Soft Law in the European Union - The Changing Nature of EU Law

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ABSTRACT - *This article is based on the assumption that there is a continuum running from non-legal positions to legally binding and judicially controlled commitments with, in between these two opposite types of norms, commitments that can be described as soft law. It aims at defining soft law in international relations in order to provide a mapping of EU law on the basis of the soft law / hard law divide. It helps categorize EU competences and public policies, and see how they fit with the distinction between two kinds of processes: legalization (transformation of non-legal norms into soft or hard law) and delegalization (transformation of hard law norms into soft law and evolution from hard to soft law).*

I. Introduction

The European Union (EU) is often presented as the most advanced form of regional integration in the world. Scholars have long stressed the importance of law in the integration process [1] and differentiated EU law from international law, echoing the legal reasoning developed by the European Court of Justice (ECJ) in its landmark rulings of the early 1960s[2]. In their view, EU law, by imposing obligations and conferring rights both on individuals and Member States, constitutes an autonomous legal order distinct from international law and limiting the sovereignty of the Member States. Through key doctrines such as direct effect and primacy, the Court has exerted influence on the integration process and set the basis for the development of a European constitutionalism. The European treaties, considered as 'the Constitutional Charter of the European Communities'[3], are deemed to play the same role in the European Union as a constitution does in a state. The idea of a European

The author would like to thank Sabine Saurugger for reading this article so carefully and exchanging ideas on the evolution of EU norms, Anna Jeannesson for the useful corrections she brought to the paper, Camille Brugier for helping me gathering the 'soft law' literature.

[1] M. Cappelletti, M. Seccombe, J. Weiler, *Integration Through Law: Methods, Tools and Institutions, v.1: Europe and the American Federal Experience* (Walter de Gruyter & Co, 1986).
[2] Case 26/62, Van Gend en Loos / Administratie der Belastingen [1963] ECR 1 ; Case 6/64, Costa v Enel [1964] ECR 1195.
[3] Case 294/83, Les Verts / Parliament [1986] ECR 1339.

constitutionalisation has spread through EU scholarship in close relation with the ECJ's case law. Law, as both the object and the instrument of integration, has helped the EU transform into a supranational polity.

Thanks to the constitutional and law-making capacity displayed by the ECJ, the political system of the European Union has been 'judicialized', meaning that judicial law-making has affected 'the strategic behaviour of non-judicial agents of governance'.[4] Judicialization has become a core element of the so-called 'Community method', which is also characterized by a prominent role for the European Commission (initiative and implementation) and the European Parliament (co-decision), as well as qualified majority voting in the Council.

At the same time, however, several policy areas have developed, in addition to the traditional Community method, through procedures that do not include judicial control by the European Court of Justice. The foreign and security policy has been working on an intergovernmental basis since the early 1970s. Plus, since the Maastricht treaty, different forms of coordination have taken place in fields such as social and economic policy, employment, environment, education and research. The Open Method of Coordination (OMC) has become a central feature among these new forms of soft governance.[5] Non-judicialized policy areas have challenged the traditional ideals of EU law, suggesting that soft norms and coordination may provide a viable alternative to hard norms and the Community method.

The purpose of this article is twofold. First, it aims at identifying those EU norms belonging to the category of soft law. This can only be done by using a clear definition distinguishing soft law from both hard law and non-legal norms. Secondly, this paper tries to evaluate the importance of these soft norms in the European integration process. The focus is on the EU level only: very little attention is paid to the impact of these rules at the domestic level. As for the methodology, this paper uses secondary literature in order to propose a mapping of EU policy areas and explain how EU law has transformed over the years[6]. The objective is to look at the existing literature on EU public policies and characterize these policies along the soft law / hard law divide with a view to establishing the respective

[4] A. Stone Sweet, 'The European Court of Justice and the judicialization of EU Governance?', (2010) *Living Reviews in European Governance*, available at www.livingreviews, accessed 6 March.
[5] B. Eberlein and D. Kerwer, 'Theorizing the New Modes of European Union Governance', (2002) 6 *European Integration Online Papers* 5 accessed 10 March 2013.
[6] On the transformation of EU law: P. Craig and G. De Burca (eds), *The Evolution of EU Law* (Oxford University Press, 1999); M. Dawson, *New Governance and the Transformation of EU Law, Coordinating EU Social Law and Policy* (Cambridge University Press, 2011).

proportion of soft and hard rules in EU law. This research should only be a first step, to be followed by further studies based on a quantitative as well as qualitative analysis of EU secondary legislation.

The discussion about EU soft law is related to a larger debate on the 'normalization' of the European Union. There is a wide consensus among scholars working in EU studies that the Union cannot be considered as a traditional international organization. Three main features are emphasized to distinguish the EU from other organizations: the scale of the competences conferred to the EU, the supranational dimension of the Community method, and the impact of law in European integration ('integration through law'). Soft governance and the use of soft law do not participate in this characterization of the European Union as a unique model of regional integration. On the contrary, it is widely acknowledged that EU law resembles state law, due to the principles of supremacy and direct effect as well as a sophisticated judicial architecture. EU law is different from the kind of law that usually applies in international relations. Being in close neighbourhood with state law, it is part of what most legal theorists would call the archetypal kind of law in modern societies.[7] By contrast, international soft law would rather be considered as a primitive kind of law[8] –or as not being law at all. If we assume that soft law in the EU is not intrinsically different from soft law in the international realm,[9] then it can be argued that the more the EU uses soft law rules, the more it resembles a traditional intergovernmental organization. To say it differently, evolutions such as the Common Foreign and Security Policy (CFSP), the OMC as well as other forms of coordination, because they heavily rely upon soft law instruments, participate in what can be called a normalization process (the transformation of the EU into a 'traditional' organisation). Moving from hard law (state-like law) to soft law (primitive law) would entail an evolution from a federal-type organization to a more intergovernmental one. Conversely, if soft law remains an exception whereas hard law still is the rule, or if soft law appears to be no more than a transition towards harder kinds of rules, this means that the European Union has not entered into a phase of normalization, and is still a federal-type organization.

[7] See for instance: N. Mac Cormick and O. Weinberger, *An Institutional Theory of Law, New Approaches of Legal Positism*, (Kluwer, 1992).
[8] 'Primitive law' is a concept used by Kelsen to depict those forms of law, which are not proper positive law. See H. Kelsen, 'The Law as a Specific Social Technique', (1941) 9 *The University of Chicago Law Review* 1 at 97.
[9] F. Terpan, *Does EU Soft Differ from International Soft Law? - Using Soft Law in a Supranational System of Governance - An Agenda for Research*, Paper presented at the 53rd International Studies Association Conference, San Diego, 2012.

The mere existence of soft law is a controversial issue.[10] Based on the traditional theory of legal acts, legal positivists usually say that law is either hard or not law at all, rejecting the mere idea of soft law. They argue that extending the frontiers of international law constitutes an artful move to accommodate an ever-growing legal scholarship.[11] On the contrary, this article is based on the assumption that there is a continuum running from non-legal positions to legally binding and judicially controlled commitments with, in between these two opposite types of norms, commitments that can be described as soft law. The second section is devoted to defining soft law as an intermediary category in this norms continuum. The third section examines how EU norms fit with this definition, while the fourth evaluates the place of soft law within the whole spectrum of EU norms and its impact on EU law.

II. Defining Soft Law in International Relations

Soft law is not a clear-cut and uncontested category. This is not surprising, given that soft law, as a category of norms, is a doctrinal creation, which has no ground in positive law. Art. 38(1) of the ICJ Statute makes no reference to soft law as a possible source of international law. Art. 288 of the Treaty on the Functioning of the European Union does not mention soft law as a type of EU secondary legislation. Some would say that soft law is a useless and misleading concept that blurs the distinction between legal norms and politics instead of clarifying the nature and impact of law. I would rather argue that it is an abstraction that helps encapsulate the complexity of the European legal order while placing law in the wider social and political context. Yet, the difficulty with soft law is the very fluidity of the notion. Paradoxically, soft law is an oft-used concept, which is still given very different meanings as no consensus has emerged in scholarship.

In order to identify soft law in the specific context of the European Union, we need to have a clear view of what soft law is made of, where it starts and where it ends. Drawing on existing attempts at defining soft law in international relations, I will propose a typology of soft law norms that will serve as a framework for a classification of EU norms.

[10] D. Thürer, 'Soft Law', in R. Bernhardt (ed), *Encyclopedia of Public International Law*, (Elsevier, 2000) at 452; L. Blutman, 'In the Trap of a Legal Metaphor: International Soft Law', (2010) 59 *International & Comparative Law Quarterly* 3: 605–624.

[11] J. d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', (2008) 19 *European Journal of International Law* 5: 1075–1093.

A. Three Meanings of Soft Law in the Doctrinal Debate

Soft law conveys different meanings depending on whether you situate soft norms in the category of binding or non-binding rules (see Table 1). Three possible meanings arise from the existing literature: #1 soft law is limited to non-binding norms with legal relevance; #2 soft law is limited to binding norms with a soft dimension; #3 soft law combines #1 and #2.

Table 1: Three ways of understanding Soft Law

#1: Non-binding norms with legal relevance

Norms		
Binding norms	Non-binding norms	
Binding norms	Non-binding norms with legal relevance	Non-binding norms without any legal relevance
Hard law	Soft law	Non legal norms

#2: Binding norms with a soft dimension

Norms		
Binding Norms		Non-binding norms
Binding norms	Binding norms with a soft dimension	Non-binding norms
Hard law	Soft law	Non legal norms

#3: Binding norms with a soft dimension + non-binding norms having legal relevance

Norms			
Binding Norms		Non-binding norms	
Binding norms	Binding norms with a soft dimension	Non-binding norms having legal relevance	Non-binding norms without any legal relevance
Hard law	Soft law		Non legal norms

A first way of examining soft law (*#1 in Table 1*) limits the definition to situations where no legal commitment is involved.[12] This is what is done, at least implicitly, by a first group of scholars who associate soft law with non-treaty agreements.[13] This approach is not satisfying for two main reasons. First, treaties sometimes contain provisions that are not binding and/or are not subject to legal control, and therefore cannot be considered hard law. Secondly, hard law is not limited to treaty agreements but also encompasses international organizations' unilateral decisions as well as judicial rulings. A second group of scholars define soft law as « international norms that are deliberately non-binding in character but still have legal relevance ».[14] Soft law may not be law in the full sense of the term (hard law), but it is law, albeit in a rather incomplete form. 'Having legal relevance' means that norms: 1°) can be used by a Court to interpret another rule, 2°) are framed in a form that resemble hard law norms, or 3°) can have the same impact as a hard law norm. Based on this assumption, legality expands to norms that are not binding.

A second understanding of soft law (*#2 in Table 1*), contrary to the first one, equals soft law with those legal commitments that have a soft dimension (the unspecific provisions of a treaty, general objectives, commitments that are only optional…). No norm can be named law if it is not of a binding nature. Those norms that do not embody a legal obligation but are shaped in a way that is close to legally binding norms are kept outside the category of soft law. Legal positivists would characterize them as merely political norms.

[12] R. L. Williamson Jr., 'Hard Law, Soft Law, and Non-Law in Multilateral Arms Control: Some Compliance Hypotheses', (2003) 4 *Chicago Journal of International Law* 1: 59–82.
[13] H. Hillgenberg, 'A Fresh Look at Soft Law', (1999) 10 *European Journal of International Law* 3: 499-515.
[14] J. B. Skjærseth, O. S. Stokke and J. Wettestad, 'Soft Law, Hard Law, and Effective Implementation of International Environmental Norms', (2006) 6 *Global Environmental Politics* 3: 104–120.

A third way to look at soft law (*#3 in Table 1*) is to combine #1 and #2, and consider that soft law can cover both legally binding and non-legally binding norms. This paper is based on this understanding of soft law. On the one hand, the fact that norms have 'legal relevance' is sufficient to place them on the 'legal' side of the norms continuum, in spite of their non-binding character. On the other hand, legal commitments do not necessarily reach the level of legality that is required to be seen as hard law. This duality in the definition of soft law, sometimes seen as a problem,[15] is considered in this paper as an advantage in that it helps describe with precision the different ways of adopting and enforcing norms in the European Union. The first and second definitions oversimplify the current situation by placing soft law on one side of a dichotomy: either it is equalled to non-legal norms (#1) or it is presented as proper law (#2). Rejecting this alternative, the third definition is based on the assumption that EU norms can be described more accurately, and more soundly analysed, by using a definition of soft comprising both legally binding and non-legally binding norms. Thus, in order to establish soft law as an autonomous category of norms, we must clarify how soft law differentiates from both non-legal norms and hard law.

B. The Emergence of Soft Law as an Autonomous Category of Norms

1. The Distinction between Soft and Hard Law

The soft law/hard law divide has drawn considerable interest among scholars since the 1990s.[16] In a special issue of *International Organization* dedicated to legalization,[17] Abbott, Keohane, Moravcsik, Slaughter and Snidal characterize legal norms as having three components: obligation, precision and delegation.[18] Obligation means that the norm contains

[15] K. Raustiala, 'Form and Substance in International Agreements', (2005) 99 *American Journal of International Law* 3: 581-614.

[16] The notion of soft law is much older. The paternity of the concept is often attributed to Lord Mc Nair, even though he did not use explicitily the expression 'soft law'. See for example: R. J. Dupuy, 'Declaratory Law and Programmatory Law: From Revolutionary Custom to « Soft Law » ', in R. Akkerman *et al*. (eds), *Declarations of Principles. A Quest for Universal Peace*, (Sijthoff, 1977).

[17] On legalization, see also: J. Goldstein, M. Kahler, R. O. Keohane and A. M. Slaughter (eds), *Legalization and World Politics* (MIT Press, 2001); J. Goldstein, M. Kahler, R. O. Keohane and A. M. Slaughter, 'Introduction: Legalization and World Politics', (2001) 55 *International Organization* 3: 385-399; L. Bélanger and K. Fontaine-Skronski, 'Legalization in International Relations: A Conceptual Analysis', (2012) 51 *Social Science Information sur les sciences sociales*, 2: 238-262. On 'juridification', see: L. C. Blichner and A. Molander, 'Mapping Juridification', (2008) 14 *European Law Journal* 1: 36-54.

[18] K. W. Abbott, R. O. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal, 'The Concept of Legalization', (2000) 54 *International Organization*, 3:401-419. See also in the same issue: K. W. Abbott and D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 3: 421-456.

an injunction to act in a specific manner, or to restrain from acting in a specific manner. Precision refers to the content of the obligation, high precision meaning that rules unambiguously describe the conduct they require, authorize or proscribe. Finally, delegation alludes to the granting of authority to third parties in order to implement, interpret and apply rules, and to resolve disputes. According to Abbott and al., if only one of these components is missing, the norm might be a legal one but cannot be considered as hard law. Their reasoning is based on the idea that soft law does not combine the different elements that usually define hard law.

The criteria I use to distinguish soft law from hard law draws on Abbott and al's, with two differences: I do not use precision as a distinctive criterion and opt for enforcement instead of delegation. Thus, I assume that the distinction between hard and soft law depends not only on the existence of an obligation but also on the way the obligation is enforced. This does not mean that precision has no relevance, but that it is a quality that helps to determine the existence and intensity of an obligation. Thus precision can be worthy but only as a secondary feature closely tied with –or integrated into- the obligation criterion. Enforcement takes precedence over delegation because the former puts the emphasis on the whole range of mechanisms that can be used to ensure that actors fulfil obligations or achieve the assigned goals (delegation to a third party but also procedures and instruments such as guidelines, standards, instructions) whereas the latter seems very much focused on the authorities designed to implement agreements but also on the instruments that are used to ensure compliance. Enforcement goes from monitoring to more coercive mechanisms including judicial control and sanctions.

Two cumulative elements give birth to an obligation: its source and its content. The softness of the obligation derives -alternatively or cumulatively- from the softness of the source (*soft instrumentum*) and the softness of what the instrument provides for, i.e. its content (*soft negotium*).[19] Conversely, an obligation is hard when both the source and the content are hard.

When rules are enshrined in a source other than a formal treaty or a binding unilateral act, or when they have not been legalized by a jurisdiction, there is a presumption that these rules do not create clear legal obligations. But sources such as treaties, binding unilateral acts,

[19] J. D'Aspremont, *op. cit.*, 1081, note 11 *supra*.

customary law or judicial decisions, which clearly seem to be legal, may also contain soft law norms in those cases when the norms are imprecise. Either the rule is clear and leaves no room for manoeuver, or it is vague and offers a variety of possible interpretations. The assumption, here is that norms, which are worked out in detail, give birth to stronger obligations than loose, ill-defined, imprecise norms. In the same vein, we can say that the obligation to achieve a particular result is stronger than a best effort obligation, or that a norm containing a principle is less mandatory than a norm containing a right.

Though the source and content of a norm help us distinguish between hard and soft obligations, the hard and soft law divide also depends on the way the obligation is enforced. Here, I will discriminate between hard enforcement, soft enforcement and the absence of any enforcement mechanism. Hard enforcement relates to those situations where rules are submitted to judicial control or to a very constraining form of non-judicial control (in the case of an international organization this would materialize in a binding decision taken by a supranational institution). The World Trade Organization (WTO) is a good case-in-point, with its implementation, monitoring and dispute settlement mechanisms.

Soft enforcement is about procedures aimed at ensuring compliance without necessarily resorting to coercion or constraint. This is the case for the bulk of international treaties, where parties are not obliged to submit disputes to the jurisdiction of the International Court of Justice or any other Court. Treaties such as human rights agreements are implemented by the parties under the 'soft' surveillance and monitoring of bodies such as the human rights committee and other specialized committees. Finally, the absence of enforcement mechanism refers to situations where compliance only depends on the actors' political will. This was the case for the General Agreement on Tariffs and Trade, before it was transformed into the WTO.[20]

These two criteria -obligation and enforcement- allow us to construct soft law as an autonomous category of norms. Indeed, norms are considered soft in opposition to hard law when at least one of the two elements is not hard. If none of the two elements is present, in

[20] F. M. Abbott, 'The Intersection of Law and Trade in the WTO System: Economics and the Transition to a Hard Law System', in D. Orden and D. Roberts (eds), *Understanding Technical Barriers to Agricultural Trade* (Minn.: International Agricultural Trade Research Consortium, 1997) at 33.

other words if there is no obligation and no enforcement at all, the norm does not resort to soft law but is mere politics. Does this approach contradict Kelsen's definition of law as a specific social technique consisting in 'the establishment of a coercive order by means of which a community monopoly is constituted for applying the measures of coercion decreed by the order'?[21] I would rather say that it takes this definition as an ideal-type, which suffers from two kinds of limitations: first, when the obligation is not clearly established; second, when measures of coercion aiming at ensuring compliance with law are lacking/limited. Kelsen himself, while arguing in favour of a clear legal order backed up with efficient coercion means, took into account situations that did not fit with the ideal-type, especially when he depicted international public law as 'primitive law'.[22]

2. The distinction between Soft law and Non legal norms

Soft law can be distinguished from non-legal norms[23] by using the same criteria that help to draw a line between soft and hard law. For a norm to be considered as soft law, there must be some kind of obligation and/or enforcement mechanism.

As regards obligation, the source and content of the norm help separate soft law from non-legal norms such as religious rules or morality. Soft law norms often look like hard law norms. They are quasi-legal because they have been given a form that clearly resembles hard law. They are 'law-like promises or statements that fall short of hard law'.[24] For instance, a memorandum of understanding (MoU) such as the 1972 MoU between the USA and the USSR relating to the Anti-Ballistic Missile treaty, may create grounds for a legal obligation, but cannot be assimilated to a formal treaty. The content of the norm shall also 'interpret or inform our understanding of legally binding rules or represent promises that in turn create expectations about future conduct'.[25] In other words soft norms have two different functions that separate them from non-legal ones: they complement hard law by giving interpretations or additional information, and exert influence on actors -as hard norms do- but without resorting to judicial coercion. The abovementioned MoU between the USA and the USSR,

[21] H. Kelsen, 'The Law as a Specific Social Technique', (1941) 9 *The University of Chicago Law Review* 1: 75-97.
[22] Ibid. 97.
[23] For an approach questioning the distinction between legal and non-legal norms: M. Finnemore, 'Are Legal Norms Distinctive?', (2000) 32 *Journal of International Law &* Politics 3: 699–705; M. Finnemore, M. & S. J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics', (2001) 55 *International Organization* 3: 743–58.
[24] A. T. Guzman and T. L. Meyer, 'International Soft Law', (2010) 2 *Journal of Legal Analysis* 1: 174.
[25] This definition is very helpful in that it gives criteria for distinguishing soft law and politics. But contrary to Abbott and al. (note 18 *supra*), Guzman and Meyer limit soft law to non-binding agreements (meaning #1): *Ibid*. note 24 *supra*.

which updated the ABM treaty, gives a good example of an act fulfilling the interpretative function. As for the second function, there are plenty of documents providing guidelines in order to shape states' behaviour, and 'binding their participants in a common cognitive framework, one that did not require coercion'.[26] A good example is given by the declaration on the rights of the indigenous people, which has been studied though the lenses of the soft law approach.[27]

When the source is quasi-legal, there is a strong probability that an enforcement mechanism is provided, through procedures, information diffusion, bureaucratic operations, delegation of authorities to enforce and implement rules. For example, within the International Labour Organization,[28] recommendations as well as conventions are supervised by a Committee of experts and a Tripartite Committee. But there is no judicial review that could lead to financial or other kinds of sanctions. The Organisation for Economic Cooperation and Development (OECD) gives examples of similar practices,[29] as does the Basle agreement.[30]

There is no other way to define non-legal norms than negatively, as norms which cannot be considered as soft law. Thus, when there is no attempt at formalizing a norm in a way that resembles legal norms, and when a norm does not fulfil the abovementioned functions (interpreting a norm and exerting influence on actors through organisational mechanisms), this means that the requirements for soft law are not met. The main challenge is to apply these criteria in a consistent and indisputable way. This should not prevent us from trying, because the costs of denying the existence of soft law is higher than the benefits of mistaking social norms for legal norms. When looking at the different forms of 'juridification', Blichner and Molander emphasize the process whereby norms becoming legal, making clear that, instead of a black and white divide between legal and non legal norms, sometimes norms are progressively 'juridicized'.[31] If we only consider those norms that can with no doubt be taken as hard law, we miss the opportunity to analyse the whole spectrum of legal normativity. And we still face a delimitation problem between law and non-legal norms. By drawing a clear line

[26] M. Dawson, *op. cit.*, 6, note 6 *supra*.
[27] M. Barelli, 'The Role of Soft Law in the International Legal System: the Case the United Nations Declaration on the Rights of Indigenous Peoples', (2009) 58 *International & Comparative Law Quarterly* 4: 957–983.
[28] I. Duplessis, 'Les vertiges de la soft law: Réactions internationales en droit international', (2007), *Revue québécoise de droit international*, Hors série: 245-268.
[29] M. Marcussen, 'Multilateral Surveillance and the OECD. Playing the idea game', in K. Armingeon and M. Beyeler (eds), *OECD Surveillance and Welfare State in Western Europe* (Edward Elgar, 2003).
[30] D. E. Ho, 'Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?', (2002) 5 *Journal of International Economic Law* 3: 647-688.
[31] L. C. Blichner and A. Molander, *op. cit.*

between hard law and non-legal norms, we face as many problems (what about customary rules, for example?) as placing norms on a continuum made of non legal norms, soft law and hard law.

C. A typology of Soft and Hard Law

The combination of the two criteria –obligation and enforcement- leads to the following typology (see Table 2). Hard law corresponds to the situation where hard obligation and hard enforcement are connected (as with the trade rules at the WTO).[32] Non legal norms follow from those situations where no legal obligation and no enforcement mechanism can be identified (e.g. a declaration made by heads of government on an international issue). In between these two opposite types of norms lie different forms of soft law, combining hard obligation/soft enforcement (a precise treaty-based rule combined with an arbitration or optional dispute settlement), hard obligation/no enforcement (a unilateral act adopted by an international institution, without control of any kind), soft obligation/hard enforcement (an imprecise treaty-base rule with a coercive mechanism of enforcement), soft obligation/soft enforcement (an imprecise treaty-based rule with an optional dispute settlement such as the ICJ), soft obligation/no enforcement (a practice being transformed into a custom). As we can see in Table 2, soft law does not necessarily lacks coercive enforcement, but when a strong enforcement mechanism has been set up in combination with soft obligation, soft law comes very close to hard law. Soft law does not necessarily imply the use of an enforcement mechanism. But if there is no such mechanism, there must be some kind of obligation at least. As regards obligation, soft law covers a wide range of situations, from non-binding rules to strong commitments. But non-binding rules, to be considered soft law, must contain some incentives to act in a specific way, ie. some kind or enforcement mechanism.

[32] WTO law can still be characterized as hard in spite of Footer's (2010) argument that soft law has been reintroduced into the World Trade Organization. M. E. Footer, 'The (Re)turn to "Soft Law" in Reconciling the Antinomies in WTO Law', (2010) 11 *Melbourne Journal of International Law* 2: 241–276.

Table 2: Criteria for Defining Soft and Hard Law

Type of norm	**Nature of the obligation**	**Nature of the enforcement mechanism**
Hard Law	Hard Obligation	Hard Enforcement
Soft Law	Hard Obligation	Soft Enforcement
		No Enforcement
	Soft Obligation	Hard Enforcement
		Soft Enforcement
		No Enforcement
	No Obligation	Soft Enforcement
Non Legal Norm	No Obligation	No Enforcement

Before applying this typology to the case of the European Union, an important objection must be examined. To some extent, as briefly mentioned in the section dealing with the soft and hard law distinction, it can be argued that soft law is not proper law because it does not contribute efficiently to social integration. More precisely, soft law would endanger the rule of law insofar as it does not fit with Kelsen and Bodenheimer's definition of law as producing highly certain normative knowledge complemented by institutionalised coercion.[33] The softness of the norms would be detrimental to the citizens, because it leads to massive discretion on the side of those who are in charge of implementing the norms. The question whether law is still law when it does not satisfy the highest criteria of social democracy is of major importance from the standpoint of the theory of law, and for everyone interested in

[33] See H. Kelsen, *Pure Theory of Law*, (The Lawbook Exchange Ltd, 2009); E. Bodenheimer, *Jurisprudence: The Philosophy and Method of Law*, (Universal Law Publishing Co Ltd, 2005).

democracy. In this paper, however, I do not look at the way law contributes to social integration. Although I acknowledge that law is 'a specific social technique",[34] a specific way of strengthening social integration, the respective merits of EU soft and hard law to perform this function is not evaluated here. The objective is to categorize norms within the soft/hard law continuum, in order to cast some light on the transformation of EU norms over time.

My assumption is that the mere fact that a legal norm badly performs its function of social integration does not preclude us from calling it law. Since a norm has been adopted and meets the criteria of obligation and enforcement, somehow it must be placed on the law continuum. The European Union is seen as an organization based on a legal order, with a high level of compliance with law. 'Integration through law' has played an important role in the integration process and resistance to European law has never reached the point where the existence of EU law would be jeopardized. But EU law, instead of being a monolithic bloc of norms, is composed of different types of norms, most of them being hard law, but some of them being soft law.

This is not say that European integration does not raise any question of democracy and legitimacy. On the contrary, the evolution of EU law may have a role in the on-going debate on the democratic deficit. Soft law, by reducing certainty in the production and implementation of norms, and putting aside the Parliament and the ECJ, may add something to the legitimacy problem. But, on the other hand, it can be argued that soft law is helping to reduce the democratic deficit by the emphasis it puts on deliberation and participation of the social partners. Yet, I do not enter into the debate on the contribution that soft law brings to democracy because: first, it does not disqualify soft law from being law; second, it does not help me to identify soft law in the EU; third, it does not help to check whether processes of soft law hardening and hard law softening have taken place in the EU.

III. Identifying soft law in the European Union

This second section aims at providing a mapping of EU law based on the distinction between soft law and hard law, and using the criteria and typology developed in the first section. In the existing literature, there is no overview of EU law that would clearly identify

[34] H. Kelsen, 'The Law as a Specific Social Technique', op.cit.

those two categories of norms and specify what kind of soft law derives from European integration.[35] This article tries to fill the gap. Hard law can be found in most of the policies functioning under the Community method, including the single market, competition, monetary union, environmental, agricultural, regional and social policy. EU soft law is widely used in those policies that are not supranational, but it is also possible, although less frequent, within the Community method. Different kinds of soft law can be identified within the EU, reflecting the different types of obligation/enforcement combination previously exposed (see Table 2).

A. Hard obligation / soft enforcement

Economic governance and fiscal policy offer an interesting case of a combination of hard obligation and soft enforcement. The Stability and Growth Pact (SGP),[36] which is based on two treaty articles (art. 121 and 126 TFEU) and outlined by Council regulations, is made of a preventive arm and a corrective arm. It was adopted in 1997, and reformed several times, in 2005, 2011 (the six-pack reform) and 2013 (the two-pack reform and the fiscal compact).

As far as the preventive arm is concerned, Member States outline medium-term budgetary plans in stability and convergence programmes, which are submitted and assessed annually in the context of multilateral fiscal surveillance under the European Semester. The Excessive Deficit Procedure (EDP) constitutes the dissuasive part of the SGP. Under the Pact, the national annual budget deficit should not be higher than 3% of GDP and the government debt should be limited to 60% of GDP (or at least diminish sufficiently towards the 60%). When the deficit and debt are considered excessive, the Council can issue recommendations to the member state concerned, which is supposed to make the necessary corrections in a limited time frame. Non-compliance with these preventive as well as corrective requirements can lead to the imposition of sanctions for euro area countries. The fiscal compact contained within the inter-governmental Treaty on Stability, Coordination and Governance (TSCG) signed in March 2012 and entered into force on 1st January 2013, adds another requirement. The Member States must enshrine in national law a balanced budget rule with a lower limit of a

[35] With the exception of F. Snyder, 'Soft Law and the Institutional Practice in the European Community', in S. S. Martin (ed), *The Construction of Europe* (Kluwer Academic Publishers, 1994) at 197.

[36] D. Hodson and I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', (2001) 39 *Journal of Common Market* Studies 4: 719-746. D. Hodson and I. Maher, 'Soft law and sanctions: economic policy co-ordination and reform of the Stability and Growth Pact', (2004) 11 *Journal of European Public Policy* 5: 798–813; W. Schelkle, 'EU Fiscal Governance: Hard Law in the Shadow of Soft Law', (2007) 13 *Columbia Journal of European Law* 3: 705-731.

structural deficit of 0.5% GDP (the so-called golden rule), centered on the concept of the country-specific medium-term objective as defined in the SGP.

At first sight, the source and content of the norms seem to indicate that the obligation is hard. The source is EU law having primacy over national law and the content is formulated in a way that confirms the compulsory character of the objectives. But the obligation is softened by two limitations contained in art. 126 TFEU. Concerning the government deficit, the ratio can exceed 3% of the GDP in two cases: when « the ratio has declined substantially and continuously and reached a level that comes close to the reference value », or, alternatively, when « the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value ». Concerning the government debt, an exception can be made if « the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace ». The extent to which these limitations have softened the obligation is debatable.[37] Generally speaking, the debt and deficit requirements, as well as the golden rule introduced by the TSCG, are rather imprecise obligations. Giving a legal definition to a 'structural deficit of 0,5% GDP', as the TSCG requires, proves to be very difficult. There is no consensus on what a structural deficit can be. Nevertheless, I assume that the obligations contained in the SGP and the TSCG remain hard because the rules, ambiguous as they may be, can be rendered more precise by the interpretations offered by the Commission and the Council. Thus, it shall be called (soft) hard obligations.

Besides, the (not so) hard obligations contained in article 126 TFEU, the SGP and the TSCG are enforced by a rather weak mechanism relying upon the Member States willingness to make it effective. In the early 1990s, the EDP has not proved efficient on the deficit objective. In particular, it has shown its limits when the Council did not sanction France and Germany for violating rules on debt and public deficits in 2002-03. Since then, many breaches of the EDP have not been sanctioned. As Hodson and Maher wrote, 'declarations of breach of obligation depend on the behaviour of peers for their effectiveness. If peers are unconcerned about breach, for example because they wish to be treated leniently if and when they are in breach, then the sanction is rendered useless. In short, where political ownership of the arrangement is absent, its very existence can be called into question'.[38] With the adoption of both the six-pack reform (2011) and the TSCG (2013), the enforcement mechanism has been strengthened. In particular, the six-pack reform and the TSCG have introduced a new rule,

[37] W. Schelkle, *op. cit.* note 36 *supra*.
[38] D. Hodson and I. Maher, 'Soft Law and Sanctions', *op. cit.*, 807, note 36 *supra*.

which allows the Council to decide sanctions on the basis of a reversed qualify majority (the sanctions are adopted unless a qualified majority rejects the decision). Financial sanctions are now possible of Euro area Member States. Nevertheless, I argue that it is still soft enforcement, as it remains implemented by the Council, instead of a supranational institution such as the Commission or the ECJ. But it is, undoubtedly, a rather hard type of soft enforcement.

A similar case of hard obligation/soft enforcement can be found in the Economic Adjustment Programmes imposed to these Member States seeking financial support in the context of the financial and economic crisis. Although enshrined in Memoranda of Understanding, the obligations are rather precise and do not give much room of manoeuver to the Member States concerned. The European Commission, the ECB and the IMF monitor compliance with the terms and conditions of the Programme, before the Eurogroup and the IMF's Executive Board approve the release of each disbursement.

B. Hard Obligation / No enforcement

The second combination –hard obligation without any sort of enforcement mechanism- describes the situation in the CFSP as well as in the third pillar 'justice and home affairs'.

The common actions and positions adopted within the framework of the Common Foreign and Security Policy (CFSP) are meant to be legally binding acts, even though the ECJ is not entrusted with controlling them.[39] The wording of the EU treaty makes it clear that common actions and common positions are legally binding, in spite of a total lack of enforcement. Decisions of the Council that require operational action in the field of CFSP 'shall commit the Member States in the positions they adopt and in the conduct of their activity » (art. 28 TEU). Regarding those decisions defining the approach of the Union to a particular matter of a geographical or thematic nature, « Member States shall ensure that their national policies conform to the Union positions » (art. 29). But the role of the Commission as

[39] F. Terpan, *La politique étrangère et de sécurité commune de l'Union européenne* (Bruylant, 2003); F. Terpan, *La politique étrangère, de sécurité et de défense commune de l'Union européenne* (La documentation française, 2004) ; R. A. Wessel, *The European Union's Foreign and Security Policy. A Legal and Institutional Perspective* (Kluwer Law International, 2000); P. Eeckhout, *European Union External Law* (Oxford University Press, 2011).

the guardian of EU law does not extend to CFSP and the ECJ has no jurisdiction over CFSP.[40] There is no enforcement mechanism that would help ensure compliance with CFSP decisions.

The second case of hard obligation / no enforcement combination is justice and home affairs,[41] the so-called third pillar of the European Union. The third pillar has been communautarized in two steps: part of JHA (asylum, immigration, border controls and civil law cooperation) has been placed under the control of the Court of the justice after the entry into force of the Amsterdam treaty, and a similar extension has been decided for the remaining part of JHA (police and judicial cooperation in the field of criminal law) in the aftermath of the Lisbon treaty. Hence, the hard obligation / no enforcement combination describes a past situation which applied to the 'large' third pillar between 1993 and 1999, and the 'reduced' one between 1999 and 2009. During these periods, the Council adopted framework decisions that were binding but could not be subjected to judicial review.

C. Soft Obligation or No Obligation / Soft Enforcement

It seems that there is no situation where soft obligations are not backed up with any sort of enforcement mechanism. When Member States define a minimum level of obligation, they usually supplement them with soft implementation procedures. Yet, a combination of 'no obligation' with soft enforcement is possible. In CFSP, declarations and strategic documents, although non-legal, often contain goals whose compliance is sustained by institutional means. The Open Method of Coordination (OMC) also seems to be very close to this combination, since the objectives are not compulsory. Programmes, general guidelines and objectives cannot be any more than weak forms of obligations. Member states commit themselves to engaging in a coordination mechanism, not to achieving specific objectives. Norms developed in this way are not directly applicable or transposable into domestic law. The national authorities only agree to take them into account when forming their own policies. The idea that the OMC includes some forms of obligation is far from being consensual. To some extent, there is an obligation of means, which may justify a qualification as soft obligation. But, whatever the nature of the obligation may be (soft or non-existent), it is still possible to characterize the OMC as soft law, due to the existence of soft enforcement mechanisms

[40] Two exceptions are provided by the TEU. The ECJ monitors CFSP's compliance with the rules of horizontal power-sharing in the EU. CFSP's intergovernmental rules of functioning cannot be applied where supranational rules shall be applied. The second exception is that the ECJ has jurisdiction on sanctions decided on the basis of a previous CFSP decision.
[41] J. Monar, 'Deviations from and Alternatives to the Community Method in Justice and Home Affairs', in R. Dehousse (ed), *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan, 2011) at 118.

composed of procedures and monitoring instruments. The OMC is not subject to review by the European Court of Justice, but it is organised with a view to reducing the Member States' room for manoeuver thanks to an ensemble of four procedural elements: 1) guidelines and timetables for achieving the goals; 2) quantitative and qualitative indicators, as well as benchmarks helping to identify best practices; 3) targets and measurements specific to each country, and aimed at translating these guidelines into national and regional programmes; 4) periodic monitoring, evaluation and peer review organized as mutual learning processes.[42] Under the OMC, central authorities such as the Commission and the Council can issue recommendations but they are not in a position to call states to account. Accountability is horizontal more than vertical, meaning that the Member States are forced to take seriously, and to answer for, the preferences, objections and counter-proposals of other governments.[43] However, the characterisation of the method as entirely heterarchical is often misleading. In a way, hierarchy has been reintroduced: the influence of the 'center' has returned, although at a more abstract and procedural level, when we look at political discourse through which reforms are evaluated, national reforms that are conducted, institutions –peer review, committees…- in which interdependencies between Member States can be managed.[44]

A huge literature has analysed the different forms of coordination existing in the European Union. Some of them focus on soft law, others study the ways and means of the OMC more generally, while including at least a reference to the softness of the rules adopted in this context. These general studies have tried to explain the search for soft alternatives in the European Union,[45] specify the functions of the OMC,[46] and evaluate its effectiveness in dealing with sensitive issues.[47] Regarding the impact of the OMC on EU governance, some studies situate soft law and the OMC with regards to the rise of flexibility in the European Union,[48] make clear the differences between the OMC and the classic and hierarchical Community method,[49] while others see it as a new form of supranationalism.[50] The

[42] Lisbon European Council, Presidency Conclusions, 23 and 24 March 2000, pt 37.
[43] M. Dawson, *op. cit.*, 151, note 6 *supra*.
[44] M. Dawson, *op. cit.*, 117, note 6 *supra*.
[45] J. Scott and J. Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union', (2002) 8 *European Law Journal* 1: 1–18.
[46] L. Tholoniat, 'The Career of the OMC: Lessons from a "Soft" EU Instrument', (2010) 33, *West European Politics*, 1: 93-117.
[47] C. De la Porte, 'Is the Open Method of Co-ordination Appropriate for Organizing Activities at European Level in Sensitive Policy Areas?', (2002) 8 *European Law Journal* 1: 38-58.
[48] I. Maher, 'Law and the OMC: Towards a New Flexibility in European Policy-Making?', (2002) 2 *Journal for Comparative Government and European Policy* 2.
[49] A. Héritier, 'New Modes Of Governance In Europe: Policy-Making Without Legislating?' in A. Héritier (ed.), *Common Goods: Reinventing European and International Governance* (Rowman and Littlefield, 2002) at 185; S. Smismans, *Law, Legitimacy and European Governance: Functional Participation in Social Regulation* (Oxford University Press, 2004); S. Smismans, 'Reflexive Law in Support of Directly Deliberative Polyarchy: Reflexive-Deliberative Polyarchy as a Normative

democratic nature of the OMC is discussed,[51] some scholars arguing that the OMC has introduced more democratic parameters into the decision-making,[52] others replying that it is less democratic due to the lack of parliamentary control. Everybody agrees that coordination brings something new,[53] although it was not totally unknown in the first decades of European integration.

Three policy areas have been specifically studied, individually or in combination.[54]

The coordination of national economic policies[55] has been treaty-based since the early 1990s and the adoption of the Maastricht treaty. The Council defines policy objectives for the European Union as well as specific recommendations for each member state in the Broad Economic Policy Guidelines (BEPG). Neither the objectives nor the guidelines are binding commitments. The Member States generate programmes that are meant to fulfil the objectives in accordance with the BEPG. A soft enforcement mechanism is provided, through surveillance monitored by the Council and Commission. Other forms of economic surveillance have been developed in response to the financial and economic crisis. The European Semester is a cycle of EU economic policy guidance, allowing for a surveillance of each country by the Commission. The Commission assesses national economic reports and proposes recommendations which are then discussed by the European Council and adopted by the Council. The Macroeconomic Imbalance Procedure (MIP) is a surveillance mechanism aiming at identifying risks of macroeconomic imbalances, preventing and correcting it. A set of indicators is used to identify countries and issues that need a closer examination (in-depth review). Just like the SGP, the MIP has a preventive and a corrective arm. Sanctions are possible under the Excessive Imbalance Procedure for euro area Member States that repeatedly fail to meet their obligations. In spite of the similarity with the SGP, the MIP incorporates softer obligations, due to a higher degree of imprecision of the norms enclosed in the MIP documents.

Frame for the OMC' in O. de Schutter, S. Deakin (eds), *Social Rights and Market Forces: Is the Open Coordination of Employment and Social Policies the Future of Social Europe?* (Bruylant, 2005) at 99; A. Héritier and M. Rhodes, *New Modes of Governance in Europe, Governing in the Shadow of Hierarchy* (Palgrave Macmillan, 2011).

[50] S. Regent, 'The Open Method of Coordination: A New Supranational Form of Governance', (2002) 9 *European Law Journal* 2: 190-214.

[51] C. De la Porte and P. Nanz, 'The OMC – A Deliberate-Democratic Mode of Governance? The Cases of Employment and Pensions' (2004) 11 *Journal of European Public Policy* 2: 267–88.

[52] J. Scott and J. Trubek, *op. cit.* note 45 *supra*.

[53] C. Radaelli, 'The code of conduct on business taxation: Open method of coordination in disguise?', (2003) 81 *Public Administration* 3: 513-531; S. Borrás and K. Jacobsson, 'The Open coordination method and the new governance patterns in the EU', (2004) 11 *Journal of European Public Policy* 2: 185-208.

[54] These three policy areas have been combined with hard law in documents such as the Lisbon strategy and the strategy 2020 (see: M. Dawson, 'Integration through Soft Law? New Governance and the Meaning of Legality in the European Union', in D. Augenstein (ed.), *Integration through Law Revisited* (Ashgate, 2012).

[55] D. Hodson and I. Maher, 'Soft Law and Sanctions', *op. cit.* note 36 *supra*.

This is why the MIP is classified as soft obligation / soft enforcement, while the SGP is a case of hard obligation / soft enforcement.

The second policy area -employment policy- has been developed since the Amsterdam treaty on the policy model of economic convergence, with guidelines issued by the Commission and agreed upon by the Council. These guidelines are not legally binding but the Member States are expected to take them into account in their national policies. The implementation of the guidelines is supervised by the Council, on the basis of a report approved by an Employment Committee composed of two officials from each member state and two officials from the Commission, and working alongside the social partners. The Committee is the place where the Member States review each other's performance. The model was inspired by the recommendation procedure and peer review of the OECD.[56] The legal dimension of this coordination process derives from the procedures that can be considered as soft enforcement.

The third area is social policy. Before the Maastricht treaty, social policy was not a clear competence of the European Community, as very few articles of the treaty set out the conditions for social action. Secondary law adopted in this field was closely related to the internal market and was viewed through an economic lens. The social protocol annexed to the Maastricht treaty has expanded EU competence while giving the opportunity for independent social legislation. From the 2000 Lisbon summit onwards, the OMC has been the favoured way of developing a social policy in the fields of social inclusion and pension reform more particularly.[57]

[56] K. Jacobsson, 'Soft regulation and the subtle transformation of states: the case of EU employment policy' (2004) 14 *Journal of European Social Policy* 355-370. See also: J. Kenner, 'EC Labour Law: the Softly, Softly Approach', (1995) 14 *The International Journal of Comparative Labour Law and Industrial Relations* 307–26, J. Kenner, 'The EC Employment Title and the "Third Way". Making Soft Law Work?', (1996) 15 *Journal of Comparative Labour Law and Industrial Relations* 1: 33–60; K. Jacobsson & A. Vifell, 'Integration by Deliberation? Dynamics of Soft Regulation in the Case of EU Employment Policy', Paper Presented at the European Consortium of Political Research Conference, 26-8 September 2002. J. Goetschy, 'The European Employment Strategy. Multilevel Governance and Policy Coordination', In J. Zeitlin and D. Trubeck (eds), *Governing Work and Welfare in a New Economy: European and American Experiments*, (Oxford University Press, 2003); D. Ashiagbor, 'Soft Harmonization: The OMC in the European Employment Strategy' (2004) 10 *European Public Law* 2: 305-332; K. Jacobsson, 'Between Deliberation and Discipline: Soft Governance in EU Employment Policy', in U. Mörth (ed.), *Soft Law in Governance and Regulation: an Interdisciplinary Analysis* (Edward Elgar, 2004); C. De la Porte and P. Pochet, 'Participation in the Open Method of Coordination. The Cases of Employment and Social Inclusion', in J. Zeitlin and P. Pochet (eds), *The Open Method of Co-ordination in Action* (Peter Lang, 2005) at 353.

[57] A. Savio, *Soft Methods in the European Union: Social Policy*, (Stakes, 1995); M. Ferrera, M. Matsaganis and S. Sacchi, 'Open Co-ordination Against Poverty: The New EU "Social Inclusion Process"', (2002) 12 *Journal of European Social Policy* 3: 227-239; I. Hartwig and C. O. Meyer, *Towards deliberative network governance? Theorising socio-economic policy coordination in the European Union*, 2002, Paper available at http://www.govecor.org.; S. Borrás and K. Jacobsson, *op.cit.*, note 53 *supra* ; C. De la Porte and P. Nanz, *op. cit.*, note 51 *supra* ; C. De la Porte and P. Pochet, *op. cit.* note 56 *supra* ; G. Falkner, O. Treib, M. Hartlapp and S. Leiber, *Complying with Europe. EU Harmonization and Soft Law in the Member States* (Cambridge University Press, 2005); D. M. Trubek and L. 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* 3: 343–364; M. Büchs,

D. Soft Law Getting Closer to Hard Law (Soft Obligation/Hard Enforcement – Soft Law Combined with Hard Law)

In the European Union, it is not so easy to differentiate soft law from hard law. Two different situations are noteworthy.

The first situation appears when soft obligation is combined with hard obligation. In those fields where the Community method and hard law apply, there is still room for soft law. Hard instruments can have a soft content or, to say it differently, what looks like hard law at first sight can actually turn out to be soft obligation (in combination with hard enforcement). Some directives (or some parts of directives) are worded in a vague and non-normative way, contain unspecified or loose obligations, showing that a hard *instrumentum* does not necessarily entail a hard obligation. This is the case for those directives dealing with social standards[58] and applying to pregnant workers, young workers, working time or employment contract information. Another example could fit with this situation of soft obligation/hard enforcement if we consider -contrary to what I did in point A- fiscal rules as soft obligations. With the hardening of the enforcement mechanism since the 2011-2013 reform (see section IV, B, 2), we could then be facing another form of soft obligation/hard enforcement combination.

The second kind of soft law/hard law ambiguity is related to policy areas generating soft law in addition to hard law. In competition policy, for instance, soft law has emerged progressively under the influence of the European Commission. The Commission has established general criteria for state aid, which is still deemed admissible.[59] Formally, this soft law binds only the Commission itself – in practice, however, it defines positive criteria for national state aid policies compatible with the common market and leaves little room for Member States aid policies, which deviate from these criteria.[60]

Justice and home affairs offer another example of soft law complementing hard law. The communautarization of the third pillar, after the Amsterdam and the Lisbon treaties, did

New Governance in European Social Policy. The Open Method of Coordination (Palgrave Macmillan, 2007); S. Kröger, *Soft Governance in Hard Politics. European Coordination of Anti-Poverty Policies in France and Germany* (VS Verlag, 2008).

[58] G. Falkner *et al*. 2005, *op. cit*., note 57 *supra*.

[59] H. Cosma and R. Whish, 'Soft law in the field of EU competition policy', (2003) 14 *European Business Law Review* 1: 5; M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', (2001) 8 *Journal of European Public Policy* 2: 192-207.

[60] M. Blauberger, 'Of "Good" and "Bad" Subsidies: European State Aid Control through Soft and Hard Law', (2009) 32 *West European Politics*, 4: 719–737.

not end up removing soft law from the JHA field. On the contrary, there is evidence showing that non-binding instruments continue to play a role.[61] Soft law in JHA consists of two main categories of instruments. The first one is composed of recommendations, conclusions, resolutions, guidelines, that set up targets to be reached by the Member States in specific areas (for example the Council Resolution of 4 December 2006 on Handbook recommendations for international police cooperation and measures to prevent and control violence and disturbances in connection with football matches with an international dimension). They often resemble legislative texts in the density and nature of their provisions. The second one consists of programme target-setting and comprises action plans, programmes and strategies which plan the adoption of common measures by the Member States (for example: the Tampere programme in 1999, the Hague programme in 2004, the Stockholm programme in 2009).

Other policy areas that seem at first sight to be covered by hard law and the Community method, in reality provide a large amount of soft law instruments. This is the case with the environment, [62] energy, [63] business taxation, [64] the research and technology development policy, [65] the information society policy, or the role of the ombudsman.[66] In a way, these policy areas resemble the OMC. Yet, they do not include the full governance architecture defined during the Lisbon summit in 2000, but only fragmentary elements, such as European Action Plans, objectives, targets, scoreboards, indicators, peer review, or exchange of good practices.[67]

[61] J. Monar, *op. cit*., note 41 *supra*.
[62] J. Scott and J. Holder, 'Law and New Environmental Governance in the European Union', in G. de Burca and J. Scott (eds), *Law and New Governance in the EU and the US* (Oxford University Press, 2005) at 211; C. Koutalakis, A. Buzogany, T. Börzel, 'When soft regulation is not enough: The integrated pollution prevention and control directive of the European Union', (2010) 4 *Regulation & Governance* 3: 324-344.
[63] B. Eberlein, 'Regulation by Cooperation: the "Third Way" in Making Rules for the Internal Energy Marketi, in P. Cameron (ed.), *Legal Aspects of EU Energy Regulation* (Oxford University Press, 2005) at 59.
[64] C. Radaelli, *op. cit.* note 53 *supra*.
[65] M. Sharp, 'The Single Market and European Technology Policies', in C. Freeman, M. Sharp and W. Walker (eds), *Technology and the Future of Europe: Global Competition and the Environment in the 1990's*? (Pinter, 1991); E. Grande and A. Peschke, 'Transnational Cooperation and Policy Networks in European Science Policy-Making', (1999) 28 *Research Policy* 43-61.
[66] P. G. Bonnor, 'The European Ombudsman: A Novel Source of Soft Law in the European Union', (2000) 25 *European Law Review* 39-56.
[67] J. Zeitlin, 'Is the Open Method of Coordination an Alternative to the Community Method?', in R. Dehousse, *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan, 2011) at 136.

Table 3: An Overview of Soft and Hard norms in the EU

Type of norm	**Type of obligation / enforcement**	**Relevance in EU law and public policies**
Hard Law	Hard Obligation / Hard Enforcement	Most of the policies under the Community method: Internal Market, Trade, Agriculture, Fisheries, Competition, Transport, Regional Policy, R&D, Environment, Monetary Union, Consumers, Development, Social Policy, Industry, JHA-AFSJ (since Amsterdam). Charter of fundamental rights (since Lisbon) Some aspects of fiscal and macro-economic surveillance (since the 2011-2013 reforms)
Soft Law	Hard Obligation / Soft Enforcement	Fiscal and macro-economic surveillance (at least before the 2011-2013 reforms)
	Hard Obligation / No Enforcement	Some aspects of CFSP: common positions and joint actions
	Soft Obligation / Hard Enforcement	Some aspects of fiscal and macro-economic surveillance (since the 2011-2013 reforms)
	Soft Obligation / Soft Enforcement	Open method of coordination: Employment, Social inclusion and pensions, Economic coordination Some aspects of: Competition, Transport, Regional Policy, Environment, Consumers, Development, Industry, R&D, Education and culture, JHA-AFSJ, Energy
	Soft Obligation / No Enforcement	
	No Obligation / Soft Enforcement	(OMC and other kinds of coordination: see above) Some aspects of CFSP: declarations and

		strategic documents
Non Legal Norm	No Obligation / No Enforcement	Declarations issued by EU institutions or individual members of EU institutions (ex: statements made by the High Representative on its own initiative – resolutions of the European Parliament)

IV. The Creation and the Evolution of Law in the European Union

The methodology used in this third section is mainly based on secondary literature dealing with law and governance in the different policy areas covered by the European Union. I use these publications in order to categorize competences and public policies, and see how they fit with the distinction between two kinds of processes: legalization and delegalization. Legalization concerns the transformation of non-legal norms into soft law (limited legalization) or hard law (complete legalization), as well as the hardening of soft law (soft law becoming hard law); Delegalization includes the softening of hard law norms (limited delegalization) as well as evolutions from soft/hard law to non-legal norms (complete delegalization) (see Table 4).

Table 4: Legalization and Delegalization Processes

	Legalization		Delegalization	
	Limited Legalization	Complete Legalization	Limited Delegalization	Complete Delegalization
NLN ⇔ Legal Norms (soft and hard)	NLN ➔ SL	NLN ➔ HL	SL ➔ NLN	HL ➔ NLN
SL ⇔ HL	SL ➔ HL (SL Hardening)		HL ➔ SL (HL Softening)	

NLN: Non-Legal Norms LN: Legal Norms SL: Soft Law HL: Hard Law

These processes of legalization and delegalization will be studied in two steps. The first section will look at the creation of norms, and check whether they are created in the form of soft or hard law. The second section will analyse the evolution of legal norms, once created, and check whether they can move from one category (hard law – soft law – non legal norms) to another. To do so, I will primarily look at the treaties insofar as they provide legal grounding for the EU public policies. Additionally, I will take into account the fact that some of these policies were launched before being enshrined in the European treaties.

A. The Creation of Norms: from Complete to Limited Legalization

Legalization is a process whereby states set up legal instruments in order to shape their relationship and limit discretional behaviors in a specific domain of activities. While complete legalization was the common practice until the 1990s, since then, limited legalization has become prominent.

1. From the early 1950s to the late 1980s: Complete Legalization as the Major Trend

From the 1950's to the 1980's, the so-called 'Community Method', relying upon supranational institutions and legal integration, was central to European integration.[68] The political objective of integrating the Member States politics and policies were to be achieved through the making of hard law rules, which constituted what the European Court of Justice called in its landmark rulings of 1963 and 1964 a European legal order. This new legal order, independent from the national and international order, was composed of norms divided into four main categories: treaties, secondary law (regulations, directives, decisions), general principles of community law, and external agreements. In most cases, the competences conferred to the European Community were implemented through a process of complete legalization. This was true for the internal market, competition, the CAP, commercial policy, regional policy, transport, research and development, the environment as well as social issues. Some of these policies also included soft law as additional rules (research and development, environment, social policy, and to some extent competition policy), but only one heavily relied upon soft law (foreign policy).

[68] R. Dehousse, *The Community Method: Obstinate or Obsolete?* (Palgrave Macmillan, 2011).

Table 5: Hard and Soft Law in EU Policy Areas – From the Rome Treaty to the SEA

Policy Area	**Date of Treaty Inclusion**	**Type of Law**	
		Hard Law	Soft Law
Internal Market	Rome 1957	+ + +	-
Trade	Rome 1957	+ + +	-
Agriculture	Rome 1957	+ + +	-
Competition	Rome 1957	+ +	+
Transport	Rome 1957	+ +	+
European Social Fund	Rome 1957	+ +	-
Regional Policy *	Single European Act 1986	+ +	+
Research and Development Technology *	Single European Act 1986	+ +	+
Environment *	Single European Act 1986	+ +	+
Foreign Policy (and Security)	Single European Act 1986	-	+ + +

** Secondary law was adopted into this area before the creation of a treaty-based competence for the policy as a whole.*

2. From the 1990s onwards: Limited Legalization as the Major Trend

Since the 1990's and the Maastricht treaty, and moreover since the Lisbon Strategy for growth and employment in March 2000, the use of soft law has increased tremendously and now concerns several « new » areas of competence. Hard law remains an option that is sometimes considered suitable. This is the case for monetary union, which works on a deeply integrated basis. This is also the case for other policy areas such as development cooperation, industry, consumers and culture, where the EU legislates (ie. creates hard law) but in combination with soft law. It can be argued, however, that the introduction of hard law in these fields had started before the 1990s, on the basis of secondary law regulations.

In other policy areas, soft law governs the area because EU institutions and Member States have opted for soft modes of governance instead of harder ones. To say it differently, there is a growing tendency to make limited legalization prevail over complete legalization, when new policy areas are launched. Recommendations, benchmarking, best practices, peer review have given rise to 'new forms of governance', based on the desire of participants to agree, through collective deliberation, on procedural norms, forms of regulation and shared political objectives, whilst preserving a diversity of solutions and local measures. Since the 1990s, there seems to be a growing preference for procedural frameworks over substantive prescriptions.[69] It can be argued that these soft modes of governance differ from old soft law procedures and concepts. New soft law is intergovernmental oriented (while old soft law was supranational oriented), kept away from the Parliament and the Court, managed at political and not only at administrative level, based on the participation of a wide range of actors, public as well as private.[70]

[69] M. Dawson, *op. cit.*, 8, note 6 *supra*.
[70] S. Borrás and K. Jacobsson, *op. cit.*, 189, note 53 *supra*.

Table 6: Hard and Soft Law in EU Policy Areas – From Maastricht to Lisbon Treaty

Policy Area	**Date of Treaty Inclusion**	**Type of Law**	
		Hard Law	Soft Law
Monetary Union *	Treaty of Maastricht	+ + +	-
Consumers	Treaty of Maastricht	+ +	+
Development Policy *	Treaty of Maastricht	+ +	+
Social Policy[71] *	Treaty of Maastricht	+	+ +
Industry *	Treaty of Maastricht	+	+ +
Education and Culture *	Treaty of Maastricht	+	+ +
Fiscal governance	Treaty of Maastricht	+	+ +
Economic Coordination and surveillance	Treaty of Maastricht	-	+ + +
JHA – AFSJ	Treaty of Maastricht	-	+ + +
	Treaty of Amsterdam and Lisbon	+ +	+
Employment *	Treaty of Amsterdam	+	+ +
Energy *	Treaty of Lisbon	+	+ +

[71] In the Rome treaty, a chapter was dedicated to "social policy", but its content was mostly limited to the European social fund. The Maastricht treaty has enlarged the scope of social actions to such an extent that it is often considered as the starting point of the social policy.

** Secondary law was adopted in this area before the creation of a treaty-based competence for the policy as a whole.*

What are the main reasons explaining this evolution? Why do states use soft law instead of hard law? In the literature dealing with soft law in international relations,[72] three kinds of reasons have been put forward, the second and third reasons being alternatives. First, soft law agreements are easier to conclude and imply lower bureaucratic transaction costs than hard law. Secondly, soft law rules are chosen when little is at stake: the objective is easy to achieve; states are relatively certain that they will not deviate from the promised behavior in the future, due to the limited importance of the subject matter. In those cases, there is no need to invest resources in a binding agreement. Thirdly, and in opposition with the second point, soft law is favored when states have considerable interests that they do not want to put at risk. They are aware that soft law will have less of an impact than hard law,[73] and that hard law implies concessions and jeopardizes sovereignty. They refuse to be constrained or to pay the costs of violating hard law rules, be it sanctions, retaliation or reputation costs. Fourth, soft law is not used to pursue materialistic interest but rather as a means to simulate progress.

It seems that the rationale behind creating soft rules within the European Union[74] is linked with the first and third points. First, the flexible nature of soft law in terms of rule-making and implementation may partly explain the use of soft law within the EU. Reforming the treaties is not an easy task and becomes more and more difficult as the European Union expands. The accession of new members also put a strain on the legislative process. Soft governance, on the contrary, is less demanding as the Member States do not have to agree upon binding rules through difficult and lengthy procedures. Secondly, the Member States want to further EU integration in sensitive fields, while avoiding a loss of sovereignty at a time when the citizens' support for European integration is called into question. The paradoxical fact that non-legally binding instruments such as new EU modes of soft governance may have an impact defies the common wisdom that only legally binding instruments have a strong political influence. This is how the Commission, in particular,

[72] A. Schäfer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law', (2006) 12 *European Law Journal* 2: 194–208.
[73] A. T. Guzman and T. L. Meyer, *op. cit.* 180, note 24 *supra.*
[74] A. Schäfer, 'Beyond the Community Method: Why the Open Method of Coordination Was Introduced to EU Policy-making', (2004) 8 *European Integration online Papers* 13, available at: http://eiop.or.at/eiop/texte/2004-013a.htm.

justified their use,[75] echoing an academic literature that emphasized the possible effects of non binding norms.[76]

B. The Evolution of Law: the Softening and Hardening of European Law

It is very unlikely that EU soft law would trigger a complete delegalization of hard law norms. Within the European Union, the Member States have to maintain the Community acquis composed of all the EU's treaties and secondary law, declarations and resolutions, international agreements and judgments made by the Court of Justice. The principle of the Community acquis protects EU law from a complete delegalization. More precisely, it is always possible for the Member States and the institutions to change the acquis and remove a norm from the treaties or secondary law, but there is no general trend whereby the introduction of soft law would end up eliminating hard law norms.

1. The Softening of Hard Law

EU soft law, however, sometimes enters into competition with EU hard law, paving the way for possible processes of limited delegalization. The softening of hard law occurs when a policy-area, or at least part of it, evolves from hard law to soft law. Again, the principle of the Community acquis can have a lock-in effect on EU law. But more and more, the emergence of soft law creates ambiguous situations where soft and hard norms are combined (see section III, B). In external action, 'hard' regulations adopted by the Council are sometimes taken on the basis of a 'soft' position adopted within the framework of CFSP, as in the case of economic sanctions implementing a CFSP position. Environmental policy is often said to move away from traditional instruments based on the setting of uniform, legally binding norms.[77] In the 1990s, the persisting problem of certain Member States' compliance with the

[75] Commission of the European Communities, *European Governance, A White Paper, 25.07.2001, COM(2001) 428 final.*
[76] G. W. Legros, 'Which Norms Matter? Revisiting the "Failure" of Internationalism', (1997) 51 *International Organization* 1: 31-63.
[77] C. Koutalakis, A. Buzogany, T. Börzel, 'Nailing the Pudding to the Wall. On the Effectiveness of Soft Regulation in EU Environmental Policies', (2004), available at http://regulation.wiki.huji.ac.il/images/Tanja.pdf. C. Koutalakis, A. Buzogany, T. Börzel, 'When Soft Law Hits Hard. On the Effectiveness of New Regulatory Approaches in Pollution Prevention and Control in the EU', (2010), Third Biennial Conference of the European Consortium on Political Research Standing Group on Regulatory Governance on 'Regulation in an Age of Crisis', University College Dublin, 17-19 June 2010, available at http://regulation.upf.edu/index.php?id=dublin_2010-papers.

environmental legislation generated scepticism about the effectiveness of harmonization. These compliance challenges were addressed through the adoption of less coercive and more flexible instruments, belonging to the category of soft law.[78] For instance, the Directive on Integrative Pollution Prevention and Control (IPPC), enacted in 1996, introduced soft, non-binding targets, and a strong procedural component through the delegation of policy formulation to participatory, co-regulatory networks, in a field where legally-binding emission limit values on air, land and water used to be applied to several industrial sectors.[79]

The open method of coordination also leads to situations of hybridity, defined as 'constellations in which both hard and soft processes operate in the same domain and affect the same actors'.[80] The 'simultaneous presence of 'hard' and 'soft' measures in the same policy domains',[81] as in employment policy or social policy, may entail a preference for those norms that are less constraining for the Member States. This issue has been tackled by the Commission in the White Paper on Governance.[82] The Commission, the Parliament and others keep on demanding that coordination and soft law should not be used when legislative action under the Community method is possible. So far, however, there has been little empirical evidence that the coordination method has displaced EU legislation.[83] In social policy, for example, the number of directives has not decreased since the OMC has been applied to social protection and social inclusion.[84] But it seems that legally binding norms are increasingly interconnected with soft rules: national plans for the use of cohesion funds are closely integrated with the objectives of the OMC in social and employment fields; 'hard law' directives 'increasingly incorporate provisions for implementation, monitoring, evaluation, peer review, periodic revision through 'soft law' OMC-style procedures'.[85]

In sum, the process of limited delegalization is far from being proved in the existing literature, due to a deficit in empirical research as well as considerable disagreement between researchers on the actual impact of the coordination method. In the meantime, I believe soft law norms should be considered as a milestone in a process of legalization, as stressed in the following paragraphs.

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[78] K. Holzinger and P. Knoepfel (eds), *Environmental Policy in a European Union of Variable Geometry. The Challenge of the Next Enlargement* (Helbing & Lichtenhahn, 2000). K. Holzinger, K. Knill and A. Schäfer, 'Rhetoric and Reality? "New Governance" in EU Environmental Policy', (2006) 12 *European Law Journal* 3: 403-420.
[79] C. Koutalakis, A. Buzogany, T. Börzel, *op. cit.* (2004) 3.
[80] D. Trubeck, P. Cottrell and M. Nance, ' "Soft Law", "Hard Law" and European Integration: Toward a Theory of Hybridity', (2005) *University of Wisconsin Legal Study Research Paper*, n°1002, 34.
[81] *Ibid.* 33.
[82] Commission of the European Communities, *op. cit*., note 75 *supra*.
[83] J. Zeitlin, *op. cit.*, 137, note 67 *supra.*
[84] P. Pochet, 'Social Europe: Why Hard Law Remains Important', in R. Dehousse, *op. cit.*, at 166, note 68 *supra.*
[85] J. Zeitlin, *op. cit.*, 138, note 67 *supra.*

2. The Hardening of Soft Law

The emergence of new forms of governance has impacted EU law to such an extent that processes of limited legalization through soft law are now common practice (see section III, A, 2). But it remains to be seen whether these soft law norms have the potential to transform into hard law. EU soft law might not be the final stage of an Europeanization process impacting environmental and economic policy and social coordination as well as foreign and security policy. It might rather be the first step –or a transition- towards hard law. Complete legalization would thus take place in two stages: creation of soft law / hardening of soft law.

Justice and home affairs (JHA) is certainly an area where this evolution has occurred since 1997 and the Amsterdam treaty. JHA was mostly soft law when instituted as the third pillar of the EU by the Maastricht treaty, because the norms in this area, although enshrined in binding decisions and framework-decisions, were out of ECJ jurisdictions reach. Then, the 'communautarization' of JHA completed by the Amsterdam treaty transformed those soft rules into hard ones, placing them under the jurisdiction of the ECJ (hard enforcement).

Apart from Justice and home affairs, other policy areas are heading towards hard law. The field of human rights protection gives a good example of such an evolution, with the European Charter on Fundamental Rights signed in 2000 as a non-biding document and transformed into a binding agreement with the entry into force of the Lisbon treaty in 2009. In the field of the environment, limited cases of soft law's hardening have been observed.[86] The same sex union policy offers another good example of soft law hardening.[87]

Fiscal discipline, in particular, has evolved from a weak enforcement mechanism to a much more constraining and efficient one. This has been done though different improvements of the Stability and Growth Pact. As far as the preventive arm is concerned, the Council now issues recommendations to the Member States deviating significantly from the medium-term budgetary objectives, after a warning addressed by the Commission. If the Member States do not comply, this can be followed, for euro area members at least, by a sanction equal to an interest-bearing deposit of 0.2% of GDP as a rule. Sanctions were not possible before the 2011 reform of

[86] P. H. Sand, 'Lessons Learned in Global Environmental Governance' (1991) 18 *Environmental Affairs Law Review* 213–277. But other scholars argue that environmental policy gives examples of the opposite trend (from hard law to soft law), see for instance A. Lenshow, 'New Regulatory Trends in "Greening" EU Policies', (2002) 8 *European Law Journal* 1: 19-37.
[87] K. Kollman, 'European Institutions, Transnational Networks and National Same-Sex Unions Policy: When Soft Law Hits Harder', (2009) 15 *Contemporary Politics* 1: 37–53.

the SGP (the Six Paxk). As far as the corrective arm is concerned, the sanctions that are possible under the excessive deficit procedure now come into force earlier and more consistently than before, due to the so-called 'Six Pack'. These sanctions are automatically applied, unless the Council otherwise decides by qualified majority voting (Six Pack and treaty on Stability, Coordination and Governance)[88]. With the entry into force of the TSCG, the European Court of Justice will play a role in enforcing the new budget rules.[89] The ECJ may require the Member States to implement the budget rules and impose financial sanction (0.1% of GDP) if a country fails to comply with this requirement. Compliance with the rules will also be monitored at national level by independent institutions.

Due to these new hard enforcement mechanisms, fiscal surveillance has entered the realm of hard law, or if not, has moved very far towards hard law. One limit of this evolution is the lack of preciseness of the rules. In spite of the efforts to define notions such as 'significant deviations from the medium-term budgetary objectives', the rules are still outlined in a quite vague manner, in contradiction with the principle of legal certainty. From the standpoint of the rule of law, this is highly problematic. With the most recent evolutions of the EMU, we may have types of law where a strong coercion is organized in order to ensure compliance with imprecise rules. The possibility of sanctions and the competence of the ECJ make it clear that we are now facing a much harder kind of law, but whether this type of law meets the requirements of an effective *rechsstaat* is a matter of discussion. Indeed, it can be argued that a combination of institutionalized coercion with rather uncertain norms is not the best way to guarantee civic rights. It is true that the precision of the rules increases when the EU institutions interpret the macro-economic performance of the Member States, but it means that the Commission and the Council have considerable discretion to interpret and adapt the rules.

However, for our purpose, which is limited to mapping EU soft and hard law, the evolutions of EU economic governance remain one of the most interesting case of soft law hardening, together with the Charter of Fundamental Rights, Justice and home affairs and a few others. Now the question is: Can the hardening of soft law become a current practice in the European integration processes? Does soft law set the pace for subsequent hard law development? For this type of legalization to appear in the European integration process, there must be a growing awareness that more binding agreements induce more effective compliance, because they are subject to greater oversight. Considering that the main reason

[88] Treaty on Stability, Growth and Governance in the Economic and Monetary Union, Doc/12/2, available at http://europa.eu/rapid/press-release_DOC-12-2_en.htm, accessed 6 March 2013.
[89] The TSCG requires contracting parties to respect/ensure convergence towards the country-specific medium-term objective as defined in the SGP, with a lower limit of a structural deficit of 0.5% of GDP.

for using soft law instruments is to generate compliance whilst avoiding loss of sovereignty, two questions arise.

First, does European soft law succeed in shaping Member States' public policies and legislation?[90] Does it produce compliance in domains where hard law is not an option?[91] These questions go far beyond the limited frame of this paper. There is a need for more systematic assessments of the EU soft law's effectiveness. Researchers often disagree on these issues, even when dealing with the same national and sectoral cases.[92] For example, the influence of the European Employment Strategy in Germany was considered limited by some [93] and rather significant by others. [94] Regarding employment and social protection/inclusion, Zeitlin[95] identified three main changes: 1) substantive policy change (changes in national policy thinking, changes in national policy agendas, changes in specific national policies); 2) procedural shifts in governance and policy-making arrangements (better horizontal coordination of interdependent policy areas, improvements in national steering and statistical capacities, enhanced vertical coordination between national governments and the region, increased involvement of non-state actors); 3) mutual learning among the Member States. Jacobsson has argued that the OMC in employment policy has triggered a subtle transformation of states, through discursive regulatory mechanisms and spreading of knowledge.[96]

The weaknesses of the coordination method have also been acknowledged by scholars, some of them doubting the greater effectiveness of soft rules, unless there is a strong shadow of hierarchy. [97] Soft law is not 'a panacea for achieving effective regulations': 'non-hierarchical, private self-regulation or public-private co-regulation require a strong shadow of hierarchy to be effective'.[98] But there is a need for more in-depth analysis of the resistance to soft law. My assumption is that both soft and hard laws generate compliance –and non-compliance- through the same mechanisms. To say it differently, soft law faces the same

[90] On compliance with non-binding international norms, see: D. Shelton (ed), *Commitment and Compliance. The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2003).
[91] On the respective advantages and disadvantages of soft law and hard law, see : G. Shaffer, M. A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', (2010) 94 *Minnesota Law Review*, 717.
[92] J. Zeitlin, *op. cit.*, 140, note 67 *supra*.
[93] M. Büchs and D. Friedrich, 'Surface Integration: the National Action Plans for Employment and Social Inclusion in Germany', in J. Zeitlin and P. Pochet (eds), *op. cit.*, 249, note 56 *supra*.
[94] J. Preunkert and S. Zirra, 'Europeanisation of Domestic Employment and Welfare Regimes: The German, French and Italian Experiences', in M. Heidenreich and J. Zeitlin (eds), *Changing European Employment and Welfare Regimes: The Influence of the Open Method of Coordination on National Reforms* (Routledge, 2009).
[95] J. Zeitlin, *op. cit.*, 143-146, note 67 *supra*.
[96] K. Jacobsson, 'Soft Regulation and the Subtle Transformation of States: the Case of EU Employment Policy', *op. cit.*, note 56 *supra*.
[97] A. Héritier and M. Rhodes, *op. cit.*, note 49 *supra*.
[98] Koutalakis & Buzogany 2010:16

attitudes of resistance, retrenchment and inertia that have been studied by the important literature on non-compliance with legal norms[99].

Secondly, how do EU institutions and Member States apprehend this issue of compliance with EU soft law? Do they promote harder forms of law when confronted with the failures of soft governance? Here, the assumption is that, while sovereignty would explain the use of soft law, the search for effectiveness would explain its transformation into hard law. Thus, the communautarization of Justice and home affairs could be explained by a growing awareness that soft law is not effective. The third pillar has been associated with lowest common denominator decision-making and implementation deficits.[100] In 2008, the Commission wrote: 'the overall general assessment of the Hague programme is rather unsatisfactory'.[101] This negative view of soft law mechanisms in JHA has been presented alongside argumentation in favour of a complete extension of the Community method to the JHA field.[102]

Moreover, soft law in the European Union is allegedly exposed to more integrative dynamics than any other international organization, due to its supranational nature and its very large scope of action. Even if there are several examples of international regimes where politics have been replaced by soft law, and where soft law has become hard law,[103] the most prominent example being the World Trade Organization,[104] the hardening of soft law is more likely to occur in the European Union because the EU is a polity, far from a classic international organization. In the European Union, when soft instruments fail to succeed, the evolution towards hard law and sanctions remains a credible option, for two main reasons. First, knowing that integration through (hard) law has proved effective since the beginning of European integration, the effectiveness of 'soft' policy-areas should be strengthened by the use of hard law. Secondly, several players –Member States or institutions - may push in this

[99] Here, this paper relates to a larger research project initiated by Sabine Saurugger at Sciences po Grenoble (whose first results can be found in S. Saurugger, 'Beyond Non-Compliance with Legal Norms', in T. Exadaktylos and C. Radaelli (eds), *Research design in European Studies: Establishing Causality in Europeanization* (Basingstoke, Palgrave 2012) at 105, and C. Fontan, S. Saurugger and N. Zahariadis, 'Resisting in times of crisis: the implementation of European rigor plans in the Irish and Greek cases' (2012), 53rd International Studies Association Conference, San Diego.

[100] J. Monar, *op. cit*., 130, note 41 *supra*.

[101] Communication from the Commission to the Council and the European Parliament - Report on implementation of the Hague programme for 2007, 02.07.2008, COM/2008/0373 final.

[102] Communication from the Commission to the Council and the European Parliament - Implementing The Hague Programme: the way forward, 28.06.2006, COM/2006/0331 final.

[103] J. Gold, 'Strengthening the Soft International Law of Exchange Arrangements', (1983) *American Journal of International Law* 77: 443; C. Fujio, 'From Soft Law to Hard Law: Moving Resolution 1325 on Resolutions 1325 on W,omen, Peace and Security', (2008) 9 *Georgetown Journal of Gender & the Law* 1: 215–235.

[104] F. M. Abbott, *op. cit.*, note 20; H. Culot, 'Soft Law et droit de l'OMC', (2005) *Revue international de droit économique* 3: 251-289.

direction and try to convince the reluctant actors that opting for the traditional Community method is necessary. These EU actors have more regulatory powers than any other actors in international organizations. Furthermore, historical and functional perspectives may help understanding how these actors can contribute to the transformation of norms in the European Union.

Here, the article reaches its limits. The assumption that the EU, due to its special nature, triggers transformations from soft law to hard law, can only be proven through a more systematic comparison with other international organizations, which goes far beyond the scope of this paper.

Table 7: Legalization / Delegalization in European Integration

	Legalization		Delegalization	
	Limited Legalization	Complete Legalization	Limited Delegalization	Complete Delegalization
NLN ⇔ Legal Norms (soft and hard)	NLN ➔ SL *Major trend since Maastricht* *Additional trend until Maastricht*	NLN ➔ HL *Major trend until Maastricht* *Additional trend since Maastricht*	SL ➔ NLN *Non Existent in EU Law*	HL ➔ NLN *Non Existent in EU Law*
SL ⇔ HL	SL ➔ HL (SL Hardening) *Additional Trend since Maastricht*		HL ➔ SL (HL Softening) *Additional Trend since Maastricht*	

NLN: Non-Legal Norms LN: Legal Norms SL: Soft Law HL: Hard Law

V. Conclusion

The aim of this paper was to identify soft law in the European Union in order to better understand the transformations of EU law. The criteria of obligation and enforcement have been used to propose a typology of norms that draws a line between soft law and hard law on the one hand, soft law and non-legal norms on the other hand. The assumption was that soft law couldn't be assimilated either to a special kind of non-legal norms (having legal relevance) or to a special kind of legal norms (softer than the hard ones). Soft law comprises both binding and non-binding rules depending on the combination of obligation and enforcement.

When applying the criteria mentioned above, it appears that EU soft law does not differ from international soft law, defined as those soft norms generated by international organizations and intergovernmental relations. On the one hand, the development of soft law in the EU could be seen as a process of 'normalization'. The use of soft law, together with the application of new forms of governance and the relative decline of the Community method, would bring the EU closer to classical international organizations.[105] Since the 1990s, indeed, soft law has developed tremendously in new areas of competence, giving credit to the idea that the European Union increasingly resembles an intergovernmental organization.

On the other hand, the specificity of EU soft law is that it develops within a far more integrated system of governance than any other international entity, a kind of polity far from a classic international organization. The use of soft law instruments is counterbalanced by a series of factors pushing towards legalization. These factors are not unknown in international regimes,[106] but there is no example of international organization where so many integrative dynamics co-exist. Soft law within the EU is subject to integration dynamics to a greater extent than it is in other international organizations. The most prominent trend, as the case of JHA indicates, seems to be that soft law is a first step towards a more constraining kind of law. In the future, we will have to further investigate whether the function of soft law is to reduce the supranational character of the European Union through a process of delegalization, or, on the contrary, to prepare further integration/legalization.

[105] J. Klabbers, 'The Undesirability of Soft Law', (1998) 36 *Nordic Journal of International Law* 1: 381-391.
[106] C. M. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (1989) 38 *International and Comparative Law Quarterly* 4: 850-866; C. Fujio, *op. cit.*, note 103 *supra*.