



## **EU Soft Law in the EU Legal Order: A Literature Review**

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*In this first SoLaR working paper we are reviewing the literature on EU soft law, with a special focus on research dealing with competition law, state aid, financial regulation, environmental protection and social policy. The literature reviewed consists of studies conducted at the EU level of governance. A further paper will focus on nationally centered analyses, in particular concerning Finland, France, Germany, Italy, the Netherlands, Slovenia, and the UK. The present paper first discusses different definitions of soft law and taxonomies before moving to an analysis of status and legal effects of soft law. The paper then reviews studies dealing with the interface between soft law and adjudication. It finally looks into issues concerning the justiciability of soft law instruments in order to distill a theory with regards to the use of soft law in courts and national administrations. The paper concludes by looking at the consequences that the enforcement of soft law can have from a rule of law perspective.*



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## Introduction<sup>1</sup>

Soft law instruments account for more than 10% of EU law.<sup>2</sup> The use of soft law in European law dates back to 1962,<sup>3</sup> when the European Commission issued the ‘Christmas notices’, a notice on exclusive dealing contracts with commercial agents<sup>4</sup> and a notice on patent licensing agreements.<sup>5</sup> Until 1968, recourse to soft law instruments was exceptional. Since then, and especially after the accomplishment of the internal market, they became quite frequent in the activity of the European Commission.<sup>6</sup> An early example of soft law includes the Communication on the Cassis de Dijon judgment<sup>7</sup> restating the principle of mutual recognition previously laid down by the Court of Justice (CoJ). Moreover, the 1985 White Paper of the Commission<sup>8</sup> expressly envisaged the increasing recourse to soft law.

The number of soft law instruments, along with the variety of fields in which they are issued, has significantly increased since 1989, especially following the Maastricht Treaty<sup>9</sup> and the construction of the then second and third pillars. Recently, entire ‘soft’ regulatory mechanisms have been developed at the EU level. Starting with the area of

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<sup>2</sup> Armin Von Bogdandy, Felix Arndt and Jürgen Bast, ‘Legal Instruments in European Union Law and their Reform: A Systematic Approach on an Empirical Basis’ (2004) 23 *Yearbook of European Law* 91, 112. In this count only the recommendations, opinions and resolutions are included. The notices, guidelines, frameworks, etc. issued by the Commission in areas such as competition law or state aid account for 1.4% extra. See *ibid* 119.

<sup>3</sup> Linda Senden and Sacha Prechal, ‘Differentiation in and Through Community Soft Law’ in Bruno de Witte, Dominik Hanf and Ellen Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001) 181.

<sup>4</sup> Commission, Notice on exclusive dealing contracts with commercial agents [1962] OJ 139/2921.

<sup>5</sup> Commission, Notice on patent licensing agreements [1962] OJ 139/2922.

<sup>6</sup> S. Leclerc, ‘Les communications de la Commission et le marché intérieur. A propos de l’arrêt rendu par la Cour de justice des Communautés européennes le 20 mars 1997 dans l’affaire C-57-95, Rec. (1997), p I-1640 à I-1652’ (1998) 34 *Cahiers de Droit Européen* 161, 163.

<sup>7</sup> Commission, Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 (‘Cassis de Dijon’) [1980] OJ C 256/2.

<sup>8</sup> Commission, ‘Completing the Internal Market’ (White Paper) COM (1985) 310 para 155.

<sup>9</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

economic policy, a ‘model of soft policy coordination’<sup>10</sup> – the Open Method of Coordination (or the OMC) – was institutionalized in sectors such as employment and social policy.

## **Section 1: DEFINITION OF SOFT LAW AND TAXONOMY**

### **A. Terminology**

Soft law comes in an ‘infinite variety’,<sup>11</sup> which presents a challenge for any attempt at defining, classifying, or developing a framework of analysis.<sup>12</sup> It is considered by different denotations as weak and fragile by Baxter,<sup>13</sup> toothless by Dupuy (*droit mou*),<sup>14</sup> muffled by Rigaux (*droit assourdi*):<sup>15</sup> in other words, devoid of any power. Some authors prefer to use words such as ‘non-treaty agreements’<sup>16</sup> and ‘informal instruments’<sup>17</sup> in order to differentiate this type of norm from traditional forms of law. Others go even further and use terms such as ‘pseudo’ and ‘quasi’ legislation,<sup>18</sup> or ‘extralegal’ and ‘non-legal’,<sup>19</sup> which suggest the idea of a ‘lesser’ form of law. For several French authors, it represents an immature version of true (hard) law, a body of norms

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<sup>10</sup> Kerstin Jacobsson, ‘Between Deliberation and Discipline: Soft Governance in the EU Employment Policy’ in Ulrika Mörth (ed), *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (Edward Elgar 2004) 82.

<sup>11</sup> Richard Baxter, ‘International Law in Her Infinite Variety’ (1980) 29 ICLQ 549.

<sup>12</sup> Christine Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 ICLQ 850, 852.

<sup>13</sup> Baxter (n11) 557.

<sup>14</sup> René J Dupuy, ‘Droit déclaratoire et droit programmatoire: de la coutume sauvage à la ‘soft law’ in Société Française de Droit International, Colloque de Toulouse, *L’élaboration du Droit International Public* (Pedone 1975) 132-148/140.

<sup>15</sup> F Rigaux, *Annuaire de l’Institut de Droit International* (Pedone 1983) vol. 60-II 147, quoted in Karel C Wellens and Gustaaf M Borchardt, ‘Soft Law in European Community Law’ (1989) 14 ELR 267, 271-279.

<sup>16</sup> Harmut Hillgenberg, ‘A Fresh Look at Soft Law’ (1999) 10 European Journal of International Law 499, 500.

<sup>17</sup> Jan Klabbers, ‘Informal Instruments Before the European Court of Justice’ (1994) Common Market Law Review 997.

<sup>18</sup> Kamiel Mortelmans, ‘De rechtsbescherming bij pseudowetgeving in het Europees economisch recht’ (1979) 27 Sociaal-Economische Wetgeving 16; P Kapteyn ‘Pseudowetgeving en internationaal recht’ in P Kapteyn and others (eds) *Non ex regula. Liber amicorum Mr J van der Hoeven* (Kluwer 1985) 77.

<sup>19</sup> Michael Bothe, ‘Legal and Non-Legal Norms - A Meaningful Distinction in International Relations’ (1980) 11 Netherlands Yearbook of International Law 65, 68.

in the process of transformation: *droit vert*<sup>20</sup> and *pre-droit*<sup>21</sup> in the writings of Dupuy and Virally. The uncertainty surrounding soft law is exemplified by the notion of *droit vague*, used by Pescatore.<sup>22</sup> Other French translations follow the English expression more faithfully, for example *droit doux*, which can be contrasted with *droit dur*,<sup>23</sup> while German offers a literal translation in *weiches Völkerrecht* or – depending on the area covered - use an entirely different terminology, such as “Verwaltungsvorschriften” when addressing the inner working of the administration.<sup>24</sup> The lack of legal procedures for the adoption of soft law in the EU Treaties has prompted some to describe EU soft law as atypical, *sui generis* acts or EU tertiary norms.<sup>25</sup> Conversely, the French term ‘*droit souple*’ illustrates the flexible character of these procedures.<sup>26</sup> In Finland, soft law does not have a generally accepted translation. Sometimes soft law is literally translated into “pehmeä sääntely” (soft regulation), but it is common to find the term ‘soft law’ in an otherwise Finnish-language text.

## **B. Definition – an international law concept**

The concept originates in public international law and dates back to the early 1970s, when the post-colonial legal order required a new system of norms suitable to accommodate the diverging interests and needs of the market-economy of industrialized States and those of the ‘Third World’.<sup>27</sup> During the 1980s, a renewed interest in soft law was registered, in a wider, more global context.<sup>28</sup> The emergence of the notion is closely connected, in the literature, to the challenges imposed on

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<sup>20</sup> Dupuy (n14) 140.

<sup>21</sup> Michel Virally, ‘La distinction entre textes internationaux de portée juridique’ in Session de Cambridge, *Annuaire de l’Institut de Droit International* (Pedone 1983) vol. 60-I, quoted in Wellens & Borchartt (n15) 271.

<sup>22</sup> Pierre Pescatore, *Annuaire de l’Institut de Droit International* (Pedone 1983) vol. 60-II 146, quoted in Wellens & Borchartt (n15) 271-279.

<sup>23</sup> Virally (n21).

<sup>24</sup> *ibid.* Knauff, Matthias (2010). *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*. Tübingen: Mohr Siebeck, p. 348.

<sup>25</sup> See for example Silvère Lefevre, *Les Actes Communautaire Atypiques* (Bruylant 2006).

<sup>26</sup> Catherine Thibierge, ‘Le droit souple, réflexion sur les textures du droit’ (2003) *Revue trimestrielle de droit civil* 599-628.

<sup>27</sup> Ignaz Seidl-Hohenveldern, ‘International Economic Soft Law’ (1979/II) 163 *Recueil des Cours de l’Académie de Droit International* 165, 173-177.

<sup>28</sup> Wellens & Borchartt (n15) 268.

traditional law-making methods by globalization, with the growing importance of non-state actors on the international plane<sup>29</sup> and, in particular, with the growth of international institutions.<sup>30</sup> The Vienna Convention on the Law of Treaties does not differentiate between hard and soft norms. However, the practice emerged that States might agree on other types of norms which are not necessarily binding or enforceable and that can carry ‘a variety of differing impacts and legal effects’.<sup>31</sup>

The notion of ‘soft law’ is generally contrasted, in the international relations literature, with that of ‘hard law,’ defined by Baxter as ‘treaty rules which States expect will be carried out and complied with’.<sup>32</sup> The main differentiating features lie in the capacity of the norm to prescribe legally binding commitments, the clarity and precision of its terms, and its enforceability. Abbott et al. synthesized these characteristics in the rationalist concept of ‘legalization’, a concept designed in order to create a bridge between the legal thinking and the political science thinking, by rejecting the understanding of law as ‘requiring enforcement by a coercive sovereign’.<sup>33</sup> ‘Legalization’ is understood as ‘a particular form of institutionalization characterized by three components: obligation, precision, and delegation’.<sup>34</sup> Obligation implies that the international actors are legally bound by a certain provision; precision requires unambiguity with respect to the conduct to follow; and delegation means that the implementation, interpretation, application of the rules and conflict resolution were entrusted to third parties. The intensity of these three characteristics can vary and different combinations of high, medium or low obligation, precision and delegation

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<sup>29</sup> Mörth, (n10) 4.

<sup>30</sup> Christine Chinkin, ‘Normative Development in the International Legal System’ in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 28.

<sup>31</sup> Baxter (n11) 30; Chinkin (n30) offered a summary of the reasons for which some instruments are classified as soft law: (i) [T]hey have been articulated in non-binding form according to traditional modes of law-making; (ii) they contain vague and imprecise terms; (iii) they emanate from bodies lacking international law-making authority; (iv) they are directed at non-state actors whose practice cannot constitute customary international law; (v) they lack any corresponding theory of responsibility; (vi) they are based solely upon voluntary adherence, or rely upon non-judicial means of enforcement.

<sup>32</sup> Baxter (n11) 549.

<sup>33</sup> Kenneth W Abbott and others, ‘The Concept of Legalization’ (2000) 54 *International Organization* 401, 402.

<sup>34</sup> *ibid* 401.

determine different types of legalization. Abbott and Sindal<sup>35</sup> define ‘hard law’ as the form of legalization characterized by high levels of obligation, precision, and delegation, whereas they consider that ‘soft law’ occurs whenever one or more of the three dimensions are weakened. Thibierge offers a similar view of *droit souple*, while considering the intersections between three facets: content (*droit flou*, characterised by the lack of precision), legally binding force (*droit doux*, or law without obligation), and enforcement (*droit mou*, or unenforceable law).<sup>36</sup> In a recent development of Abbott et al’s theory, Terpan introduces enforcement as a defining characteristic of soft law instead of delegation, and eliminates the precision criterion.<sup>37</sup> While conceptualising soft law as a continuum, Terpan sees soft law as instruments where the intensity of obligation or enforcement is weak. With regards to enforcement, Terpan characterises hard enforcement through courts or supranational institutions, such as the WTO mechanisms of implementation, monitoring and dispute settlement. On the other hand, soft enforcement entails non-constraining mechanisms such as surveillance and monitoring. Enforcement thus becomes a defining feature of soft law, but it can vary across soft law instruments, with some being enforced softly while others are enforced the hard way.

This categorization is not free from criticism. For some authors, the legal character of a norm cannot be a matter of degree; either a norm is law or it is not law at all.<sup>38</sup> More importantly, some other authors pointed out that the three criteria obligation, precision, and delegation cannot contribute to an understanding of soft law, since the possible combinations between them are multiple.<sup>39</sup> Also, and more importantly, from a constructivist point of view, the categorization understates the mechanisms through

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<sup>35</sup> Kenneth Abbott and Duncan Sindal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organization* 421, 422.

<sup>36</sup> Thibierge (n26).

<sup>37</sup> Fabien Terpan, ‘Soft Law in the European Union - The Changing Nature of EU Law’ (2015) 21 *European Law Journal* 68.

<sup>38</sup> P. Weil, ‘Vers une normativité relative en droit international ?’ (1982) *Revue Générale de Droit International Public* 5-47.

<sup>39</sup> Mörth (n10) 6.

which ‘a sense of obligation might be generated’.<sup>40</sup> In particular, it disregards the concept of legitimacy, a constitutive element that has to be taken into account when determining the degrees of obligation.<sup>41</sup> The legitimacy of rules is linked to the observance of principles such as non-retroactivity, clarity, constancy and consistency.<sup>42</sup> Moreover, legitimacy signifies that the agents need to understand and assume the rules. This is accomplished by their participation in the rule-making process.<sup>43</sup>

Thus, the sense of obligation is generated only when the rules are enacted by properly constituted bodies, as underlined by Wellens and Borchardt: ‘The binding requirement of a certain conduct or omission, whatever the circumstances, is formulated by subjects who *are vested with the necessary competence and according to pre-established procedures*’ (emphasis added).<sup>44</sup> It follows that a certain degree of legitimacy and procedural formality is required in order to speak of binding international norms, imposing obligations, and thus of ‘hard law’. Studies on the European Union, took on board the soft law concept from international relations literature, in order to catalogue those instruments that have an uncertain legal status,<sup>45</sup> and to define the concept in contrast to the notion of hard law.

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<sup>40</sup> Martha Finnemore and Stephen J Toope, ‘Alternatives to ‘Legalization’: Richer Views of Law and Politics’ (2001) 55 *International Organization* 743, 748.

<sup>41</sup> *ibid* 749-750.

<sup>42</sup> See Albert V Dicey, *Lectures on the Relation between Law and Public Opinion in England in the Nineteenth Century* (2nd edn, Macmillan 1914); Lon L Fuller, *The Morality of Law* (Yale University Press 1964).

<sup>43</sup> Finnemore & Toope (n40) 749.

<sup>44</sup> Wellens & Borchardt (n15) 280.

<sup>45</sup> Bogdandy, Arndt & Bast (n2) 112: authors do not consider the umbrella concept of soft law satisfactory to encapsulate the ‘variety of legal instruments with a non-binding operating mode’ adopted within the European Union. On the other hand, Fiona Beveridge and Sue Nott, ‘A Hard Look at Soft Law’ in Paul Craig and Carol Harlow (eds), *Lawmaking in the European Union* (Kluwer Law International 1998) 289 recommended prudence in equating the meaning of European soft law with the meaning given in international law. It is beyond the scope of this research to engage in this debate.

### **C. The concept of soft law in EU studies**

In EU studies, some define soft law by listing several non-legally binding instruments, such as recommendations, codes of conduct, and resolutions, and by pointing out the uncertainty surrounding their legal effects.<sup>46</sup>

Some others define soft law by opposition to hard law. In the EU context, hard law ‘arises from the treaties, regulations and the Community method’<sup>47</sup> and it usually takes the form of regulations, directives and decisions, as laid down in Article 288 TFEU.<sup>48</sup> European hard law is, thus, defined as having binding legal force, as producing general and external effects, as being adopted by the Community institutions according to specific procedures and as having a legal basis in the Treaty.<sup>49</sup> Soft law, on the other hand, consists of recommendations, opinions and other instruments not mentioned in Article 288 TFEU such as communications, notices or guidelines.

Accordingly, soft law will be defined by the lack of hard law qualities, and will comprise all norms which lack some or all of the four elements that make up hard law or conventional legal norms. These are the primary hypothesis, the primary disposition, the secondary hypothesis and the secondary disposition.<sup>50</sup> Most often the secondary disposition, eg the sanction is missing. Therefore, soft law is defined as non-binding. Additionally, the type of language in which the norm is drafted also bears on the nature of the legal norm. A binding legal norm typically contains a proposition which mandates, prohibits or allows a particular kind of conduct. In contrast, a non-binding legal norm, *lex imperfecta*, contains a proposition which is drafted in conditional terms.<sup>51</sup> What is more, some authors choose to point towards the lack of formal legal

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<sup>46</sup> Beveridge & Nott (n45) 290.

<sup>47</sup> David M Trubek, Patrick Cottrell and Mark Nance, ‘Soft Law’, ‘Hard Law’, and the EU Integration’ in Gráinne de Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006), 65.

<sup>48</sup> Beveridge & Nott (n45) 285; Senden & Prechal (n3) 185 believe that only regulations and directives can be considered hard law.

<sup>49</sup> Linda Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 45.

<sup>50</sup> Jorg Sladič, ‘Ali se lahko soft law EU obravnava kot hard law EU?’ (2014) 33 *Pravna Praksa* III.

<sup>51</sup> *ibid* IV.

procedure for the adoption of soft law norms in the EU Treaties.<sup>52</sup> Sometimes, the intermediary status of soft law is considered a defining feature thereof: ‘soft law lies somewhere between general policy statements (and Commission discretion), on the one hand, and legislation, on the other’.<sup>53</sup> The relationship with hard law is more important for other authors. Consequently, soft law is defined as law that has to comply with hard or ‘real’ law since it constitutes a ‘tertiary source’<sup>54</sup> placed at the bottom of the legal sources hierarchy.<sup>55</sup>

The most quoted definition of soft law in EU law is by Snyder,<sup>56</sup> who considers that it consists of ‘rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects’<sup>57</sup> and also legal effects.<sup>58</sup> It was noted that this definition is susceptible to cover both the international and the EU notions of soft law.<sup>59</sup> A relatively analogous definition is proposed by Senden, for whom soft law represents ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’.<sup>60</sup> This account

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<sup>52</sup> Lefevre (n25).

<sup>53</sup> Michelle Cini, ‘The Soft Law Approach: Commission Rule-Making in the EU’s State Aid Regime’ (2001) 8 *Journal of European Public Policy* 192, 194.

<sup>54</sup> Robert Baldwin, *Rules and Government* (Clarendon Press 1995), 226 et seq.

<sup>55</sup> Senden (n49) 59.

<sup>56</sup> Cini (n53) 194; Trubek, Cottrell & Nance (n47) 65; J Peter Burgess, ‘What’s So European About the European Union? Legitimacy Between Institution and Identity’ (2002) 5 *European Journal of Social Theory* 467, 469; Damian Chalmers, ‘Community Law-Making’ in Damian Chalmers and others (eds), *European Union Law Texts and Materials* (CUP 2006) 137; Dermot Hodson and Imelda Maher, ‘Soft Law and Sanctions: Economic Policy Co-ordination and Reform of the Stability and Growth Pact’ (2004) 11 *Journal of European Public Policy* 798, 801; Imelda Maher, ‘Law and the Open Method of Coordination: Towards a New Flexibility in European Policy-Making?’ (2004) 2 *Zeitschrift für Staats und Europawissenschaften* 248, 251; Stéphane de la Rosa, ‘The Open Method of Coordination in the New Member States - the Perspectives for its Use as a Tool of Soft Law’ (2005) 11 *European Law Journal* 618, 621; Charles F Sabel and Jonathan Zeitlin, ‘Learning From Difference: The New Architecture of Experimentalist Governance in the EU’ (2008) 14 *European Law Journal* 271, 276; David M Trubek and Louise G Trubek, ‘Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination’ (2005) 11 *European Law Journal* 343.

<sup>57</sup> Francis Snyder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *MLR* 19, 64.

<sup>58</sup> I thank Professor Snyder for suggesting this completion to his initial definition of soft law during the 6<sup>th</sup> International Workshop for Young Scholars, ‘The Evolution of European Courts: Institutional Change and Continuity’, Dublin, 16-17 November 2007.

<sup>59</sup> Cini (n53) 194.

<sup>60</sup> Senden (n49) 112.

of soft law emphasises the intention of the legislator to endow the soft law norm with ‘practical’ effects that depend ‘on factors other than legally binding force.’<sup>61</sup> Conversely, ‘legal’ effects may occur because of mechanisms independent of the intention of the legislator, for instance the existence of a ‘legal obligation’ to comply with soft law instruments, which stems from the application of general principles of law such as legal certainty or legitimate expectations.

More recently, it has been suggested that there is no existing classification of EU law that would clearly delineate between hard and soft law, also by specifying what kind of soft law derives from European integration.<sup>62</sup> Building on the conception of legalization from Abbott et al., two criteria have been developed by Terpan: the nature of obligation stemming from the norm and the nature of the enforcement of the norm.<sup>63</sup> The obligation can be either hard or soft, which depends on its source and its content. An obligation is hard if its source is a formally binding legal instrument, whose content is drafted in unconditional terms and requires, authorizes or prohibits a particular kind of conduct.<sup>64</sup> The enforcement is hard, when it is subject to a judicial review or an analogous, functionally equivalent procedure.<sup>65</sup> In its absence, the enforcement is typically soft, subject to alternative means falling short of coercion or constraint.<sup>66</sup> However, a norm, even a legal one, can also come with no enforcement at all.<sup>67</sup>

On the basis of this criteria, Terpan distinguishes between hard law, soft law and non-legal norms as follows.

**Hard law consists of the norms which come with hard obligation and are equipped with hard enforcement.**<sup>68</sup> These norms can be found across the EU’s

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<sup>61</sup> *ibid* 113.

<sup>62</sup> Terpan (n37) 40.

<sup>63</sup> Terpan’s work, in turn, draws on K.W. Abbott and others (n33) and Abbott & Sindal (n35).

<sup>64</sup> Terpan (n37) 8-9; Sladič (n50).

<sup>65</sup> Terpan (n37) 10.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid*.

<sup>68</sup> *ibid* 25.

exclusive and shared competences (subject to the former Community method, currently ordinary legislative procedure) and have increasingly also found their way in EU macro-economic governance through the hardening of soft law within the European Semester.<sup>69</sup>

**Non-legal norms come with no obligation and are unenforceable.** Terpan cites declarations issued by EU institutions and other EU individual stakeholders,<sup>70</sup> but other instruments could be mentioned here too.

**Soft law**, on the other hand, comprises the most diverse groups of legal instruments, combining the two constitutive criteria in all imaginable ways.

Hard obligation / soft enforcement	Fiscal and Macro-economic surveillance prior to 2013
Hard obligation / no enforcement	Some aspects of CFSP: common positions and joint actions
Soft obligation / hard enforcement	European Semester after 2013
Soft obligation / soft enforcement	OMC, Some aspects of competition, transport, regional policy, environment, consumers, industry, R&D, Education and culture, JHA-AFSJ, Energy
Soft obligation / no enforcement	
No obligation / soft enforcement	OMC, some aspects of CFSP

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<sup>69</sup> *ibid* 23.

<sup>70</sup> *ibid* 26.

Following up on this conceptualization, more recently, Fabien Terpan, Sabine Saurugger and Miriam Hartlapp define a continuum from hard law to soft law, where “Soft law includes: 1°) legal obligations that are either not precise enough to be considered hard law, or not controlled by an independent authority (such as a tribunal); 2°) non-binding objectives, guidelines, incentives that are combined with soft enforcement such as monitoring or peer-review processes. Depending on the way these elements are combined, a norm, a legal act or an entire policy-area, can be placed at different points on the *continuum* of EU norms that ranges from non-legal norms over soft law to hard law.”

**D. Graph: Continuum of EU norms**



Sectoral accounts of EU soft law reflect similar variation stemming either from conceptual divergences or from addressing different types of EU policy instruments. For example, in the 1990s the quality of EU social policy has been criticized as a form of ‘neo-voluntarism’ by scholars that compared national and EU social policy. EU social policy was characterized as low in capacity to impose binding obligations on market participants and to therewith de facto increase ungoverned competition between

national regimes.<sup>71</sup> Law is described as soft because it ‘tries to do with a minimum of compulsory modification of both market outcomes and national policy choices, presenting itself as an alternative to hard regulation as well as to no regulation at all’.<sup>72</sup> Similarly, in environment, it has been pointed out that soft law is a stop-gap measure, which provides an initial foundation for legislating in the future. Soft law becomes a half-way solution, a non-binding instrument with a guiding role, which uses statutory language and refers to rules and implementation deadlines.<sup>73</sup> Others highlight, more optimistically, that EU soft law ‘rather than weakening or displacing the authority of member states, accepts and strengthens it’ by improving problem-solving capacities.<sup>74</sup> In the same vein, Kenner suggests that ‘while hard laws [...] create rules that Member States are bound to comply with, soft laws [...] are essentially methods of Community guidance or rules which create an expectation that the conduct of Member States will be in conformity with them, but without an accompanying legal obligation.’<sup>75</sup> While not legally binding, soft laws are ‘impulses for integration’, a ‘basis of interpretation of hard laws’ and may result in the ‘desired legal effects’.<sup>76</sup> The Community Charter of the Fundamental Social Rights of Workers 1989, for example, was a ‘bold statement’ to usher ‘activism’, while other types of soft law could be Commission or Council recommendations that reflected an ‘unfulfilled ambition’; recommendations that would ‘supplement existing hard law’; or statements of political principle that subsist while ‘binding legislative proposals’ had no ‘realistic prospect’.<sup>77</sup>

Empirical analysis trying to substantiate these claims found an increase in non-binding acts over time, with more and more recommendations, resolutions and declarations

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<sup>71</sup> Wolfgang Streeck, ‘Neo-Voluntarism. New European Social Policy Regime?’ (1995) 1 *European Law Journal* 31.

<sup>72</sup> Wolfgang Streeck, ‘From Market Making to State Building? Reflections on the Political Economy of European Social Policy’ in Stephan Leibfried and Paul Pierson (eds), *European Social Policy. Between Fragmentation and Integration* (The Brookings Institution 1995) 389-431.

<sup>73</sup> F. Aldson, ‘The EU’s Recommendation on hydraulic fracturing and its implementation in the UK’ (2014) 2 *Environmental Liability* 67, 67-69.

<sup>74</sup> Fritz W Sharpf, ‘Community and Autonomy. Multi-Level Policy-Making in the European Union’ (1994) 1 *Journal of European Public Policy* 219, 227.

<sup>75</sup> Jeff Kenner, *EU Employment Law: From Rome to Amsterdam and Beyond* (Hart 2003) 127-128.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

adopted during each decade of the integration process,<sup>78</sup> as well as a regulatory style that allows for ‘opportunities to exempt or derogate from specific standards’<sup>79</sup> even where these are formally part of ‘hard’ EU directives.<sup>80</sup> These studies focus on law as a regulatory instrument and distinguish (hard) binding standards from (soft) standards that are either non-binding or non-enforceable. In addition, social partner agreements at the supranational level and their implementation in member states have been studied as soft regulatory instruments.<sup>81</sup>

With the turn of the century, the EU discovered a new and distinct form of soft governance, the open method of coordination (OMC). The OMC is generally characterised by (1) the EU setting guidelines goals and standards by Commission Decision, (2) Member States or other groups choosing whether to implement those standards, (3) Member States reporting on the performance, and subjecting themselves to ‘peer review’, and (4) subsequent revision of the guidelines in light of what (if anything) was learned.<sup>82</sup> Formalised in the Amsterdam Treaty, coordination of national employment policies had already developed incrementally as a follow-up to the European Council of Essen (1994).<sup>83</sup> Subsequently, the OMC was extended to additional fields of social policy such as pension reform,<sup>84</sup> social inclusion,<sup>85</sup> and

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<sup>78</sup> Gerda Falkner and others, *Complying with Europe? The Impact of EU Minimum Harmonisation and Soft Law in the Member States* (CUP 2005) 49-50.

<sup>79</sup> *ibid* 2.

<sup>80</sup> See Thomas Duttler and others, ‘Opting Out from European Union Legislation: The Differentiation of Secondary Law’ (2016) *Journal of European Public Policy* 1 for opt-outs in secondary law.

<sup>81</sup> Prosser, T. (2013). Accounting for National and Sectoral Variance in the Implementation of European Social Partner ‘Soft’ Law. The Cases of the Implementation of the Telework and Work-Related Stress Agreements. *British Journal of Industrial Relations* 53(2): 254–277. doi: 10.1111/bjir.12036.

<sup>82</sup> Simon Deakin, ‘Reflexive Governance and European Company Law’ (2007) CLPE Research Paper 20/2007, <  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1002678&rec=1&srcabs=1410897&alg=7&pos=7](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1002678&rec=1&srcabs=1410897&alg=7&pos=7)> accessed 1 September 2017.

<sup>83</sup> Armin Schäfer, ‘A New Form of Governance? Comparing the Open Method of Co-Ordination to Multilateral Surveillance by the IMF and the OECD’ (2006) 13 *Journal of European Public Policy* 70, 84; James J Mosher and David M Trubek, ‘Alternative Approaches to Governance in the EU. EU Social Policy and the European Employment Strategy’ (2003) 41 *Journal of Common Market Studies* 63.

<sup>84</sup> Caroline De Law Porte and Patricia Nanz, ‘The OMC – A Deliberative-Democratic Mode of Governance? The Cases of Employment and Pensions’ (2004) 11 *Journal of European Public Policy* 267.

<sup>85</sup> Tony Atkinson, Eric Marlier and Brian Nolan, ‘Indicators and Targets for Social Inclusion in the European Union’ (2004) 42 *Journal of Common Market Studies* 47.

education.<sup>86</sup> More recently it was integrated into the European Semester.<sup>87</sup> Studies of the OMC understand governance to be ‘soft’ where interaction between actors is not organized hierarchically. Rather, soft modes foster exchange of information through reporting and discussion and support mutual learning and innovation processes via recommendations and benchmarking. Typically, research in this strand stresses the potential of soft governance instruments and processes for more efficient and effective solving of societal problems.<sup>88</sup>

In contrast to the above perspective on EU soft *law*, OMC research is interested in the distinct *governance nature* of soft instruments (which might take the form of law, but more typically do not). Trubek and Trubek note that some people prefer to classify the open method of coordination as soft ‘governance’, rather than laws, which might become ‘hard’ through judicial interpretation.<sup>89</sup> While hard governance instruments allow the state to exert influence through hierarchy, soft governance instruments aim at fostering exchange of information and learning among a large group of actors (see below in more detail). Kilpatrick argues that to represent ‘new’ employment governance, it is not that new.<sup>90</sup> Much employment policy (on unemployment, retraining or active ageing) had been achieved within Member States through bureaucratic means, as opposed to binding rules. Moreover ‘soft’ law accompanies rather than replaces ‘hard’ law. The only novelty is, according to certain views, the fact that such mechanism is now also implemented at the EU level<sup>91</sup> and that linking soft steering in social policy with stricter economic governance under the European

<sup>86</sup> Jonathan Zeitlin, Philippe Pochet and Lars Magnusson (eds), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang 2005).

<sup>87</sup> Jonathan Zeitlin and Bart Vanhercke, ‘Socializing the European Semester? Economic Governance and Social Policy Coordination in Europe 2020’ (2014) 7 *Swedish Institute for European Policy Studies Report* <file:///C:/Users/K1459919/Downloads/Zeitlin-Vanhercke%20Sieps%202014\_7%20webb%20NY\_2.pdf> accessed 1 September 2017.

<sup>88</sup> Sabel and Zeitlin (n56) 271; Tom Korver and Peter R Oeij, ‘The Soft Law of Covenant. Making Governance Instrumental’ (2005) 11 *European Journal of Industrial Relations* 367; Trubek & Trubek (n56).

<sup>89</sup> Trubek & Trubek (n56) 343. Also Dawson, M. (2011). *New Governance and the Transformation of European Law: Coordinating EU Social Law and Policy: Cambridge Studies in European Law and Policy*. Cambridge: Cambridge University Press.

<sup>90</sup> Claire Kilpatrick, ‘New EU Employment Governance and Constitutionalism’ in Gráinne de Búrca and Joanne Scott (eds) *Law and New Governance in the EU and the US* (Hart Publishing 2006) 121.

<sup>91</sup> *ibid* 124.

Semester gives the EU options to also strengthen employment and social policy coordination.<sup>92</sup> Other authors conclude that the EU is not experiencing with new forms of governance but with ‘new-ish governance’ while ‘the focus of the new governance in the EU is largely on governing without law.’<sup>93</sup>

At this stage of the project, SoLaR does not engage with a discussion of the benefits and shortcomings of each of these definitions. Rather, the goal is to determine, inductively, at the end of the project, the elements of a comprehensive definition of soft law. In order to be as inclusive as possible, the SoLaR project will not work with definitions that assume various degrees of softness of legal instruments. Rather, in line with Article 288 TFEU, SoLaR will be based on Snyder’s definition of soft law as rules of conduct which have no legally binding force but may have legal and practical effects. The soft law that will make the object of study for our project will therefore fit with this definition, and can include instruments such as recommendations, opinions, guidelines, codes of conduct, press releases, etc. Such instruments can be adopted by EU institutions, alone or in collaboration with non-institutional stakeholders. However, formally binding instruments, such as directives, regulations, and decisions are excluded from the scope of this research, regardless their degrees of precision or enforceability.

#### **D. Taxonomy**

Even though the vast variety of European soft law instruments makes it difficult to construct a systematic framework of analysis, several authors have set out various classifications. Wellens and Borchard, in 1989, proposed an inventory of EC soft law.<sup>94</sup> They used four criteria to structure this type of instrument: first, the way in which the

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<sup>92</sup> Bekker, S. (2014). EU coordination of welfare states after the crisis: further interconnecting soft and hard law. *International Review of Public Administration* 19(3): 296–307. doi: 10.1080/12294659.2014.966891.

<sup>93</sup> Scott C, ‘Governing Without Law or Governing Without Government? New-ish Governance and the Legitimacy of the EU’ (2009) 15 ELJ 160

<sup>94</sup> Wellens & Borchardt (n15).

authors avail themselves of certain acts; second, the enacting forum; third, the form; and fourth, the content of the documents.<sup>95</sup>

In an updated overview of European soft law, Senden provides a threefold classification on functional and purposive criteria: first, preparatory and informative; second, interpretative and decisional; and third, formal and informal steering instruments.<sup>96</sup> The first category includes acts that put forward various proposals for future action but, with the exception of the White Papers, do not establish rules of conduct and can hardly fit into the soft law definition.<sup>97</sup> The second category includes those instruments that ‘restate or summarize the interpretation that should be given to Community law provisions’<sup>98</sup> (interpretative) and those indicating ‘the way in which a Community institution will apply Community law provisions in an individual case where it has implementing and discretionary powers’<sup>99</sup> (decisional). The third category comprises those legal and/or political instruments with the objective of steering or guiding action in a non-legally binding way, by laying down ‘new rules independently of an existing legal framework, or [...] adopted in the context of such a framework, prior to, simultaneous with or subsequent to legislation’,<sup>100</sup> hence, adding to existing acts.

Following up on the Senden definition, Slovenian literature classifies EU soft law as: preparatory and informative instruments; explanatory and executive instruments; and steering instruments.<sup>101</sup> The French literature puts forward similar definitions, adding on one occasion a fourth category: internal acts concerning institutional matters (such as the IIAs).<sup>102</sup> Another French author suggests a classification of para-legislative, peri-legislative, and intra-legislative soft law. Accordingly, para-legislative soft law puts forward models for administrative or judicial decision making; peri-legislative soft law

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<sup>95</sup> *ibid.* 298-301.

<sup>96</sup> Senden (n49).

<sup>97</sup> *ibid.* 219-220.

<sup>98</sup> *ibid.* 140.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.* 157.

<sup>101</sup> Verena Rošic Feguš, ‘Vloga aktov mehkega prava v Evropski uniji (pravni in institucionalni vidiki uporabe in pojav hibridnih pravnih področij)’ (PhD Thesis, University of Maribor 2015).

<sup>102</sup> Nicolas de Sadeleer, ‘Classification des actes de droit non contraignants de l’Union européenne’ in Isabelle Hachez (ed) *Les sources du droit revisitées* (Anthemis 2012) 253-293.).

interprets existing hard legislation; and intra-legislative soft law refers to instruments that are legally binding (similar to the terms of ‘legal soft law’ used by Chinkin,<sup>103</sup> or ‘soft negotium’ by d’Aspremont<sup>104</sup>).<sup>105</sup>

Chalmers et al. suggest another purposive classification, comprising four categories: commitments about the conduct of an institution; commitments to respect certain values; programming legislation (action plans for European policies); and regulatory instruments (indications from the Commission as to the behaviour of undertakings in certain sectors and the possible sanctions they might incur in case of infractions).<sup>106</sup>

According to several Dutch scholars on European administrative law, two types of European administrative soft law can be distinguished: interpretative soft law and decisive soft law. The concept of interpretative soft law refers to Commission documents which aim to clarify how EU law – according to the Commission - is to be interpreted.<sup>107</sup> However, the Court of Justice has the final say on the interpretation of EU law. Even where Commission interpretative guidance is available, national courts having doubts about the interpretation of a concept of EU law still may or need to make preliminary references to the Court of Justice.

The concept ‘decisory soft law’ refers to documents in which the Commission indicates how it envisages exercising its discretion in certain fields.<sup>108</sup> Decisive rules are sometimes used as legally binding rules. However, they are only binding on the national legislator and the courts when secondary EU law obliges them to take such

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<sup>103</sup> Chinkin (n12) 851.

<sup>104</sup> Jean d’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials’ (2008) 19 *The European Journal of International Law* 1075, 1081.

<sup>105</sup> Isabelle Hachez, ‘Le soft law : qui trop embrasse mal étireint ?’ in Isabelle Hachez (ed) *Les sources du droit revisitées* (Anthemis 2012) 539-586.).

<sup>106</sup> Chalmers (n56) 137-138.

<sup>107</sup> Claartje van Dam, ‘De Doorwerking van Europese Administratieve Soft Law: In Strijd Met Nederlandse Legaliteit?’ (2013) *Netherlands Administrative Law Library* <<http://www.nall.nl/tijdschrift/nall/2013/01/NALL-D-12-00008>> accessed 02 September 2017, 3; Hanneke Luijendijk and Linda A J Senden, ‘De Gelaagde Doorwerking van Europese Administratieve Soft Law in de Nationale Rechtsorde’ (2011) 7(8) *SEW* 317.

<sup>108</sup> Van Dam (n107).

rules into account, or when the Kingdom of the Netherlands State has agreed to such rules in the context of a specific duty of cooperation.<sup>109</sup>

The dividing line between both categories of soft law is often blurred. Many Commission Communications on competition law simultaneously indicate how the Commission considers that certain concepts of EU law need to be interpreted, and how it will interpret and apply them in infringement proceedings.

Certain Dutch scholars argue that a third category of European administrative soft law is to be distinguished: soft law instruments in which the Commission makes suggestions to the Member States as to the implementation and/or application of EU law in their national legal system.<sup>110</sup> The line between this third category of soft law instrument and the first category of interpretative instrument, is very thin.

All these classifications show that soft law is an essentially composite phenomenon and that a single analytical narrative to categorize such instruments cannot be easily achieved. This task is rendered even more difficult by the fact that soft law is hardly ever used alone at the policy level: the various sources of law hardly ever exist in isolation from each other. The classifications above appear to ignore this reality and the rapport between soft law and other legal sources. For these reasons, some authors have put forward a theory of hybridity, to which we will return in Section 4 of this working paper.

## **Section 2: STATUS AND LEGAL EFFECTS**

Depending on their ontological and epistemological standpoints, scholars have found various virtues (or shortcomings) in the use of soft law in international relations<sup>111</sup> and

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<sup>109</sup> Hanneke Luijendijk and Linda A J Senden, 'De Gelaagde Doorwerking van Europese Administratieve Soft Law in de Nationale Rechtsorde' (2011) 7(8) SEW 317, 350.

<sup>110</sup> *ibid* 317.

<sup>111</sup> See Abbott & Sindal (n35) for a rationalist approach to the soft law and Finnemore & Toope (n40) for a constructivist approach.

in European affairs.<sup>112</sup> Soft law is considered an important catalyst for creating the premises of successful international cooperation, in the context of globalization and the rising importance of private actors on the international scene.<sup>113</sup> It is suggested that soft law is best suited to deal with the complexity of European affairs, their diversity,<sup>114</sup> as well as with the bargaining constraints of sovereignty and the complicated repartition of competences between the Community and the Member States.<sup>115</sup> As in the international context, it has been underlined that the flexibility of soft law and its simplified adoption procedures are highly valued characteristics in regulating sensitive sectors in which agreements are very hard to reach, in tackling issues of regulatory philosophy and broad policy, and in addressing situations where swift action is imperative. Soft law was considered suitable to answer the demands for fast regulation in European competition law<sup>116</sup> and to accommodate uncertainty and national diversity, which are characteristics of European economic policy co-ordination.<sup>117</sup>

The literature noted that European soft law produces both legal and practical effects. However, as expressed in the international relations literature, the legal or practical effects that soft law can produce, in the absence of legally binding force, remain rather uncertain, which makes the enforceability of such instruments problematic.<sup>118</sup>

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<sup>112</sup> See Beveridge & Nott (n45) 291-292 for different views of contextualists and formalists and Trubek, Cottrell & Nance (n47) for different views of constructivists-rationalists and the proposal to merge the two perspectives.

<sup>113</sup> Wolfgang H Reinicke and Jan M Witte, 'Interdependence, Globalization, and Sovereignty: the Role of Non-Binding Legal Accords' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000), 76.

<sup>114</sup> Schäfer (n84) 84.

<sup>115</sup> See Keith Sisson and Paul Marginson, "Soft Regulation' - Travesty of the Real Thing or New Dimension?" (2001) The Economic and Social Research Centre 'One Europe or Several?' Programme Working Paper 32/01, <[https://www.researchgate.net/publication/5015676\\_%27Soft\\_Regulation%27\\_Travesty\\_of\\_the\\_Real\\_Thing\\_or\\_New\\_Dimension](https://www.researchgate.net/publication/5015676_%27Soft_Regulation%27_Travesty_of_the_Real_Thing_or_New_Dimension)> accessed 1 September 2017.

<sup>116</sup> Cini (n53) 194; Håkon A Cosma and Richard Whish, 'Soft Law in the Field of EU Competition Policy' (2003) 14 *European Business Law Review* 25, 33.

<sup>117</sup> Hodson & Maher (n56) 810-811.

<sup>118</sup> Chinkin (n12) 862-865.

## **A. Practical effects**

The practical effects of soft law include the transformations that soft law may generate in the behaviour and practices of the Member States and the institutions of the Union. Soft law can lead to policy change, but what is more, it induces subtler changes at the level of discourse, understanding and policy principles.<sup>119</sup> Hence, ‘formally non-binding agreements can gradually become politically, socially and morally binding for the actors involved’<sup>120</sup> by the intervention of certain devices other than the legal force of an act, such as those related to knowledge and meaning making. For example, the mechanisms used in the employment field to stimulate common knowledge of the challenges, objectives and policy goals, while placing social and time pressure on Member States to improve national practices, are effective in fostering cooperation.

These devices have a strong sociological character and include: common discourse; the symbols of a common project; strengthening socialization through repeated meetings; mobilizing the actors and their partnership through networks; and iterative processes.<sup>121</sup> They appear to be more important than soft law itself, as pointed out in a study on the OMC.<sup>122</sup> Dehousse and Weiler note that soft law can perform a socialisation function. An example is offered by the mechanisms that were put in place through the European Political Coordination, which helped the Member States in getting used to ‘consulting each other on major international issues, to profiting from each other’s advice and to paying due attention to each other’s concerns’.<sup>123</sup> Thus it appears that, in the long run, states may integrate, into their national orders, norms and practices established by way of soft law. Ashiagbor states that soft law, while its Treaty basis does not yield binding instruments, creates ‘an intense form of peer pressure to change policy’.<sup>124</sup> The Joint Employment Reports of the Commission and

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<sup>119</sup> Jacobsson (n10) 89.

<sup>120</sup> Kerstin Jacobsson, ‘Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy’ (2004) 14 *Journal of European Social Policy* 355, 359.

<sup>121</sup> Jacobsson (n10) 90-98.

<sup>122</sup> *ibid* 98.

<sup>123</sup> Renaud Dehousse and Joseph H H Weiler, ‘EPC and the Single Act: from Soft Law to Hard Law?’ in Martin Holland (ed) *The Future of European Political Cooperation* (Macmillan 1991) 132.

<sup>124</sup> Diamond Ashiagbor, ‘Soft Harmonisation: The Open Method of Coordination in the European

Council, followed by the ‘National Action Plans’ of Member States, gear the bureaucracy of Member States toward perceived best practice. These are ‘normative effects’.<sup>125</sup> The ‘soft-coordination procedures’ achieve a ‘common discourse among elite actors’ as norms of conduct are internalised without coercion. In this way, for example, the hard-right American idea of ‘welfare-to-work’ was adopted by Thatcher, but then spread to Belgium or Norway, because policy makers did not want to be seen as ‘falling behind an international trend.’<sup>126</sup>

Soft law can also shape social change, at the level of the Community institutions and also at the level of the Member States. In this regard, it can be of assistance for interest groups that try to influence the decision-making process. Soft law provides them with the necessary knowledge about ‘the pre-legal stages of policy formulation and legal developments’ and also with an alternative method through which socially marginalized groups can achieve results that they would not have been able to attain through hard law.<sup>127</sup> By avoiding problems such as the lack of legal basis or the impossibility of achieving the necessary majority for the passage of hard legislation, marginalized groups can use soft law to challenge dominant ideologies.<sup>128</sup>

The effectiveness of soft law is hugely debated in the literature. For example, Bouveresse shows how soft law was integrated by the Courts within the structure of competition law, while arguing that the wide recognition of soft law occurred because of its effectiveness. She shows that the fine line between binding and non-binding norms has thus been blurred, as such endangering EU law, at least to a certain extent.<sup>129</sup> The effectiveness of soft law is also underlined by Berrod, who believes that soft law is the most appropriate means to legislate in competition law, especially in the context of modernisation and decentralisation.<sup>130</sup> Empirical studies on the effectiveness of EU soft law at the national level were conducted in the area of social

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employment strategy’ (2004) 10 *European Public Law* 305, 314-315.

<sup>125</sup> *ibid.*

<sup>126</sup> *ibid* 329.

<sup>127</sup> Beveridge & Nott (n45) 293.

<sup>128</sup> *ibid* 296.

<sup>129</sup> Bouveresse Aude (2015), « La portée normative de la soft law », *Revue de l’Union européenne* 588, 291-298.

<sup>130</sup> Berrod Frederique (2015), « L’utilisation de la soft law comme méthode de conception du droit européen de la concurrence, *Revue de l’Union européenne* 588, p. 283-290.

policy, more specifically in relation to the various open methods of coordination employed in this area. While our working paper on national literatures will deal with this research, suffice is to mention here that these studies have reached mixed results in relation to the actual effectiveness of soft law instruments.

However, we note that in certain circumstances practical effects of soft law are quite important, constraining behaviour and orienting policies. This makes it hard to distinguish between practical and legal effects, as illustrated by one example drawn from the area of State aid, which shows the European Commission constraining a recalcitrant Member State to agree to a certain soft law instrument by threatening to issue a hard law decision. As noted by Blauburger and Cini, if a Member State does not agree to a certain communication or notice, the Commission can coerce acceptance by threatening to open formal investigations into national aid measures which fall within the ambit of the said instrument. This technique was used on several occasions to obtain the agreement of Spain and Germany to a motor vehicle aid framework,<sup>131</sup> as well as the agreement of Germany to the 2007–2013 guidelines on regional aid.<sup>132</sup> The support of the Court of Justice is, however, essential in securing compliance through this route, leading to hybrid judicial-administrative enforcement mechanisms, as noted by Snyder.<sup>133</sup>

## **B. Legal effects**

Legal effects generally consist of the capacity of EU legal instruments to change the rights and obligations of actors.<sup>134</sup> Snyder provides a comprehensive list of the legal effects that European soft law may produce. They can be composed of: providing a normative framework for future negotiations and for potential arguments or conflicts; binding the enacting institution and also the institutions' parties to an inter-institutional agreement; concretizing the duty of institutional cooperation; creating the expectation that the enacting institution will comply with the rules it laid down in a soft law instrument; producing a stand-still effect on the non-conforming conduct of a

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<sup>131</sup> Cini (n53) 201–202.

<sup>132</sup> Michael Blauburger, 'Of 'Good' and 'Bad' Subsidies: European State Aid Control through Soft and Hard Law' (2009) 32 *West European Politics* 719, 729–730.

<sup>133</sup> Snyder (n57) 204.

<sup>134</sup> Trevor Hartley, *The Foundations of European Community Law* (7th ed, OUP 2010) 354.

state or institutions; and influencing the legal rights and obligations of third parties. Soft law can impact on national and European legislation by expressing general principles of EU law, being part of the *acquis communautaire*, interpreting hard law provisions, and serving as a legal basis for the enactment of national legislation. In a court of law, the effects of soft law include, *inter alia*: providing the basis for judicial review; being the object of an action for annulment; being used in litigation by the parties to a trial; and serving as an aid in the interpretation of hard law provisions.<sup>135</sup>

Through its informative function, soft law plays an important role in enhancing the links between the institutions and individuals, natural or legal persons. The interpretative communications of the Commission were found to constitute a source of doctrine, to guide public administrations in their activities, and to provide a ‘magna carta’<sup>136</sup> for individuals, clarifying matters related to their rights and duties. An important tool of EU administrative governance,<sup>137</sup> soft law limits institutional discretion, encouraging the administrators to take consistent decisions.<sup>138</sup> Through these instruments, the Commission explains the existing Community law in a specific sector, it presents its own views on the law and clarifies those provisions of an open and indeterminate character.<sup>139</sup> In this context, Snyder talked about ‘regulation by publication’<sup>140</sup> and Hoffman about ‘regulation by information’.<sup>141</sup> While such soft law instruments bind the Commission’s discretion, they could have more limited effects within the national legal orders, with national authorities being compelled to abide by Commission soft law only in certain circumstances, as explained in the next section.

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<sup>135</sup> This list of legal effects is provided in Francis Snyder, ‘Interinstitutional Agreements: Forms and Constitutional Limitations’ in Gerd Winter (ed), *Sources and Categories of European Union Law: A Comparative and Reform Perspective* (Nomos Verlags-Ges 1996) 463.

<sup>136</sup> Nina Tornberg, ‘The Commission’s Communications on the General Good - Magna Carta or Law-Making?’ (1999) 24 *European Business Law Review* 27.

<sup>137</sup> Herwig CF Hofmann, ‘Administrative Governance in State Aid Policy’ in Herwig CF Hofmann and Alexander H Türk (eds), *EU Administrative Governance* (Edward Elgar 2006) 196-199.

<sup>138</sup> Cini (n53) 194.

<sup>139</sup> Miguel Gardenes Santiago, ‘Las Comunicaciones Interpretativas de la Comisión: Concepto y Valor Normativo’ (1992) 19 *Revista de Instituciones Europeas* 933, 939-940.

<sup>140</sup> Francis Snyder, ‘Soft Law and Institutional Practice in the European Community’ in Stephen Martin (ed) *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer 1994) 199-201.

<sup>141</sup> Herwig CF Hofmann, ‘Negotiated and Non-Negotiated Administrative Rule-Making: the Example of EC Competition Policy’ (2006) 43 *Common Market Law Review* 153, 169-170.

This large variety of effects shows that soft law matters, and it has important practical and legal consequences for institutions, Member States or individuals. What is more, despite the fact that it is deprived of legally binding force, the effects of soft law sometimes appear binding, from a legal or even an extra-legal point of view. As we have seen above, soft law can gradually become politically, socially and morally binding and, in certain situations, even binding 'legal' effects are admitted to soft law instruments (including the list of legal effects mentioned above): for instance, soft law can create legal obligations for the enacting European institution. In the light of such important consequences of soft law, the question arises as to whether these effects can be given legal value in a court of law, and whether courts can take soft law instruments into consideration when deciding cases. While it could appear obvious that Courts cannot recognize purely political, social or moral commitments, the line that separates legal and practical effects appears quite thin.

### **Section 3: JUSTICIABILITY OF SOFT LAW**

Soft law has many advantages, in that it can be rapidly adopted and changed, it promotes flexibility, and accommodates variation in regulatory preferences. However, the ways in which soft law is adopted are not always legitimate or transparent. In this context, many have warned that the use of soft law in Courts might foster illegitimate ways of decision making and 'backdoor legislation'.<sup>142</sup> What is more, it was argued in the literature that uncertainty surrounds the effects of soft law, which makes such instruments unsuitable for judicial dispute resolution.<sup>143</sup> Nevertheless, the case law of the European Courts contains numerous references to soft law instruments. More than twenty years ago, the CoJ advised national courts to take into consideration soft law instruments when judging cases.<sup>144</sup>

There is little systematic research on the use of European soft law before the courts. In his seminal article on soft law, Snyder argued that when dealing with soft law, the Court

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<sup>142</sup> The term was used in the context of English law in Gabriele Ganz, *Quasi-Legislation: Recent Developments in Secondary Legislation* (Sweet & Maxwell 1987), 14-24.

<sup>143</sup> See, for instance, Chinkin (n12) 862-865.

<sup>144</sup> Case C-322/88 *Grimaldi* [1989] ECR I-4407, para 18.

and the Commission influence each other ‘such that the result of each institution’s decisional processes are incorporated as an input into the decisional processes of the other’<sup>145</sup>. A general overview of the use of soft law in court is offered by Senden in her book on soft law, published in 2006.<sup>146</sup> The book offers an impressive analysis of soft law in the European Union, dealing with various issues from classifications to legal effects, and problems associated with the use of soft law. Senden focuses, in the chapter dedicated to the effects of soft law in a court of law, on several seminal judgments of the EU Courts, concluding that European soft law is used as an interpretation aid, voluntarily in the case of the CoJ, but mandatorily in the case of national courts.

With regards to the EU Courts, one empirical study in competition and State aid showed active judicial engagement with soft law instruments in an upwards trajectory, following the millennium. Stefan shows that competition and State aid soft law instruments are binding on the enacting institution because, by publishing guidelines, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules or else risk being found in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations, where appropriate.<sup>147</sup>

As far as environmental protection is concerned, another study contextualised in the debate on new governance, found that the role of courts has been transformed by the legal and political experimentation currently taking place. Drawing on three case studies covering the Water Framework Directive, the EU’s Chemicals Regulation REACH and the EU’s Sustainable Development Strategy, it was shown that soft law produced by different governance frameworks, although offering little by way of hard binding law, still conditions judicial decision making, and, at best, assists the functioning of the courts.<sup>148</sup>

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<sup>145</sup> Snyder (n57) 204.

<sup>146</sup> Senden (n49) 361-399.

<sup>147</sup> Case C-189/02 *Dansk Rørindustri* ECR I-05425, para 211.

<sup>148</sup> Emilia Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the EU* (Routledge 2015).

With regards to the effects that soft law can have on national authorities, it should be noted first that only negotiated soft law has judicially recognised binding legal effects for Member States, and these effects are connected by the Courts to a specific duty of cooperation provided for in the Treaty, such as Article 108 TFEU in the area of State aid.<sup>149</sup> While it has been argued that no general obligation to comply with soft law instruments could be drawn solely from Article 4(3) TEU, both in the EU<sup>150</sup> as well as in national literature,<sup>151</sup> the recent *Kotnik* case law prompts an updating of the analysis, as the Court has not been so unequivocal on this matter. It is now part of its established case-law that:

“the provisions of such acts of ‘soft law’ are, by virtue of the duty of sincere co-operation enshrined in Article 4(3) TEU, to be taken into due account by the Member States’ authorities, that duty cannot be understood as making those rules binding – not even *de facto* – on pain of eluding the legislative procedure set out in the TFEU”.<sup>152</sup>

It is clear from this proposition of the Court, that by virtue of the principle of sincere co-operation, soft law’s ‘soft’ legal obligation begins to harden, but not to the extent that it is either *de facto* or formally binding.<sup>153</sup> A sound and nuanced theory of soft law (and ECJ case law on the matter) is therefore needed to explain or even justify this strand of case law.

Arguments that national authorities should observe soft law on the basis of principles such as legitimate expectations or legal certainty, have so far been rejected by the Court. National procedural autonomy appears to prevail in this regard. In the *Pfleiderer* case, the Court admitted that soft law can produce effects on the practice of national authorities; nonetheless, such effects could not be given legal weight in judicial proceedings.<sup>154</sup> Furthermore, in *Expedia* the Court held that the national

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<sup>149</sup> C-311/94 *IJssel-Vliet Combinatie BV v Minister van Economische Zaken* [1996] ECRI-5023 para 211.

<sup>150</sup> Štefan (n1) 190.

<sup>151</sup> Sladič (n50) IV.

<sup>152</sup> Case C-525/14 *Commission v Czech Republic* ECR EU:C:2016:714, para 38.

<sup>153</sup> For a similar view see John T Lang, ‘Community Constitutional Law: Article 5 EEC Treaty’ (1990) 27 *Common Market Law Review* 645, 668-669.

<sup>154</sup> Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-05161, para 23.

authorities and national courts were not bound by the provisions of the Notice on agreements of minor importance that do not fall under the EU antitrust rules, and that they had complete discretion to take the thresholds mentioned therein into consideration when deciding on whether or not agreements between undertakings breached EU competition law.<sup>155</sup> The national authorities' disregard of the *de minimis* notice could interfere with principles such as legitimate expectations and legal certainty.<sup>156</sup> Such a conclusion accords importance to the principle of national procedural autonomy: national authorities cannot see their discretion limited by a soft law instrument exterior to them. However, this has serious consequences from the point of view of individual rights, as legitimate expectations and legal certainty appear to have variable content in the multi-layered system of EU competition law enforcement.<sup>157</sup>

With regards to the legal effect that soft law can have for national courts, in *Grimaldi* the ECJ urged national judges to 'take into consideration'<sup>158</sup> soft law whenever deciding on cases; however, no further explanation was offered regarding exactly what this statement entailed. Some explanations with regards to the legal effects of soft law have been brought in subsequent cases.<sup>159</sup> *Grimaldi* was considered to be 'reminiscent of *Von Colson*,'<sup>160</sup> which suggests that it introduces a duty of consistent interpretation in relation to soft law instruments. National courts would thus be under a duty to interpret national law in the light of the wording of soft law instruments issued at the European level. Conversely, it was argued that the reading of this judgment should be less strict, and that national courts are required to take soft law into consideration only when it helps to clarify the meaning of Community or national law.<sup>161</sup>

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<sup>155</sup> Case C-226/11 *Expedia Inc v Autorité de la concurrence and Others* [2011] EU:C:2012:795, para 31.

<sup>156</sup> *ibid* para 32.

<sup>157</sup> Oana Ștefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21 *Maastricht Journal of European and Comparative Law* 359.

<sup>158</sup> *Grimaldi* (n140) para 18.

<sup>159</sup> See Case C-207/01 *Altair Chimica v Commission* [2003] ECR I-8875, para 41; Case C-415/07 *Lodato Gennaro & C. SpA v Istituto nazionale della previdenza sociale* [2009] ECR I-02599, para 32; Joined Cases 253/78 and 1 to 3/79 *Procureur de la République and others v Bruno Giry and Guerlain SA and others* [1980] ECR 2327, para 13; Case 99/79 *Lancôme v Etos* [1980] ECR 2511, para 11.

<sup>160</sup> Anthony Arnall, 'The Legal Status of Recommendations' (1990) 15 *ELR* 318; Chalmers and others (n56) 388.

<sup>161</sup> See the debate in Senden (n49) 387–393 and 391.

Performing a longitudinal study on the *Grimaldi* jurisprudence, Korkea-aho shows that since the 1989 *Grimaldi* ruling, the ECJ has referred to *Grimaldi* only seven times. Whilst the ECJ has not reversed the precedent set by *Grimaldi*, nearly three decades of EU soft law making have eroded the foundations of the doctrine to the extent that the obligation has become heavily nuanced. First, to the extent that the soft law measure is issued by the EU institution and its development is foreseen in primary or secondary law, national courts can depart from the interpretation offered in the measure only if they can provide detailed and substantively valid reasons why it should not apply. Second, if the soft law instrument is free-standing, that is, it is not derived from primary or secondary law, or where non-binding guidance is given by actors other than the institutions, the national court has more leeway to decide whether or not to take non-binding guidance into account. The third noteworthy feature that emerges from the analysed jurisprudence is that Member States have become more proactive in challenging EU soft law.

#### **Section 4: DISTILLING A THEORY OF SOFT LAW - Soft law, positivism, and legal pluralism**

Distilling a theory of soft law depends essentially on the stand one takes with regards to the definition and the legal status of such instruments. As we have seen in Section 1, pursuant to the conventional positivist approach, law is defined in binary terms, so that norms are either legal norms or not law at all. In this definition, there is no room for soft law.<sup>162</sup> An alternative definition conceives law as a continuum with two opposite poles. One is composed of legal norms another of non-legal norms, with an ample space in between occupied by soft law.<sup>163</sup> This divide has also been noted by authors writing at the national level. For instance, in Slovenia, Verena Rošic Feguš broadly divided the theories of soft law into two opposing camps. One set of authors adheres to a more conventional concept of law according to which law properly so-called can be composed exclusively of binding legal norms (*lex perfecta*).<sup>164</sup> Soft law is accordingly

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<sup>162</sup> See Terpan (n37) 5.

<sup>163</sup> In particular *ibid*.

<sup>164</sup> See Rošic Feguš (n101) 5 (referring to the works of Kuiper, Van der Woude, Shelton).

not part of law, but belongs to the field of politics, or stands for the so-called programmatic norms. On the other hand, other authors work with a broader definition of soft law and assign it a status of tertiary legal norms in EU law.<sup>165</sup>

However, a third (or a middle) position can be identified as well. As noted by some authors, it is difficult to determine at the outset the individual impact of the hard or the soft element on policy development. In a judgment concerning the Stability and Growth Pact (SGP),<sup>166</sup> the CoJ held that the discretion of the Council was limited by recommendations issued by the European Commission in the framework of the system of multilateral surveillance, thus increasing the importance of SGP's soft dimension.<sup>167</sup> This judgment illustrates that soft law is not simply politics and that 'even where there is no immediate sanction other than peer pressure and the prospect of further decisions, soft law has practical and legal effects that cannot be bypassed'.<sup>168</sup>

Against such empirical background, it was pointed out that rather than establishing differences between hard and soft law, and finding the advantages and disadvantages of each, it would be more appropriate to consider the possibility of their complementary use, as confirmed by practice.<sup>169</sup> Since the literature identified different forms of coexistence of soft and hard law, it was deemed necessary to construct a theory of hybridity, dealing with the relationship between hard and soft law. Combining rationalist and constructivist accounts, Trubek, Cottrell and Nance put forward a theory explaining the 'coexistence and engagement of law and 'new' governance' (including soft law),<sup>170</sup> and 'to explore different ways of securing their fruitful interaction'.<sup>171</sup> The model was further refined by de Búrca and Scott, who identified several types of hybridity, showing how new governance (or soft law) can

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<sup>165</sup> *ibid* 6 (referring to the works of Prechal, Kapteyn, Mortelmans).

<sup>166</sup> Case C-27/04 *Commission v Council* [2004] ECR I-6649.

<sup>167</sup> Imelda Maher, 'Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion' (2004) 29 *European Law Review* 831, 838-840.

<sup>168</sup> *ibid* 841.

<sup>169</sup> Trubek & Trubek (n56) 361-362.

<sup>170</sup> Trubek, Cottrell & Nance (n47) 93.

<sup>171</sup> Gráinne de Búrca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism' De Búrca & Scott (n47) 6.

serve as a compliance/enforcement mechanism for traditional (hard) law, and vice versa.<sup>172</sup> Trubek and Trubek narrowed down the definition of hybridity, considered to be the ‘transformation of both law and governance, their integration in a single system in which the functioning of each element is necessary for the successful operation of the other’.<sup>173</sup> Conducting their study into the environment, Trubek and Trubek noted that by combining new governance tools and traditional community method mechanisms, the Water Framework Directive achieved results that were not possible under either system working alone.<sup>174</sup>

Hybridity occurs *ex ante*, as a conscious decision of the regulators, but also *ex post*, during the implementation process.<sup>175</sup> An example of consciously designed hybridity is the fiscal coordination system which draws on broad economic policy guidelines and multilateral surveillance, while relying on the hard law of the excessive deficit procedure.<sup>176</sup> *Ex post* hybridity is illustrated by the initiatives to combat discrimination at the EU level, through both the Race Directive<sup>177</sup> and Action Plan Against Discrimination.<sup>178</sup> While the Directive contained the requirement to pass national legislation to combat discrimination, the action plan established the necessary framework to exchange ideas between regulators on challenges and best practice. The two systems were conceived to function independently, but they became increasingly integrated during implementation.<sup>179</sup> In this context, research is needed in order to establish the way in which soft law is used in governance design: ‘the calibration of

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<sup>172</sup> *ibid* 6–10.

<sup>173</sup> David M Trubek and Louise G Trubek, ‘New Governance and Legal Regulation: Complementarity, Rivalry and Transformation’ (2007) 13 *Columbia Journal of European Law* 539, 543.

<sup>174</sup> *ibid* 557.

<sup>175</sup> *ibid* 549–550.

<sup>176</sup> Imelda Maher, ‘Economic Governance: Hybridity, Accountability and Control’ (2006) 13 *Columbia Journal of European Law* 679; Trubek, Cottrell & Nance (n47) 93. Bekker, S. (2014). EU coordination of welfare states after the crisis: further interconnecting soft and hard law. *International Review of Public Administration* 19(3): 296–307. doi: 10.1080/12294659.2014.966891.

<sup>177</sup> Council Directive (EC) 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22 (Race Directive).

<sup>178</sup> Commission, ‘Action plan against racism’ (Communication) COM (98) 01983 final.

<sup>179</sup> Trubek & Trubek (n56) 558–559.

different instruments and actors to deliver effective and legitimate forms of governance'.<sup>180</sup>

National accounts of soft law show nuanced views too. The French Conseil d'Etat embraces hybridity as well in its 2013 report on 'droit souple' with soft law intertwined with hard law in regulation. Hard law can provide for further soft law norms, or delegate certain issues to be dealt with through soft law; at the same time, soft law can in certain situations transform into hard law.<sup>181</sup> Similarly, Thibierge shows that presenting law as having either a hard or a soft texture offers only a limited perspective; conversely, the focus of the study should be on the various degrees of relationships between hard and soft law. These relationships can vary in terms of the function of the obligation written down in a certain norm, as well as in terms of the function of the sanctions provided for.<sup>182</sup> In his more recent research on environmental law and legislative studies, Määttä has introduced the idea of 'living law', the law as it is *de facto* understood and interpreted by those applying it. A wider perspective offered by the notion of 'the living law' enables a more nuanced understanding of soft law measures in legal decision-making.<sup>183</sup>

While the hybridity theory offers a good framework to describe the current EU regulatory landscape, it does little to solve a crucial drawback of EU soft law, namely its legitimacy deficit. At least from the point of view of input legitimacy,<sup>184</sup> soft law escapes the usual safeguards of democratic politics, which can be problematic from a rule of law perspective. In such context, accountability is crucial,<sup>185</sup> which brings to the forefront the question whether judicial intervention can remedy to a certain extent the lack in input legitimacy. The following section will review the literature assessing the

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<sup>180</sup> Kenneth Armstrong, 'The Character of EU Law and Governance: From 'Community Method' to New Modes of Governance' (2011) *Current Legal Problems* 1, 35.

<sup>181</sup> Conseil d'Etat (2013), *Le droit souple*, Etude annuelle, La documentation française, 72-73.

<sup>182</sup> Thibierge (n26).

<sup>183</sup> Tapio Määttä, 'Näkökulmia sääntelytarkkuuteen: Lainsäädäntölähtöisestä analyysistä elävään oikeuteen' in Jyrki Tala (ed) *Sääntelytarkkuuden ongelmia. Oikeuspoliittisen tutkimuslaitoksen tutkimuksia* (Helsinki 2010) 71.

<sup>184</sup> Scharpf, FW, *Governing in Europe* 1999 OUP Oxford.

<sup>185</sup> Thatcher M. and Stone Sweet, A., 'The Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25(1) *West European Politics* 1.

problems that soft law raises from a rule of law perspective. In line with the objectives of the SoLaR project, the following section will give an overview of research analysing the role that the Courts play/may play in fostering rule of law compliant soft law.

## **Section 5: SOFT LAW AND THE RULE OF LAW**

The Fullerian conception of EU law-making is described as ‘one that sees the function of law as the provision of stable normative expectations’, where legal rules are ‘prospective and stable, they apply equally to all and they are to be formulated independently of the circumstances in which they are applied’.<sup>186</sup> On a traditional ‘thick vs. thin’ reading of any understanding of the rule of law, this definition provides a set of eight procedural rules that will precede any legal system as a pre-condition to its functioning. If legality is understood by such procedural definition, it is easy to see how the development of soft law poses a threat to the rule of law principles. Indeed, Dawson categorises the objections to soft law into two groups, namely institutional and normative, and concludes by saying that any objection will not only be based on the potential threat soft law poses to the Community’s institutional balance, but also on the values and forms of law-making that soft law embodies. Nevertheless, Dawson acknowledges that the whole EU legal system, including the Community method, might raise important rule of law problems.<sup>187</sup> Acknowledging the caveat that sticking to traditional rule of law notions may not always be suitable for the EU, the following subsection reviews research that looks at soft law through a legitimacy lens.

### **A. Legitimacy**

One of the most important drawbacks of soft law is undoubtedly its legitimacy deficit. Although cheap, fast and flexible, the procedures for the adoption of soft law generally tend to circumvent the more legitimate but costly decision-making ways. Therefore, recourse to soft law might enhance the discretion of Community institutions to the

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<sup>186</sup> Mark Dawson, ‘Soft Law and the Rule of Law in the European Union: Revision or Redundancy?’ (2009) EUI Working Papers (RSCAS) 2009/24 <<https://ssrn.com/abstract=1415003>> accessed 2 August.

<sup>187</sup> *Ibid.*, 14.

detriment of Member State competences.<sup>188</sup> As early as 1968, the European Parliament warned about the dangers associated with the proliferation, by the Council, of acts not mentioned in the Treaty, notably the circumvention of decision-making formalities, regarding the consultation of the Parliament and the right of initiative of the Commission.<sup>189</sup> More recently, in its 2007 Resolution, the European Parliament took a very critical approach to soft-law. Accordingly, *‘the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality.’*<sup>190</sup> National authorities also expressed concerns regarding the high number of soft documents not mentioned in the Treaty. In its 1992 report, the French Conseil d’État condemned the profusion of Council decisions and resolutions, as well as of Commission communications.<sup>191</sup>

Also, albeit Parliament’s involvement in the decision making process increases through the intermediary of soft law measures such as inter-institutional agreements,<sup>192</sup> it was noted that its position is not necessarily strengthened, because its bargaining power remains the same: the outcome of the final negotiations on legislation can depart from the content of the inter-institutional agreement.<sup>193</sup> Even though the preparatory and informative soft law instruments fulfil an important function in the pre-legislative stage because it is through these means that the Parliament is informed and consulted on future legislation,<sup>194</sup> many other soft law instruments are concluded without parliamentary involvement. An example are the soft law instruments issued by the

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<sup>188</sup> Ibid., 201-203.

<sup>189</sup> Résolution du Parlement européen du 8 mai 1969, sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités adoptée à la suite du rapport fait au nom de la Commission juridique par M. Burger [1969] OJ C63/18.

<sup>190</sup> Resolution of the European Parliament ‘on the institutional and legal implications of the use of soft law instruments’ 2007/2028(INI), at 1.

<sup>191</sup> Conseil d’État, Rapport Public 1992, collection ‘Études et documents’, Documentation française 44, 1993, Paris, pp 22-23 quoted in Leclerc (n6) 163.

<sup>192</sup> Snyder (n140) 459.

<sup>193</sup> See the discussion in I. Eiselt and P. Slominski, ‘Sub-Constitutional Engineering: Negotiation, Content, and Legal Value of Interinstitutional Agreements in the EU’, *European Law Journal* 12, no.2 (2006): 209.

<sup>194</sup> Senden (n49) 483.

European Commission in competition law.<sup>195</sup> Thus, if we consider legality in the European Union in terms of the institutions that are charged with protecting, applying and enforcing the law, the development of soft law is an obvious challenge to the existing institutional balance of power. Yet, as Dawson suggests, the institutional objections to soft law, even if they are concerning, can partly be put down simply to ‘inter-institutional wrangling’, rather than a broader concern for the legitimacy of European law-making.<sup>196</sup> What matters is how they relate to normative considerations regarding the legitimacy of soft law measures, which have been considered in a number of studies.

These democratic legitimacy concerns have been highlighted in the academic literature. According to Van Dam, European soft law lacks democratic legitimacy as it does not follow from one of the legislative procedures involving the legislative bodies of the Union, namely the Parliament and the Council. European administrative soft law poses a problem for legal protection on a national and European level, it increases the problem of legitimacy in the European Union and it leads to legal insecurity. As possible remedies to the legitimacy deficit, van Dam suggests the publication of soft law instruments, the creation of a democratic decision-making process for soft law and a greater involvement of the Netherlands in the formation of soft law.<sup>197</sup> Two major studies have specifically examined soft law instruments against the standards of democratic legitimacy. In 2007, Kröger evaluated the democratic legitimacy of the OMC by extracting criteria from both liberal and deliberative theories of democracy, and summarizing them in the benchmarks of participation, representation, deliberation, and accountability.<sup>198</sup> The study examined the period of the OMC’s inclusion and implementation in France, Germany and at the European level and concluded that it did not fulfill the democratic standards. It was noted that there was a lack of formal participation rights, and access to those rights was undemocratic and

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<sup>195</sup> Hofmann (n137)172.

<sup>196</sup> Dawson, 5.

<sup>197</sup> Van Dam (n107).

<sup>198</sup> Sandra Kröger, ‘The End of Democracy as We Know it? The Legitimacy Deficits of Bureaucratic Social Policy Governance’ (2007) *Journal of European Integration*, 29(5), 565-582.

dependent on invitation. In practice, participation of various stakeholders' rights were even more limited<sup>199</sup>, resulting in uneven representation of actors involved in the inclusion and implementation processes. Indeed, the problem of stakeholder and expert participation in the decision-making process has been emphasised as being even more acute in the case of soft law instruments, 'since consultative procedures are less rigorously adopted and structured in relation to rules whose binding nature is uncertain'.<sup>200</sup> Accordingly, even if it is true that the Commission undertakes lengthy public consultation before publishing soft law, empirical research in the environmental sector shows that these consultations are not always systematic, and there is little information as to how they occur.<sup>201</sup> When it comes to representation, Kröger's study indicated that there was a prevalence of technocratic and bureaucratic forms of representation, as opposed to substantive political or functional ones. It was noted that the limited participation of actors was connected with a limited degree of transparency, where at both national and European level, there was a lack of a formal sanction mechanism or judicial control. The study concluded by noting that the discussion during OMC's inclusion and implementation processes generally took place behind closed doors, isolating public debate and scrutiny, and allowing leading representatives an escape from the need to take critical feedback into account.

Kröger's study, however, was re-evaluated in 2014 by Borrás and Radaelli, who summarized the existing empirical literature on soft law and democratic standards, by adopting very similar benchmarks derived from normative theories of democracy and narrowing them down to those concerning measuring the standards of *demoi*-cratic legitimacy, a notion implying an active role of domestic level democratic third-way channels into the European multi-level order.<sup>202</sup> Whereas the studies found evidence of different levels of stakeholder participation at national level, in the OMC areas

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<sup>199</sup> Kenneth Armstrong, 'How Open is the United Kingdom to the OMC process on social inclusion?' in Zeitlin, Pochet & Magnusson (n87) 287.

<sup>200</sup> Baldwin (n54) 284.

<sup>201</sup> J Scott, 'In Legal Limbo: Post-legislative Guidance as a Challenge for European Administrative Law' (2011) 48 CML Rev 329, 336.

<sup>202</sup> Susana Borrás & Claudio M. Radaelli, 'Open Method of Co-ordination for Demoi-cracy? Standards and Purposes' (2015) *Journal of European Public Policy* 22(1), 129-144.

focused on mutual learning,<sup>203</sup> such evidence of participation and deliberation was not found at the EU level.<sup>204</sup> This was taken to correspond with the notion of *demoi*-cratic legitimacy, where engagement and deliberation is much more relevant at the national level. What was noted was the importance of the participation of national stakeholders as a precondition for effectiveness and legitimacy of the OMC, in the light of research indicating that the mechanisms of consensus-building and peer-pressure were not well-organized and had limited acceptance in domestic political arenas.<sup>205</sup> Furthermore, research revealed the legitimacy problems specific to the area of macroeconomic governance following the financial crisis, and the relative perceptions of the costs and benefits of OMC processes of different European *demoi*. The increased conditionality of the emerging eurozone architecture, since 2010, aims to improve these structures, but will not diminish the differentiated views among European *demoi* as to who takes the pain.<sup>206</sup> In this context, the study concluded that any analysis of the OMC against democratic benchmarks will always have to be determined against the policy area and intended use of OMC.

In this context of problematic input legitimacy, the question that the SoLaR project seeks to ascertain is whether and how can Courts contribute to ensure accountability, hence foster rule of law compliant soft law. The views expressed in the literature concerning this matter are mixed, and will be dealt with in the next section.

## **B. Courts as watchdogs?**

The potential for Courts to foster rule of law compliant soft law has mixed reviews in the literature, with Senden arguing that the judicialization of soft law can ‘influence or co-determine the lawfulness of Community and national law and hence the rights and

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<sup>203</sup> S Borrás and A Eijraes, ‘The Legitimacy of New Modes of Governance in the EU: Studying Stakeholders’ (2011) *European Union Politics* 12(1): 107-26. A Harcourt, ‘Participatory gains and policy effectiveness: the Open Method of Co-ordination Information Society’ (2013) *Journal of Common Market Studies*, 1-17.

<sup>204</sup> E Radulova, ‘The OMC: an Opaque Method of Consideration or Deliberative Governance in Action?’ (2007) *Journal of European Integration*, 29(3): 363-80.

<sup>205</sup> D Hodson, *Governing the Euro Area in Good and Bad Times* (OUP 2011).

<sup>206</sup> I Begg, ‘Are Better Defined Rules Enough? An Assessment of the Post-Crisis Reforms and Governance of EMU’ (2013) *Transfer: European Review of Labour and Research* 19(1): 49-62.

obligations that ensue therefrom' and at the same time also 'contribute to broadening the scope of the Treaty and the Community's competences'.<sup>207</sup> In the same vein, it was argued that soft law was used by the Court to expand competences in the area of education<sup>208</sup> or of freedom of access to information,<sup>209</sup> while judicial review of competition soft law was found to contribute to 'a creeping supranationalisation of both *de facto* and *de jure* competences.'<sup>210</sup> This discussion on competences, while coupled with the previous analysis concerning legitimacy, might mean that the Court is fostering illegitimate ways of decision-making and 'backdoor legislation'.<sup>211</sup>

Conversely, research in competition and State aid shows how, through the process of judicialization, the EU Courts re-institutionalize, in an environment of constitutional pluralism, normative material lacking formal guarantees of legitimacy, while grounding it into principles that form part of the constitutional values common to the Member States.<sup>212</sup> The EU Court relies on a mechanism based on good administration principles such as legitimate expectations, legal certainty, and transparency, in order to recognize the legal effects of soft law. However, the grounds and the intensity of effects judicially recognized to soft law instruments vary in accordance with the level within which they are invoked – European or national - and this weakens individual rights.<sup>213</sup>

This later view can be challenged, if one considers the specificities of the sector and of the instruments analysed. Senden and Hancher also distinguish a specific type of EU Soft law, namely EU policy rules. These are general rules concerning the interpretation and application of existing EU law. The fact that they relate to existing EU law distinguishes and explains why a new legislative instrument is not considered

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<sup>207</sup> Ibid., 393--397.

<sup>208</sup> K. Lenaerts, 'Education in European Community Law after Maastricht', *Common Market Law Review* 3 (1994): 7, 9-10.

<sup>209</sup> I. Österdahl, 'The CoJ and Soft Law: Who's Afraid of the EU Fundamental Rights Charter?' in *Soft Law in Governance and Regulation: an Interdisciplinary Analysis*, ed. Mörth, 53.

<sup>210</sup> D. Lehmkühl, 'On Government, Governance and Judicial Review: The Case of European Competition Policy', *Journal of Public Policy* 28 (2008): 139, 157.

<sup>211</sup> The term was used in the context of English law by G. Ganz, *Quasi-Legislation* (London: Sweet & Maxwell, 1987), 14 & 24.

<sup>212</sup> Ștefan (n1) 239.

<sup>213</sup> Oana Ștefan, 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance' (2014) 21 *Maastricht Journal of European and Comparative Law* 359, 379.

necessary for this kind of rule. The fact that they relate to existing EU law also distinguishes them from other types of EU soft law. Policy rules do not have the same legal implications in competition law and State aid law. This is due to institutional differences relating to the type of the treaty provisions and the type of the policy rules concerned. The reliance principle plays an important part in determining the legal implications of policy rules. The State aid procedure is controlled by the Commission; third parties are hardly involved. The reliance principle plays an important part in order to protect the interests of third parties and national courts must take this into account. Moreover, State aid guidelines are mainly decisive. The Commission indicates how it will exercise its discretionary powers. These guidelines are binding on the Commission and on the Member States who agreed with them. They do not have direct effect, but raise legitimate expectations that the Commission and the Member States will comply with them. The European courts assess their compatibility with the Treaty and their consistent application.

In competition proceedings, Member States play an insignificant part and undertakings are directly involved. Given the fact that undertakings may have an impact on the procedure, there is less need to protect legitimate expectations raised by Commission communications. Moreover, in the field of competition law, policy rules are mainly interpretative and not really absolute. An increased decentralization of competition law enforcement might change this, but this will not have an impact on the importance of the principle of reliance because the Commission only limits its own powers (it considers itself bound by the statements in its Communications) but does not impose obligations on Member States, national courts or national authorities (these are not bound by the Commission's Communications<sup>214</sup>)<sup>215</sup>.

Leaving aside the specificity of competition law, in other sectors, authors have also criticized the reluctance of the EU Courts to give full legal weight to certain effects that soft law may produce. In relation to environmental protection, Scott commends the

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<sup>214</sup> As recently confirmed by the Court of Justice in *Expedia*.

<sup>215</sup> L. Senden en L. Hancher, 'De juridische werking van communautaire beleidsregels inzake mededinging en staatssteun', NTER 2000, 96-104.

fact that the EU court looks beyond the lack of legally binding force and admits that soft law can produce certain legal effects. However, she considers that the court does not go far enough, and disregards many of the legal effects of soft law, thus, often, depriving such instruments of judicial scrutiny.<sup>216</sup>

In light of these conflicting views with regards to the role of Courts to foster rule of law compliant soft law, the relationship between soft law and adjudication needs to be explored in more detail. The literature has either expressed strong views against the appropriateness of such a link or constructed theoretical frameworks that could help understand (and promote) the use of soft law by Courts. The next section will look at these studies in more detail.

### **C. Soft law-adjudication**

With regards to the relationship between soft law and adjudication, a theory in this regard will essentially depend on the definition of law that one adopts. According to a positivist view, Chinkin argued that the informative and the educative role of soft law made it suitable for non-judicial forms of dispute settlement. Even though she acknowledged the instances where courts took soft law instruments into consideration, Chinkin stood by the opinion that soft law was unsuitable for adjudication and that court enforcement of soft law instruments might come at the expense of legal certainty.<sup>217</sup> More forcefully, Klabbers points out that use of soft law instruments in court is undesirable.<sup>218</sup> He argues that whenever dealing with soft law, the domestic and international courts try to ‘recast it into the more accepted sources of international law: treaties and custom’<sup>219</sup> and that soft law becomes ‘completely indistinguishable from hard law’ whenever applied, complied with or violated.<sup>220</sup> However, other studies claim that in a ‘new governance’ context, the role of the courts needs to be redefined:

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<sup>216</sup> Scott, ‘In Legal Limbo: Post-legislative Guidance’, 329, 342-343.

<sup>217</sup> Chinkin (n12) 862-865.

<sup>218</sup> See Klabbers (n17; n98)

<sup>219</sup> Klabbers ‘The Redundancy of Soft Law’ (1998) 65 *Nordic Journal of International Law* (1998) 167, 174.

<sup>220</sup> *ibid* 177.

courts are not enforcers of legal rules but rather ‘a source of communicating ideas and experience [...] without being specifically prescriptive in relation to any particular form’.<sup>221</sup>

The most important criticism of the use of soft law in court is that it can judicially transform soft law into hard law. For some authors, this transformation can only occur in specific circumstances. As pointed out by Wellens and Borchardt, it is not enough that the soft law argument figures among the *obiter dicta* of the judgment: it must be its *ratio decidendi* in order to become hard by judicial intervention.<sup>222</sup> However, other authors argue that judicial transformation could occur solely by the positive invocation of soft law, i.e. the use of soft law in litigation by individuals or by challenging a soft law instrument via Article 263 TFEU.<sup>223</sup> By publishing its soft law, the Commission renders it more effective but also exposes it to the risk of being challenged, or relied on, in court. Snyder pointed out that the court might decide that ‘the putatively soft law has hard legal consequences’ which would blur the distinction between soft and hard law.<sup>224</sup> In the same vein, Hofmann argued that by recognizing legal effects through the operation of principles such as legitimate expectations or legal certainty, the EU courts endow the competition guidelines of the Commission with certain hard features.<sup>225</sup> Finally, Österdahl pointed out that the repeated references to soft law instruments by the Advocates General and by both courts of the EU (especially the CoJ) might contribute to their ‘hardening’, even if they are qualified as not legally binding.<sup>226</sup>

Snyder suggests that soft law can be transformed, also, by the interplay between the Commission and the CoJ. European soft law is often put into effect through interaction between the Community institutions. While analysing the consequences of the *Deufil*

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<sup>221</sup> Joanne Scott and Susan Sturm, ‘Courts as Catalysts: Rethinking the Judicial Role in New Governance’ (2007) 13 *Columbia Journal of European Law* 565, 572.

<sup>222</sup> Wellens & Borchardt (n15) 291.

<sup>223</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47.

<sup>224</sup> Snyder (n57) 65.

<sup>225</sup> Hofmann (n141) 165.

<sup>226</sup> Inger Österdahl, ‘The ECJ and Soft Law: Who's Afraid of the EU Fundamental Rights Charter?’ in Mörth (n10) 51.

judgment,<sup>227</sup> Snyder noted that, in dealing with soft law, the activity of the court and that of the Commission have an effect on each other ‘such that the result of each institution’s decisional processes are incorporated as an input into the decisional processes of the other’.<sup>228</sup> The mechanism is, according to Snyder, as follows. A soft law instrument issued by the Commission is, at a later stage, taken into consideration by the EU courts in a judgment. Next, the Commission uses the court’s decision, while elaborating and generalising the judicial language in order to justify the incorporation of the soft law instrument into hard law. Hence, Snyder argues, ‘soft law, based partly on a court judgment, is transformed into hard law by administrative decision’.<sup>229</sup>

However, the relationship between adjudication and governance is not always viewed as contradictory and more nuanced views were put forward recently by authors who undertook empirical research of certain sectors. As pointed out by Armstrong, adjudication pertains to more than simply applying the rules and often involves complex assessments of interests and values that could ultimately encourage litigants to rely on new forms of governance and cooperation.<sup>230</sup> Indeed, as argued by Scott and Sturm:

[T]he relation between courts and governance is dynamic and reciprocal: both draw upon the practice of governance in their construction of the criteria they apply to their judgments, and provide an incentive structure for participation, transparency, principled decision-making and accountability which in turn shapes, directly and indirectly, the political and deliberative process.<sup>231</sup>

Courts could thus shape the necessary link between the realm of governance and that of command-and-control, by inculcating within governance structures rule of law values and principles.<sup>232</sup> It follows that courts could actively influence the deliberation processes, by determining the standards for review of soft law and encouraging the most principled approaches towards soft law. In this scenario, soft law would need to

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<sup>227</sup> Case 310/85 *Deufil GmbH & Co. KG v Commission of the European Communities* [1987] ECR 901.

<sup>228</sup> Snyder (n140) 204.

<sup>229</sup> *ibid* 216.

<sup>230</sup> Armstrong (n180) 27.

<sup>231</sup> Scott & Sturm (n221) 567.

<sup>232</sup> *ibid*.

be treated by the EU courts as regulatory instruments in their own right, not as stepping stones towards legislation, and legal effects would necessarily be recognized, without any judicial transformation into hard law being required.

Building on Scott and Sturm's model, Hervey concluded that the relationship between courts and governance could be represented along a continuum ranging from 'mutual ignorance; through separation, either with hierarchy, or in parallel; to hybrid forms of mutual transformation'.<sup>233</sup> She argues that ignorance of new forms of governance should be the norm from a traditional legal perspective. The middle position on the continuum is represented by a scenario whereby adjudication and governance have a parallel or a hierarchical relationship. Courts can reject the logics of governance if they are considered contrary to the hierarchically superior legal requirements. On the other hand, courts can endorse a 'new governance' position if it is the illustration of principles laid down by traditional law. Finally, the extreme position is represented by hybrid forms of mutual transformation, whereby the interpretation given by the courts to legal instruments becomes 'embedded in the context and experience of "new governance", bargaining or informal settlement processes'.<sup>234</sup>

Hervey conducted her study in the social welfare sector and found evidence for the first and the second types of interaction. She did not find many cases to substantiate the third type, mainly because of the relative novelty of new governance methods in the particular field of research. In fact, also other studies showed a limited impact of the OMC on the case law. In a study on the effects of Lisbon Strategy on European law, Smismans discovered that while the ideational and organizational components of the strategy had an effect on regulatory output, they had a very modest impact on the case law.<sup>235</sup> A more optimistic perspective on the impact of soft law on adjudication is illustrated by Korkea-aho, who looked at the implementation of the Water Framework Directive through soft mechanisms based on networks and consensual enforcement.

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<sup>233</sup> Tamara Hervey, 'Adjudicating in the Shadow of Informal Settlement?: The Court of Justice of the European Union, 'New Governance' and Social Welfare' (2010) 63 *Current Legal Problems* 63 92, 138.

<sup>234</sup> *ibid* 144.

<sup>235</sup> Stijn Smismans, 'From Harmonization to Co-Ordination? EU Law in the Lisbon Governance Architecture' (2010) 18 *Journal of European Public Policy* 504.

Empirical evidence showed that soft enforcement mechanisms might streamline legal actions, by offering the information and the administrative resources necessary in order to lead effective infringement proceedings. Furthermore, managing implementation through networks reduces case loads, as problems are solved by participants, without judicial intervention.<sup>236</sup> Soft law may also enhance the legitimacy of governing and, ultimately, adjudication. Contextualising her argument to the Water Framework Directive, Korkea-aho shows how soft law is needed to both develop and implement framework directives. This kind of implementing soft law, which is here called administrative reasoning embodies the work taken up by multiple actors in the form of soft law guidance. To unleash the full (legitimising) potential of soft law, its use by the courts, however, requires clarification of the unclear legal authority of soft law.<sup>237</sup>

However, clear hybrid interactions between adjudication and soft law have been found in the competition and State aid sectors.<sup>238</sup> The court admits legally binding effects of soft law on the European Commission, on the basis of a mechanism based on the general principles of law (such as legitimate expectations, legal certainty, and transparency).<sup>239</sup> Stefan notes that the argumentation of the court, based on legal principles, is inserted into new soft law instruments issued at the Commission level,<sup>240</sup> which is then reflected in new judgments of the EU courts,<sup>241</sup> completing a kind of ‘virtuous circle’.<sup>242</sup> However, the CJEU is reluctant to apply the same principle-based formula when assessing the effects that EU soft law may produce at the national level,

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<sup>236</sup> Emilia Korkea-aho, ‘Watering Down the Court of Justice? The Dynamics Between Network Implementation and Article 258 TFEU Litigation’ (2014) 20 *European Law Journal* 649.

<sup>237</sup> *ibid.* Emilia Korkea-aho, ‘Legal Interpretation of EU Framework Directives: A Soft Law Approach’ (2015) 40 *European Law Review* 70.

<sup>238</sup> Stefan (n1) 219-227.

<sup>239</sup> Stefan (n1) 229 et seq.

<sup>240</sup> For example: Guidelines on the method of setting fines imposed pursuant to Article 23 (2) (a) of Regulation No 1/2003 [2006] OJ C210/2, para. 3; Commission notice on the determination of the applicable rules for the assessment of unlawful State aid [2002] OJ C119/22.

<sup>241</sup> See Case T-15/02 *BASF AG v Commission of the European Communities* [2006] ECR II-497, para 250 on the guidelines on fines; see Case T-357/02 *Freistaat Sachsen and Land Sachsen-Anhalt v European Commission* [2007] ECR II-1261, para118 on the notice on unlawful state aid.

<sup>242</sup> Alec S Sweet, ‘Judicialization and the Construction of Governance’ (1999) 31 *Comparative Political Studies* 158.

thus obstructing some of the functions that such instruments can play in the multilayered system of enforcement of EU competition policy.

## **Conclusions**

One important take away that emerges from the SoLaR literature review is that variety of soft law instruments is potentially matched by the variety of theoretical perspectives on soft law, new governance, and the relationship with adjudication. For the purposes of our project, the SoLaR team will embrace a plural, hybrid understanding of the law, whereas both soft and hard instruments can be combined in various ways in the process of European integration. Given its spread in European governance, soft law can not be ignored by individuals, administrations, or courts. The SoLaR project aims at studying this reality, and at adding to these theoretical perspectives empirical grounding, following detailed analysis of the national application of EU soft law. A review of the literature in this regard will be undertaken in our second SoLaR Working Paper.