative legitimacy, having an institutional framework in place is not sufficient. A comparison between soft laws created by two organizations which have the same institutional framework can serve as an illustration. The Swedish Bar Association and the insurance intermediaries' business association, Sfm (Svenska försäkringsförmedlares förbund) were both created within the professions. Both have memberships and members from the professions, and both have codes of conduct and disciplinary boards that issue statements on ethical standards. But while the soft law from the Swedish Bar Association has a very high normative legitimacy for lawyers, the soft law from Sfm does not have anywhere near the same normative legitimacy for insurance intermediaries. The difference lies within the constituent components described in this section.

3.1 *The Relationship Between the Soft-law Maker and its Addressees*

It is not uncommon that the relationship between the “regulator” and the addressee is based on the addressee's *membership* in the soft-law-making organization. In some cases, membership is mandatory by law. A Swedish lawyer who wishes to conduct business as a solicitor or a barrister (advokat) must be a member of the Swedish Bar Association (Sveriges Advokatsamfund). According to the Charter of the Swedish Bar Association, one of the purposes of the association is to form competent professionals with high ethical standards. This task is partly fulfilled through the enacting of the association's Code of Conduct. The association has also established a disciplinary board, which publishes statements on the association website that function as guidelines for every member of the association. Another example is the membership in the

Swedish Motor Insurers (Trafikförsäkringsföreningen). According to the Motor Traffic Damage Act (1975:1410), every insurance undertaking that provides traffic insurance has a duty to be a member of the Swedish Motor Insurers. The Traffic Insurance Ordinance (1976:359) states that every motor insurance undertaking, together with the Swedish Motor Insurers, has a duty to maintain a Commission on Traffic Injuries and to submit claims of personal injury to the commission. Nevertheless, the decisions of the commission are only recommendations, and not binding for the insurance undertakings. In practice, however, the decisions function as binding “judgements”.

In most cases, membership in an organization is voluntary. For instance, most Swedish insurance companies are members of the insurance industry organization Insurance Sweden (Svensk Försäkring). Membership does not affect a company’s formal possibilities to conduct insurance business in Sweden. Insurance Sweden issues a large number of recommendations and guidelines with the insurance industry as the addressee; examples include a code of conduct of distributing insurance over the internet, a code of conduct concerning claims adjustments and certain standards concerning special insurance terms. Another example is the Swedish Securities Council (Aktiemarknadsnämnden), which has deep roots in Swedish industry. The organization began its operations in 1986 on the initiative of the Federation of Swedish Industries and the Stockholm Chamber of Commerce. The council has nine members; eight of them are other non-profit organizations and one of them is the NASDAQ OMX stock exchange. Membership is voluntary and any action by a Swedish limited company which has issued shares listed on the OMX Nordic Exchange Stockholm or the Nordic Growth Market (NGM) list, or any action by a shareholder of such company, may be subject to the Swedish Securities Council’s evaluation.

Another model that describes the relationship between the regulator and the addressees is *ownership*. For instance, The Swedish Anti-corruption Institute (Institutet Mot Mutor) was founded in 1923 and is owned by five of Sweden’s largest industry organizations. The purpose of the Anti-corruption Institute is to promote an ethical decision processes within businesses as well as within the rest of the community. The Anti-corruption Institute also has members and thus has the mandate to issue norms for both members and the owners.

However, an actor can be an “addressee” of soft law even without membership or ownership. An organization with the intent to target all actors within a certain industry, and that has for instance 95 % of the companies within that industry as members, has more or less automatically a kind of relationship with the 5 % of the company that are not members or owners of the organization.

To sum up, there must be some sort of relationship, formal or informal, between the soft-law maker and the addressees in order for the soft law to gain normative legitimacy. On the contrary, if the soft-law-making organization has no obvious addressees, it is unlikely that anyone is going to view themselves as a target of the norms. In Sweden there are a few examples of well-known normative instruments but which “no one” follows or respects, because no one feels obligated to do so. One example is a soft-law instrument in its traditional, international context, namely the Draft Common Frame Reference (DCFR). In the beginning, the DCFR’s “regulator” consisted of a study group of distinguished academics. When the DCFR was published in 2009, the immediate

discussion concerned what to do with it and how to make it useful. No one felt obligated to comply with the rules, and one explanation is that the group that created the DCFR had no members or owners. It was a purely academic project. Sweden has its own example of the same phenomenon. In 2010 a law professor at Stockholm University launched “The Law of Contract 2010” (Avtalslagen 2010). The document consists of 70 articles and, according to the author, is a “source of law”. To date, Avtalslagen 2010 has hardly achieved normative legitimacy, and one explanation is that no one regards themselves as an addressee of the rules.

In cases where the members are obliged to comply with the norms issued by the organizations, the norms are contractually binding for the members, and thus *hard law*. The same can be true for owners; through contract, the owners of a soft-law-making organization commit themselves to comply with the norms. From a soft-law perspective, the norms get interesting when they gain a normative legitimacy for other actors in addition to the members and owners (including members of owners). A historical Swedish example is found within the field of insurance distribution, which in the beginning of the twentieth century was regulated by agreements entered into by all of the insurance companies in operation at that time on the Swedish market. At first, all of these insurance companies were parties to the agreement. After a while, the Swedish insurance market emerged, and new actors entered the scene. The supervisory authorities expected insurers that were not parties to the agreement to follow the norms in the agreement.

In addition, norms that are not formally binding for the members can have a normative legitimacy for others. An example of this phenomenon is the compensation tables for non-pecuniary losses, which are recommendations made by the Commission on Traffic Injuries (Trafikskadenämnden). Addressees of these recommendations are the members of the owner of the organization, Swedish Motor Insurers – i.e. every Swedish traffic insurance company. In practice, the non-binding recommendations have a high normative legitimacy not only for the members, but for everyone who makes decisions about non-pecuniary compensation due to personal losses; this includes insurance companies (other than the traffic insurance companies), public agencies, courts and law firms. Thus, the compensation tables are referred to also for deciding on non-pecuniary compensations that are not related to traffic accidents.

3.2 Public Actors as Initiators of Soft-law-making

It is not uncommon that the government, a public agency or authority is the driving force behind an initiative for the norm-making process. There are many Swedish examples where the government has appointed a private organization to issue norms in a certain context. One example is the Swedish Bar Association’s Code of conduct. According to the Swedish Code of Judicial Procedure (1942:740) there must be an association in Sweden for solicitors. In the preparatory works of the Code of Judicial Procedure, the Bar Association is

given the mandate to monitor the profession.² Another example is the preparatory works to regulation of bribery, where the government invites the Swedish Anti-corruption Institute to issue detailed norms describing what can be considered as bribery (and what is not bribery).³ The development of the Swedish Corporate Governance Code, produced by the Swedish Corporate Governance Board (Kollegiet för Svensk bolagsstyrning), started as an assessment conducted by the government.⁴ In Swedish law there are also examples where an *agency* mandates a private organization to issue norms in a certain legal area. A recent example is when the Swedish Financial Supervisory Authority gave Insurance Sweden the mandate to issue recommendations, with the purpose of increasing transparency when policyholders transfer their life insurance from one insurance company to another.⁵

Even if the norms are not formally binding, the fact that the initiative comes from the government or the agencies gives the norms legitimacy, and increases the likelihood that they will be respected and complied with by the industry. According to the 1974 Instrument of Government (1974:152), the Parliament's legislative power can be delegated to the government, which in turn can delegate the legislative power to the agencies. The Instrument of Government does not allow delegation of legislative powers to private actors. But when the government – in the preparatory works “assigns” the task to a private organization to issue (non-binding) norms, there is a resemblance with legal delegation of power; this gives the soft law produced under that “mandate” legitimacy. An initiative from the government or public agencies to encourage private actors to create norms can also be seen as an expression of trust; if the government trusts the industry organization to create norms, the addressees of the norms should trust them too. Finally, by extension, an initiative from the government or a public agency can also be interpreted as a “threat”. Thus, the government has identified a need for regulation, but decides for the time being to refrain from legislation, on the condition that the industry makes its own adequate soft-law arrangements. The “deal” is on as long as the industry acts responsibly – if not, legislation is to be expected.

On the contrary, norms that stem from private initiatives lack the informal legitimacy that comes with a public initiative. The normative legitimacy of such soft law must depend on other factors, for instance the sanctions resulting from non-compliance with the norms. However, there are cases where an industry acts in a proactive way when it *expects* future legislation. The goal is that, when the question of legislation rises, is that the industry's response to the legislator will be that there is already an effective soft-law mechanism in place, and it is hoped that this will persuade the legislator that legislation is unnecessary. There are several examples of this mechanism in Swedish law history. The insurance industry created a full-coverage, no-fault insurance scheme for medical injuries (the Pharmaceutical Insurance). The Pharmaceutical Insurance is connected to a

2 Processkommissionen, SOU 1926:31 p. 120.

3 *Mutbrott*, SOU 2010:38 p. 205.

4 *Svensk kod för bolagsstyrning, förslag från Kodgruppen*, SOU 2004:46.

5 Issued by the Swedish Financial Supervisory Authority 2014-10-28.

special dispute board that publishes statements on personal injury compensation issues. The scheme was effective from the start and included all of the actors distributing medicines on the Swedish market, and the legislator decided that it was unnecessary to adopt a mandatory insurance scheme by law.⁶

Another example of this phenomenon in Swedish insurance law history is insurance distribution. In 1914, the legislator identified the need for regulating insurance distribution. A law was enacted, according to which only well-suited persons were allowed to sell insurance on the market. In addition, the law stipulated that the insurance companies were obliged to report a list of insurance salespersons to the supervisory authority. However, the duty to report was lifted if the insurance company had taken adequate measures to supervise the distribution. The result was that the insurance business entered into an agreement between all Swedish insurance companies, which in detail regulated insurance distribution and the supervision of the insurance distribution. These insurance distribution agreements were in force between 1917 and the end of the 1980s, when the insurance intermediaries entered the market. At first the addressees were the insurance companies that entered into the agreement, which meant that the norms in the agreement were binding by contract. From around 1930, the government participated in the development of new drafts of the agreements, to the effect that the insurance companies that were not parties to the agreement were nonetheless expected to follow the norms in the agreement. Thus, for 70 years and with the legislator's consent, insurance intermediation was effectively regulated only by insurer agreements and soft law.

3.3 *Public Actors Involved in the Soft-law-making Process*

As we have seen, an initiative for domestic soft law can come from a public actor. In some cases, the involvement goes even further, and the government or public agency also appoints the members of soft-law-making bodies. For instance, the government appoints the chairperson of the National Board of Consumer Disputes (*Allmänna reklamationsnämnden*), which issues non-binding recommendations on business-to-consumer disputes. The members of the Commission for Traffic Injuries are appointed by the Swedish Financial Supervisory Authority. The chairperson and the members of the Patient Claims Panel (*Patientskadenämnden*) are appointed by the government. The government appoints several members of the Swedish Bar Association's disciplinary board.

In other cases, members of a soft-law-making organization are not appointed by the government; instead the organization engages persons with certain "quasi-public" authority, such as judges or professors. One example is the Swedish Securities Council, where the chairperson, as well as one of the members, is a Supreme Court judge. Another example is the Press Council (*Pressens opinionsnämnd*) for which the president of the Court of Appeal is chairperson. A third example is the Anti-corruption Institute's ethical board, which is chaired by a former Supreme Court judge.

6 *Samordning och regress – ersättning vid personskada*, SOU 2002:1.

The engagement of judges or professors in the norm-creating process increases the normative legitimacy of the soft law. One explanation is that their involvement means that official representatives sanction the norms. Another explanation is that the involvement of judges or professors implies seriousness and quality. Firstly, the involvement of judges and professors is a signal that the norms are of a high technical quality, i.e. thoroughly processed, well written and in alignment with relevant hard law. Secondly, the involvement signals that the norms are created according to due process, for example with relevant interests taken into account. Thirdly, the involvement signals transparency in the norm-creating process.

3.4 *Impact on Argumentation in Disputes, Legal Literature etc.*

References to norms in judgments, legal literature, preparatory works by the government and other official documents increases the normative legitimacy of the norms. For instance, the Swedish Supreme Court ruled in 1972 that non-pecuniary losses could be established according to flat rates, and there are judgments where the Supreme Court has applied the Commission for Traffic Injury's (non-binding) compensation tables for non-pecuniary losses. If the Supreme Court is applying the tables, it is very convenient for everyone else to do the same. There are also many examples where the Supreme Court has obtained opinions from private organizations, such as the Commission for Traffic Injury, and has ruled according to their norms. When the Supreme Court, or even a district court or an appeal court, applies a soft-law rule to solve a legal problem, the normative legitimacy increases – not only for the parties to that particular dispute but for the legal community at large.

The way in which parties argue in the matter of a dispute is evidence of impact. It is not uncommon that the parties in the trial refer to non-binding guidelines or statements to support their case. Even though the judge might not make a judgment (explicitly) based on the guidelines, it shows that the parties regarded them as being normative.

Other evidence of impact can be found in the legal literature, such as monographs, articles or legal handbooks. For instance, Swedish legal literature concerning personal injury contains numerous references to soft law, such as the help tables for personal non-pecuniary losses and statements from the Commission on Traffic Injury. Earlier Swedish insurance law literature has plentiful references to decisions made by the insurance industry complaint boards. This is not the case anymore, because the boards either have been dissolved or the remaining boards' decisions are no longer published (see below).

Another form of impact has to do with the organization's success in attracting the persons or companies belonging to a profession or an industry. If, say, 95 per cent of the insurance companies on the Swedish market are members of an organization that requires them to follow a guideline, the guideline more or less automatically gains a normative legitimacy for the five per cent of the insurers that are not members of the organization.

3.5 *Normative Purposes of the Soft-law Maker*

In the doctrine that identifies the features of international soft law, it is argued that one main feature of soft law is that the issuer has a normative purpose with the norms,⁷ i.e. the recommendation, guideline or code of conduct is issued and published with the intention to direct the addressees' behaviour or conduct. Thus, if an actor makes a statement with no normative intentions, the statement has, as a starting point, no normative legitimacy.

A few years ago the Swedish Financial Supervisory Authority made a statement in its annual Supervisory Report, addressing the complicated question whether financial investment advice within the frame of a life insurance policy should be regarded as insurance intermediation (covered by IDD)⁸ or as financial investment advice (covered by MiFID)⁹. According to the statement in the report, such conduct was regarded by the authority as insurance intermediation. This statement received much attention in the insurance industry, and the was also held as a "rule" that legitimized financial investment advising by persons having only permission to conduct insurance intermediation, as long as the investment product had life insurance as a "wrapper". The problem is that the authority did not make the statement with a normative purpose. The statement was made in another context, i.e. a report to the government and to the public, about the operations conducted during the past year. Therefore, it could be argued that the statement cannot be regarded as soft law, but instead as "no law". On the other hand, the fact that the statement generated so much notice and had so much impact (see Section 3.4 above) on the insurance industry made the statement relevant as a norm.

3.6 *Publication – a Requirement for Soft Law?*

In order for a recommendation or a guideline to gain normative legitimacy, it needs to be published. In the international legal literature there is no requirement for norms to be published in order to be regarded as soft law. Some authors consider it to be sufficient if the norms are manifested in protocols etcetera.¹⁰ In my opinion it is doubtful whether it is possible to argue successfully that "rules" which are not published – and thus not made accessible to the public – have any normative legitimacy at all.

In the 1970's the insurance industry founded several insurance complaint boards that functioned as alternative dispute resolution schemes for insurance contract disputes. At that time the Swedish insurance industry was characterized

7 Gruchalla-Wesierski, *A framework for Understanding "Soft Law"*, McGill Law Journal, Vol. 37 (1984-1985) p. 46.

8 Directive (EU) 2016/97 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 January 2016 on insurance distribution (recast).

9 Markets in Financial Instruments Directive (Directive 2004/39/EC).

10 See, for instance, Gruchalla-Wesierski, *A framework for Understanding "Soft Law"*, McGill Law Journal, Vol. 37 (1984-1985) s. 48.

by a high degree of cooperation among insurance companies. One effect of that collaboration was that all of the insurance companies used the same insurance contract terms in their insurance contracts. As a consequence, a board decision on insurance contract interpretation of a specific clause in a contract entered into by a specific insurance company concerned every insurance company that used the same clause in their insurance contracts. At first, the statements by the complaint boards were circulated only among the insurance companies. Then, in the 1980's the boards started to publish important statements in a yearbook. After some years, most Swedish courts, libraries, larger law firms, and agencies had the yearbook in their collections. The effect was that the statements gained normative legitimacy with respect to insurance contract interpretation. This period offers many references to the statements in district court judgments and in insurance law literature. In 2000 the insurance industry decided not to print the yearbook any longer, and instead publish the statements online. At the same time the insurance industry made a crucial decision: the statements were to be published in a database that could be accessed by paying subscribers only. From that moment the quite vivid soft law on insurance contract interpretation was transformed into "no law".

Another perspective of the publication component is a mechanism that can be described as "once published – always published". A piece of legislation can be replaced or withdrawn. Soft law, once it has reached a certain level of practical importance, cannot be withdrawn or superseded (not in the same way, at least). For instance, the code of conduct for insurance brokers was initially published as an attachment to the Swedish Financial Supervisory Authority's agency regulation on authorization of insurance brokers. The regulation, due to the implementation of the directive on insurance intermediaries,¹¹ was replaced by a new regulation in 2005.¹² The new regulation lacks an attachment with a code of conduct for insurance intermediaries. As a consequence, the attachment of 1995 still has normative legitimacy for the insurance intermediary industry, and functions in practice as a code of conduct for insurance intermediaries.

3.7 Sanctions Resulting from Non-compliance with Soft Law

Although non-compliance with soft law cannot result in legal sanctions, an actor cannot assume that there are no sanctions for failure to comply. Various sanctions can follow non-compliance with soft law, and the normative legitimacy of the soft-law norm is intimately connected to the character of the sanction. If the sanctions are hard-hitting (economically, politically or even emotionally), it is likely that addressees will respect and comply with the norms.

It can be difficult to predict the sanctions that might follow from soft-law non-compliance. An action in violation of soft law can lead to spontaneous enforcement mechanisms such as poor publicity. There is also a risk for "naming and shaming" effects, or the risk of becoming an object for "blacklisting". Soft

11 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.

12 FFFS 2005:11.

law often entails monitoring of actors in different ways by appointed enforcement organizations. Even if soft law lacks direct legal sanctions, it can still be a burden to the addressee, in an unpredictable manner. In some cases, the sanctions are predictable, such as loss of membership or exclusion from a business organization.

The sanctions can be issued according to different models. According to one model, the organization issues the sanctions. It is quite common that soft-law-producing actors have disciplinary boards or dispute resolution boards with powers to issue sanctions. Most disciplinary boards have a spectrum of potential sanctions to choose from, ranging from issuing reprimands or warnings to excluding the actor from the organization. Withdrawing a license or a membership can be a very powerful sanction, since it might obstruct or even prohibit an actor from conducting a certain business or exercising a certain profession. For instance, in order to practice as a solicitor, one must be a member of the Swedish Bar Association and most insurance companies require contracted insurance intermediaries to hold a licence from the insurance intermediaries' association InsureSec.

In another model the organization does not have the power to issue sanctions, but only to make statements about an actor's compliance (or non-compliance) with the soft law. The sanctions occur on another level, when someone else takes measures as a result of the statements. For example, the ethical board of the Anti-corruption Institute makes statements about companies' compliance with the code, and the statements are published on the website. For the companies that are subject to the assessment of the board, the public statement might lead to bad publicity or it might have other negative effects on the businesses. But milder sanctions, such as reprimands or warnings, can also cause reactions in others. A lawyer or an insurance intermediary who has received a warning from the business organization will probably have a hard time finding employment within that sector.

The (non-legal) sanctions that follow soft law are probably the most important component for assessing the normative legitimacy of a recommendation or a guideline. It is highly likely that for an actor, the economic risks, public-relation risks or exclusion risks that might be involved with soft-law non-compliance – more than any other of the components – will determine whether he or she chooses to comply with a recommendation.

This does not mean that soft law with no obvious sanctions will automatically be ignored by the industry. For instance, in the insurance industry, hundreds of thousands of claims adjustment decisions are made yearly, by thousands of employees. Claims adjustment can be complicated, which means that there is a need for standards. Thus, even though the Insurance Sweden's recommendation on claims adjustments lacks obvious sanctions, the need of a standard is an important incentive that gives the recommendation normative legitimacy. The mechanism might be described as follows: the employee who complies with the recommendation on claims adjustment can be relatively sure that his or her claims adjustment decisions will not entirely wrong. Furthermore, a referral to the recommendation means that the decisions can be justified to policy-insurance-holders who are dissatisfied with the claims adjustment.

3.8 *The Legitimacy of Soft-law Changes Over Time*

One characteristic of soft-law mechanisms is that their normative legitimacy may vary over time. Thus, rules that initially concern only a small community (such as employees within an agency), might, due to public demand, be published and thereby gain normative legitimacy. One example of this phenomenon is when an agency (for example the Tax Authority) circulates standards internally for the employees to apply in their everyday practice. After a while, external actors begin to take interest in these documents, since they are an important evidence of the agency's view on a certain matter. These documents start to circulate not only within the agency, but also over the Internet among external actors. The public's demand for published documents arises and eventually the documents are published as "statements" on the website. The documents, initially meant to serve only as guidelines for the employees, have completed a transformation into soft law.

Soft-law mechanisms often need time to "mature". Soft-law norms that are not followed and respected shortly after their adoption or publication can still gain normative legitimacy over time. In Sweden, some of the most "solid" soft-law mechanisms are also the oldest ones; examples include the Swedish Bar Association's guidelines or the help tables for determining compensation for non-pecuniary losses.

4 **Factors Controlled by the Soft-law Maker**

In Sections 2 and 3 above, I have sketched the infrastructures of normative legitimacy of domestic soft law. From this sketch, it is possible to determine the components, or factors, that lie within the *organization's* control sphere, i.e. *internal factors*, and the factors that are *external* and thus lie beyond the organization's control sphere.

Starting with the external factors, *public initiative* is a component over which the organization typically has little control. Of course, through lobbying an organization might encourage the government or an agency to take initiatives, but that is not the same as the component being within the control sphere of the organization. Nor can an organization compel the government or an agency to *appoint* the members of the organization's board or committee. However, it is possible for an organization through its own initiative, to convince judges or professors to partake in the soft-law creation process. In this way, the organization can work on its own to strengthen the normative legitimacy of the produced norms. Another external factor is the *impact*. The organization can hardly force authors of legal literature to refer to the norms, lawyers to refer to them in legal disputes, or judges to pay attention to them when issuing judgments. The time component is also beyond the soft-law issuers' control.

All of the other infrastructures described in this article are *internal*, and thus lie within the control sphere of the organization. It is up to the organization to ensure the existence of the *institutional framework* needed to make guidelines, recommendations and dispute board statements. It is up to the organization to make sure that there is no doubt as to the *normative purposes* of the statements,

guidelines or recommendations. The organization decides whether judges, professors or other persons with “quasi-authority” are *engaged* in the soft-law-making process. Further, the organization is in control of *publication and communication* with the public, and it is up to the organization to determine the *sanctions* that result from non-compliance with the norms.

Hence, to a significant extent, it is up to the organization to decide whether the aim of the guidelines, recommendations and codes of conduct is to create soft law with a strong normative legitimacy. The choice may depend on many aspects: the members’ or owners’ demands and needs for soft law, the organization’s financial or human resources, or the legal developments within the field.

Depending on the decision and measures taken, the organization may take on different characteristics; it might grow into a service organization for the members and owners, or a monitoring organization. Many Swedish soft-law-producing organizations have double functions. Thus, they function both as a *monitoring* organization and as a *service* organization for their members and owners. The purpose of the organization is both to strengthen the status or the public’s “trust” for the profession or industry *and* to provide services to the members and owners. All of the professional organizations (for lawyers, auditors, real estate brokers and insurance intermediaries) have these double functions, as do Insurance Sweden, the Swedish Corporate Governance Board, and the Anti-corruption Institute. The charters of these organizations state that the purposes of the organizations are, for example, to provide services and education, collect and disseminate information, conduct investigations, and look after the members’ interests in various contexts, promote the profession or business and ensure the trustworthiness of the profession or business.

Even though the organizations have double functions, the functions may be differently *weighted*. Some organizations are mainly monitoring bodies that also happen to provide some services to the members. For instance, the Swedish Securities Council has mainly a supervisory approach to the addressees (their members’ members) but also provides advisory services and information to the Swedish stock market. Other organizations are mainly service-oriented organizations that conduct supervision in certain cases. To evaluate whether the organization is one or the other, it is necessary to take a closer look at its full operations. For example, at first glance, the mentioned professional organizations for lawyers, auditors, real estate brokers and insurance intermediaries look similar. Closer inspection of these four organizations reveals very different approaches to their members. While the Swedish Bar Association is mainly a supervisory organization (the most important supervisory organization for lawyers, actually), the Swedish real estate brokers’ associations are mainly service organizations.

An organization that starts out as a service body may evolve over time into a supervisory organization. The organization for Swedish insurance brokers, Sfm, started out as an organization with double functions, with most emphasis on the service function. For a long time the organization has issued a code of conduct for insurance intermediaries and has also had a long-standing disciplinary board with powers to exclude members. However, there are no disciplinary decisions published and the code of conduct has made no impact in legal literature, court

decisions or handbooks. Lately, however, the profession has been put in the spotlight and there is increasing demand from consumers and the public to raise the standards of the profession. In 2012 Sfm founded a sub-organization, InsureSec, to register and license insurance intermediaries. The registration and licensing functions as a complement to the mandatory authorizations by the Swedish Financial Supervisory Authority, and is thus a private licence regime. The insurance business has responded quite quickly to this new regime and it is not uncommon that insurance companies engage only those insurance intermediaries who are licensed by InsureSec. Thus, Sfm – which started as a service organization – is moving towards becoming a monitoring organization.

5 Concluding Remarks – A Sketch for Evaluating Normative Legitimacy

The model sketched out here can be used when evaluating whether a soft-law mechanism is most likely to be regarded as relevant for that specific industry or not. Firstly, in order to create soft law at all, there must be an institutional framework in place. Secondly, different constituting components determine whether the norms are likely to have a high normative legitimacy. The constituent components are not ranked in any specific order. Instead, all of the components should be taken into consideration when conducting an overall assessment of the normative legitimacy of a guideline, recommendation or code of conduct.

A comparison between the Swedish Bar Association and Sfm, two professional organizations with the same institutional framework in place, but whose soft law differs in normative legitimacy, serves as an illustration. The government did take the initiative to the recommendations produced by both associations, but in different ways; the Swedish Bar Association is appointed by legislation, while Sfm's mandate is given a mandate in the preparatory works. The government appoints the members of the Bar Association's disciplinary board, but not the members of the Sfm disciplinary board. The Bar Association's norms are often referred to in the legal literature, and in judgments. Sfm's norms are not. If a solicitor does not comply with the norms, he or she might be excluded by the Bar Association, which means that he or she can no longer practise law. If a member is excluded from Sfm, it is still possible to carry on in the profession. To sum up, the guideline made by Sfm – in comparison with the soft law made by the Bar Association – is based on fewer of the constituent components of normative legitimacy described above in Section 3. Hence, in order to assess the practical relevance of soft law, it is insufficient to analyse only the institutional framework. It is necessary to make a deeper assessment in the light of, for instance, the constituent components described in Section 3.

In conclusion, if a highly qualitative guideline is intentionally created by an organization with the members as addressees, on the government's initiative, with the involvement of a supreme court judge, and the guideline is published and has long been frequently referred to in the legal literature, with sanctions that might affect the conditions for the business, the norms will likely be regarded as

relevant – and also complied with by the addressees. On the other hand, a guideline produced under a purely private initiative, by an organization with an unclear member structure (for instance an interest group), without any involvement of a public actor, and this guideline makes no evident impact in disputes, judgments or literature and has no sanctions, it will likely be ignored by the actors.

The increasing complexity of the legal landscape, not least in the financial markets law field, makes fertile ground for soft law. To most practitioners, who in their everyday legal practice have to make difficult decisions, the issue whether a soft-law norm is binding in its traditional sense or not is less important. They need guidance, and are therefore willing to grasp for any norm that might serve that function. In this way, domestic recommendations, guidelines, codes of conduct and statements produced by public and private actors are definitely, in practice, law beyond the state.