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Social Policy and the Open Method of Coordination

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**Hard and Soft Law in the European Union:
The Case of Social Policy and the Open Method of Coordination**

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Abstract:

The European integrative experiment rests on a dynamic equilibrium of intergovernmental and supranational features of the regulatory framework of the European Union. One of the most important challenges to this system currently lies in finding ways to maintain its capacity to operate and, at the same time, adapt its problem-solving instruments to changing conditions of the regulatory politics. The current pragmatic mix of regulative strategies employed in the European Union allows for different possible scenarios concerning future development of the regulatory system within the EU.

The article analyses the emergence and proliferation of new forms of decision-making and related legal techniques in the European Union. The origins and possible trajectory of a whole spectrum of contemporary legal techniques and governance methods, ranging from 'hard' to 'soft', are being contextualized. Special attention is given to the Open Method of Coordination and examples of its application in the social policy field.

Keywords: Open Method of Coordination, regulatory politics, rule of law, social policy

Introduction

This article analyses the emergence and proliferation of new forms of decision-making and their legal techniques in the European Union (EU). A special attention is given to the Open Method of Coordination (OMC) and examples of its application in the social field at the European level.

The contemporary EU is a highly institutionalized template for integration, equipped with different models of operation, which range from supranational to intergovernmental methods¹. The recourse to a single process of integration, based on a single legal format, has been made untenable by several waves of enlargement and additions of new competences², which have amplified respectively variability among interests of the member states and diversity of tackled issues. The center of gravity in the EU is fluctuating between two opposed methodologies of integration: one more supranational and another more intergovernmental. As a consequence, the policy-making process is far from being a coherent combination of supranational institutionalization, teleological integration and the Community method of decision-making. There is a growing tension between the traditional sectors of integration, with a more routinized manner of decision-making, and a new block of areas, where experimental forms of integration are under way³. Interestingly, all the newer forms of EU integration have used non-binding legal instruments and developed a complex relationship with the European Court of Justice (ECJ).

Despite the introduction of new forms of integration, however, certain characteristics of traditional European regulation are resilient. According to a historical neo-institutional perspective, reform of the rule-making mechanisms encounters resistance from institutionalized patterns and vested interests of the supranational bodies. The latter have a pre-eminent position in the reform process and defend their role in the

¹ Helen Wallace, William Wallace (eds.), *Policy-Making in the European Union* 4th ed (Oxford University Press, 2000)

² Mark Pollack, "Creeping Competences: The Expanding Agenda of the European Communities", *Journal of Public Policy*, 14:2 (1995) pp. 95-145

³ Helen Wallace, "The changing politics of the European Union: an Overview", *Journal of Common Market Studies* 39:4 (2001) pp. 581-594

name of the general interest. Nonetheless, the search for new forms and methodologies of integrative policy-making and rule-setting is progressing, even if through a narrow path of reform, which is not unlimited⁴. In sum, the EU as a structure for integration has its own inertia and autonomy.

The following section of the article will analyze the OMC as the best example of this painstaking process of internal reform of the EU model of integration. Then, the article will attempt to contextualize the origins and possible trajectory of the contemporary legal techniques within the EU, covering the whole range between 'hard' and 'soft' governance methods. Finally, the article will assess the current pragmatic mix of regulative strategies employed in the EU and will draw some possible scenarios for future developments.

The Open Method of Coordination

Since the 1980s a renewed dynamics of European integration has been linked to the emergence of new voluntarist methods of governance⁵. Until the creation of the EU, with the Maastricht Treaty serving as a complex blueprint, this development eluded being transposed into the formal provisions of the Treaties. Since then, however, the intergovernmental method has been increasingly formalized alongside with the Community method.

Helen Wallace argues that the EU is based upon a variety of modes of policy making, which vary from purely intergovernmental to entirely supranational. In consequence, decision-makers inside the EU have a spectrum of instruments at their disposal, ranging from supranational to intergovernmental. The latter instruments come in different forms and degrees of intensity. At one extreme, 'intensive intergovernmentalism', conceived outside the Community framework and shielded from the interference of supranational bodies, has an explicitly inter-state design. Compared with classic intergovernmental arrangements, it is characterized by the

⁴ James G. March, "Continuity and change in theories of organizational action", *Administrative Organization Quarterly* 41:2 (1996) pp. 278-287

⁵ Renaud Dehousse, "Integration v. Regulation? On the dynamics of regulation in the European Community", *Journal of Common Market Studies* 30 (1992) pp. 383-402
Wolfgang Streeck, "Neo-Voluntarism: A new European Social Policy Regime?", in Gary Marks, Fritz Scharpf, Philippe Schmitter, Wolfgang Streeck (eds.), *op. cit.*, pp. 64-94

emergence of dense and intense patterns of interaction, which involve stable networks of national ministers and officials⁶. At the other extreme, ‘integration through multilateral surveillance’ is a policy methodology present in various international organizations, where socialization and learning processes among decision-makers are the main vehicles for changing domestic policies and politics.

One good example of the second strategy of inter-governmental coordination is the OMC, formalized at the Lisbon European Council in 2004 and aimed at dealing with various policy areas linked to economic growth and adjustment of the welfare state. In fact, the OMC is the product of a long process, which was launched informally at the 1997 Luxembourg Summit on the European Employment Strategy (EES) and developed over the years by the member states by way of experimentation with the traditional Community method⁷. Specifically, the OMC departed from the Community method of decision-making by creating formalized procedures in which governmental performance is defined and assessed under broad peer-managed guidance, without sanctions. The OMC can be simply characterized as a special form of multilateral surveillance, which introduces non-enforceable voluntary obligations in the EU and does not differ in kind from the legal instruments used by other international organizations, such as the OECD⁸.

Whereas the Community method has traditionally been associated with the mandatory enactment of the Community law and recourse to judicial review, ‘intensive

⁶ The first reflection on this aspect of European integration was advanced in a seminal chapter by Robert O. Keohane and Stanley Hoffmann, “Conclusions: Community Politics and Institutional Change”, in William Wallace (ed.), *The Dynamics of European Integration* (London: Pinter, 1990) pp. 276-300. Sociological implications of the intergovernmental integration in the European Union were analyzed by Knud Erik Jorgensen, “PoCo: The Diplomatic Republic of Europe”, in Knud Erik Jorgensen (ed), *Reflective Approaches to European Governance* (Macmillan, 1997) pp. 167-180

This analysis at the regional level complements the more ambitious hypothesis of Anne-Marie Slaughter of a ‘New World order’ formed by networked interaction among liberal states at the global level. Slaughter looks at the proliferation of global networks, especially among government officials, including judges, legislators and bureaucrats, who exchange information and coordinate their activities across national borders in order to tackle transnational problems. Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2005)

⁷ Mario Telo, “Governance and government in the European Union: The open method of coordination” in

Maria Joao Rodrigues (ed), *The New Knowledge Economy in Europe* (Edward Elgar, 2002) p. 251

⁸ Armin Schaefer, “A New and Effective Form of Governance? Comparing the OMC to Multilateral Surveillance by the IMF and the OECD”, Paper for the 2004 Conference of Europeanists, March 11-13 2004, Chicago

intergovernmentalism'⁹ and, more recently, the OMC are based on a different legal approach¹⁰. The OMC produces guidelines agreed at the European level that are not binding and do not impose sanctions in case a government decides not to act. The invigilation of these guidelines is limited to peer review and public naming-and-shaming. It is possible to distinguish between 'hard' and 'soft' means of governance by using the binding versus non-binding character of legal techniques as a criterion of discrimination. The metaphor of the 'hard' character of the Community method refers to its legal output, which is based on adjudication and enforcement procedures. In comparison, legal practices, procedures and rules, which are produced by the OMC, are described as 'soft', because they lack rigidity and enforceability.

From an intergovernmentalist point of view, the explanation for the development of the 'hard' legal approach is presence of a relative consensus amongst the member states on specific goals in certain policy areas, which leads them to accept the Community law as the standard legal practice. In areas where this consensus is not present, harmonization and legal sanctions are replaced by more compromising and subtler means of compliance. According to Joseph Weiler, however, the exceptional status of the Community law, or the 'approfondissement' of 'normative supranationalism' is countered by the emergence of 'decisional intergovernmentalism'. Member states tolerated the construction of adventurous doctrines by the ECJ over the status of the Community law precisely because each member state retained a veto over the acts that would bear these legal characteristics. Moreover, such legal doctrines provided a guarantee of commitment of all the parties to these intergovernmental compromises.

Joseph Weiler presents this phenomenon as the structural equation of the classical European constitutionalism, which was developed in the context of the Common Market¹¹. Here, the enforceability of normative supranationalism is tied together in a dynamic balance with decisional intergovernmentalism. In his view, the 'hardness' of the Community law is directly proportional to the willingness of governments to be

⁹ Michael Smith, 'Diplomacy by Decree: The Legalization of EU Foreign Policy', *Journal of Common Market Studies* 39 (2001) pp. 81-106

¹⁰ Sabrina Regent, "The Open Method of Coordination: A New Supranational Form of Governance?", *European Law Journal* 9:2 (2003) pp. 190-214

bound by it. Consequently, given the increasing resort to qualified majority voting in the decision-making process of the EU, member states are less willing to submit themselves to the rigidity implied by the traditional Community law. Thus, the character of new strategies and instruments employed within the EU can be explained by the fact that it is more difficult to achieve consensus amongst the member states. Moreover, the addition of the second and third pillars of policy-making has shielded certain policy areas from the judicial review of the ECJ or from the monopoly of initiative by the Commission. For these reasons, one can describe the current EU institutional framework as a legal patchwork, made up of different legal bits and pieces¹².

Since the Single European Act it has been possible to individuate a correlation between a policy area and legal instruments used¹³. In fact, different legal techniques were conceived for different spheres of activity. New practical demands have triggered a change in response as well as process through which it was delivered. Whereas the Community method has been dealing prevalently with movements of goods and services, governed according to harmonized standards, the new methods of integration are mostly concerned with immaterial exchange of information and best practices. Thus, there has been a shift from an emphasis upon behavioral enforcement through negative restrictions towards creative construction of consensus for positive objectives.

In this context, the OMC has become an object of intensive discussion and analysis, which aim at exploring practical implications of formalizing this methodology¹⁴. Amongst other things, this debate helps to understand the prestige of traditional methods of European integration, backed by the Community law as a guarantor. In fact, the success of the past integration process is often presented as inherently dependent on formal characteristics of the EU institutions, arguably the only

¹¹ Joseph Weiler, "The Community System: The Dual Character of Supranationalism", *Yearbook of European Law* 1 (1981) pp. 268-306

¹² Denis Curtis, "The constitutional structure of the Union: a Europe of bits and pieces", *Common Market Law Review* 30 (1993) p. 17

Jean-Claude Gautron, "Une Europe à droits variables", *Pouvoirs* 69 (1994) pp. 77-93

¹³ Renaud Dehousse, Joseph Weiler, "EPC and the Single Act: From Soft Law to Hard Law?", in Martin Holland (ed), *The Future of European Political Cooperation* (Macmillan, 1991) p. 161

¹⁴ Grainne de Burca, Jonathan Zeitlin, "Constitutionalizing the Open Method of Coordination: A Note to the Convention" *CEPS Policy Briefs* 31 (2003)

international organizations enacting binding rules. As a consequence, the introduction of the OMC and flexible enforcement of its rules seem to challenge this assumption, which is at the core of traditional understanding of the European integration process.

For lawyers, the major controversy regarding the OMC resides in its challenge to the uniformity and integrity of the Community law, which are seen as structural guarantees of integration. On the contrary, the OMC is used as a platform for striking voluntary agreements rather than making laws. According to the purists of ‘orthodox’ integration, the OMC is enlarging strategic room of maneuver available to governments in choosing whether and to what degree to take European goals into account in their domestic policies. In their view, the main dynamics driving this new method is a renewed intergovernmental logic of European integration, characterized by lack of commitment and rhetorical effects¹⁵. In other words, the OMC is viewed as a less supranational and less integrationist form of governance. The advocates of this new method, however, underline advantages presented by the characteristics associated with the OMC: flexibility, adaptability, and pervasiveness¹⁶. Another argument is that preservation of diversity is particularly important in the fields where the OMC is used. Due to extensive differences among current member states, a straight-jacketed harmonization in certain areas would cause more damage than benefits¹⁷.

Despite contrasting views on desirability and effectiveness of the OMC¹⁸, critics and advocates of this approach do agree on the inherent opposition between flexibility and ‘softness’ of the legal features of the OMC and uniformity as well as rigidity of the Community law used as the ‘orthodox’ method of integration¹⁹. This type of conceptualization, however, falls victim to excessive dualization of the two

¹⁵ Claudio Radaelli, “The Open Method of Coordination”, *SIEPS Report* 2003:1

¹⁶ Maria-Joao Rodriguez, Mario Telo (eds), *Vers une société européenne de la connaissance. La stratégie de Lisbonne 2000-2010*, (Éditions de l’Université de Bruxelles, 2004)

¹⁷ Fritz W. Scharpf, “The European Social Model: Coping with the Challenge of Diversity” *MPIfG Working Paper* 8 (2002)

¹⁸ Introduction in Renaud Dehousse (ed.), *L’Europe sans Bruxelles ?* (Paris, L’Harmattan, 2004), pp. 13-20

¹⁹ Jacques Delors “Avant-Propos”, in Renaud Dehousse (ed.), *L’Europe sans Bruxelles ?* (Paris: L’Harmattan, 2004), pp. 9-10

methodologies of policy-making²⁰. In reality, the use of ‘soft’ and ‘hard’ legal instruments in different areas of the EU is not so neatly segregated²¹. On the contrary, because of the presence of a common institutional background and actions of common supranational organizations, such as the Commission and the ECJ, there is a widespread cross-fertilization amongst pillars, especially in terms of policy methodologies and legal approaches. This mutual hybridization has been contributing to the growth of a new pragmatic mix of regulative instruments, intrinsically linked to the present fluctuating state of European integration. The EU, in its current form, is the most important institutionalized forum on the European continent; thus it serves as a nesting ground for various integrative experiments among its member countries. Cross-fertilization and mutual exchange among these different integrative experiments result in a fragmented system that transcends a simplistic opposition of ‘soft’ against ‘hard’ governance²².

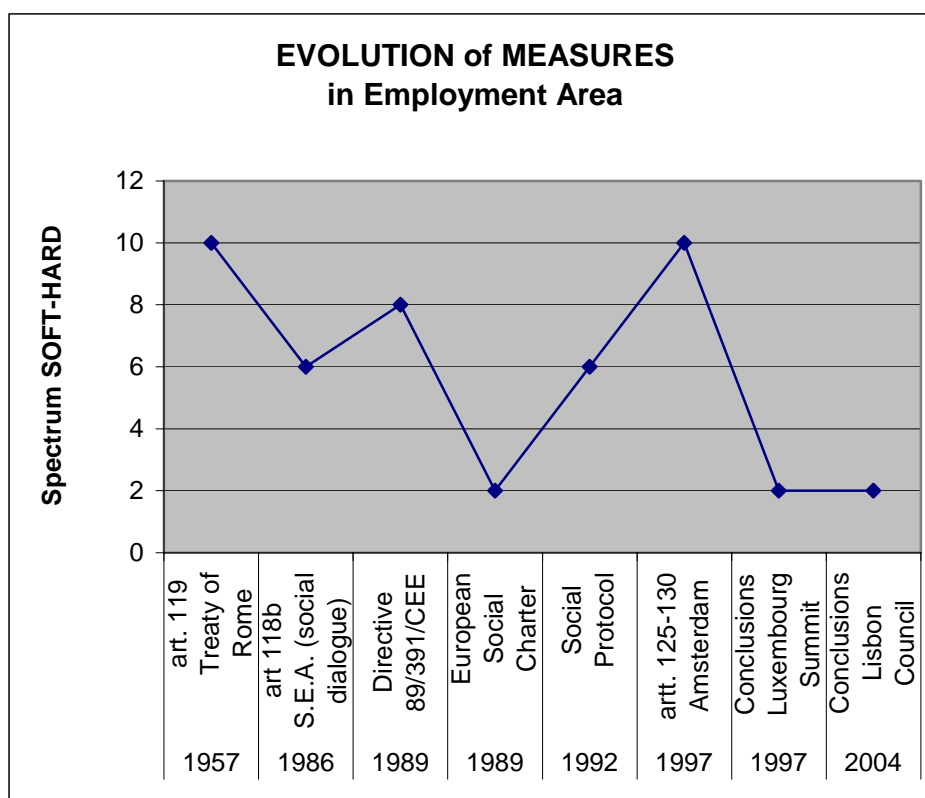
This result is apparent, for instance, in the field of employment. In this policy area, where the OMC was first applied *ante litteram* as the European Employment Strategy²³, all possible legal means have been applied over time. The spectrum of measures have ranged from ‘hard’ Treaty dispositions on wage equality, regulations on safety and directives on health matters to ‘soft’ guidelines produced by the Luxembourg Summit, passing through self-regulation promoted by the Commission through the procedure of Social Dialogue between employers and employees. The chronological development of this process is extremely irregular on the ‘soft-hard’ axis.

²⁰ Renaud Dehousse, “The Open Method of Coordination: a New Policy Paradigm?”, *Cahiers européens de Sciences Po*, 3 (2003)

²¹ Imelda Maher, “Law and the Open Method of Coordination: Towards a new Flexibility in European Policy-Making?”, *Journal for Comparative Government and European Policy* 2:2 (2004) pp. 248-262

²² Philippe Pochet, “European Employment Strategies and Open Method of Coordination: Mixed Results and Multiple Challenges”, in Edward Best, Danielle Bossaert (eds.), *From Luxembourg to Lisbon and Beyond* (EIPA, 2002) pp. 31-47

²³ Janine Goetschy, “Les nouveaux éléments sur l’emploi et le social: rattrapage, consolidation ou percée” in Mario Telo, Paul Magnette (eds.), *De Maastricht à Amsterdam* (Editions Complexe, 1998) pp. 139-162



In sum, this part of the article attempted to place the OMC in the context of general parameters of European integration while adopting a long-term perspective in respect of the patterns of evolution in the EU governance. It was argued that such conceptualization allows for different analysis of the debate concerning the OMC. The next part of the article applies the same method to the analysis of the phenomenon of ‘soft’ law, generally perceived as ‘the’ legal technique associated with the OMC.

Soft Law in Context

This section of the article attempts to present origins (a) and possible directions (b) of ‘soft’ law in the context of the legal style of EU regulation, paying particular attention to research carried out on the OMC and its application in the field of social policy. Before discussing these issues, however, the article will point out some preliminary clarifications. First, the article will argue that the transformation of EU legal technique towards ‘soft’ regulation under conditions of intergovernmental bargaining cannot be explained by a simple paradigmatic shift, either pragmatic or ideological. Secondly, the article will point out why the supranational machinery of the EU is not irremediably incompatible with the introduction of new modes of regulation.

The shift to new forms of regulation at the European level can be linked to broader trends of legal style in the context of modern administrative practices. One possible interpretation is that we are experiencing a consistent and progressive substitution of 'hard' forms of regulations with 'soft' ones across different policy areas²⁴. This hypothesis indicates a gradual shift from authoritative to indicative regulation in modern administrative practices²⁵. At the national level administrative and public law have shifted from the traditional top-down regulatory approach towards a greater recognition of the virtue of informal standards and negotiation. Moreover, the shortcomings of hierarchical and detailed regulation are magnified by the ideological turn against command-and-control approaches. The latter are viewed as suppressing individual freedom and interfering with the complex dynamics of market allocation.

Accordingly, the adoption of 'soft' law in the EU is deemed to be part of this new regulatory paradigm, which places more emphasis on informal norm-setting. The underlying claim is that the legal style of the EU is moving away from traditional, top-down, control-and-command forms, typical of the European Communities. This trend is well documented in traditional areas, such as market regulation²⁶, and in newer ones, such as environment²⁷. In older policy areas, the integration process reached a stage where all possible formal integration has been obtained, thus additional results can be achieved only under informal procedures. In newer policy areas, harmonization as an approach is often not even considered, because it is not desirable or politically feasible²⁸. Yet, some action towards policy consistency has to be taken in order to address the existing problems. Chalmers and Lodge capture this trend:

“No longer is the European Union to be centered around the Classical Community Method of supranational management of regulation. Instead it is to be a decentered participatory process in which national governments are no

²⁴ François Chazel, Jacques Commaille (eds), *Normes juridiques et regulation sociale* (LGDJ, 1991)

²⁵ Charles-Albert Morand, *Le droit neo-moderne des politiques publiques* (LDGJ, 1999)

²⁶ Burkhard Eberlein, “Formal and Informal Cooperation in Single Market Regulation”, in Thomas Christiansen, Silvia Piattoni (eds.), *Informal Governance in the EU* (Edward Elgar, 2003)

²⁷ Jonathan Golub (ed), *New Instruments for Environmental Policy in the EU* (Routledge, 1998)

²⁸ Andrea Lenschow, “New Regulatory Approaches in ‘Greening’ EU policies”, in *European Law Journal* 8:1 (2002) pp. 19-37

longer controlled and commanded by the imperatives of EC law...and new types of Union-member State relations are forged which are centered less around classical legal prescriptions, and more around diffuse adaptation to a wide array of transnational norms, whose form and origin varies.”²⁹

In spite of the clarity and thrust of this argument, there are major problems concerning such a simplistic explanation concerning paradigmatic shift towards a generalized ‘soft’ approach. This view fails to point out that ‘soft’ law can prosper also because of the success of ‘hard’ law. On the one hand, some of the legitimacy for the use of ‘soft’ law derives in part from the established patterns of the ‘hard’ Community law. The historical legacy of European integration, achieved through the use of ‘hard’ sanctions, is not put into question by the search for new instruments for future integration. On the other hand, there is empirical evidence against the hypothesis of a progressive fading of traditional legal arrangements, backed by sanction-oriented remedies. For a start, the current use of ‘soft’ law by the Commission is not threatening the *acquis* of the internal market. In other words, the use of ‘soft’ law is not detracting from the validity of the traditional paradigm of law, at least in the context of the first pillar³⁰.

In reality, the emergence of ‘soft’ law is not a sign of the progressive erosion of its ‘hard’ version. The rise of ‘soft’ law around new modes of governance is a fact, but up to this date European integration remains based to a large extent on ‘hard’ law enacted through the Community method. Moreover, the proliferation of ‘soft’ law does not preclude these new legal forms progressing towards a subsequent phase, which is based on coupling of obligations and sanctions. For instance, the area of Justice and Home Affairs (JHA), which has been associated with ‘soft’ law and flexible rules of cooperation since its onset³¹, has experienced a shift in the mid-1990s towards ‘harder’ forms of legislation and a progressive, if imperfect, incorporation

²⁹ Damian Chalmers and Martin Lodge, “The Open Method of Co-ordination and the European Welfare State”, *Discussion paper*, ESCR Center for Analysis of Risk and Regulation (11 June 2003) p. 1

³⁰ Geraint Howells, “Soft Law in EC consumer law”, in Paul Craig, Carol Harlow, *Lawmaking in the European Union* (Kluwer Law International, 1998) pp. 310-331

³¹ Elspeth Guild, “The Constitutional Consequences of lawmaking in the third pillar” in Paul Craig, Carol Harlow, *Lawmaking in the European Union* (Kluwer Law International, 1998) pp. 65-88

under the scope of the Community law and the interpretation of the ECJ³². Even in the sphere of security and defense cooperation, the long-term experience is that of a progressive ‘hardening’ of the otherwise flexible dispositions dealing with highly discretionary and sensitive issues³³. Finally, prototypes of informal coordination similar to the OMC have been used in the past by the Commission to prepare the ground for formal legislation³⁴.

Another point of clarification concerns the supposedly unconditional opposition of the EU supranational bodies to ‘soft’ law agreements, and especially the OMC. Along the axis of uniformity/flexibility, European supranational organizations have tended to operate close to the uniformity pole. However, it is possible to notice a growing shift from this traditional way of functioning. The Commission in particular derogated more freely from the tenets of uniformity and enforceability of the Community law, to which the ECJ is tied in virtue of its own constitution³⁵. This freedom of maneuver has been exploited without always acknowledging it, most often in order to achieve concrete results while keeping the appearances. For instance, with the adoption of the principle of subsidiarity, the design of directives changed. Member states were given increasingly larger room of maneuver for transposing the content of directives, while the criteria for judging their conformity with the common principles have become less stringent³⁶. Conversely, the ECJ took note of this move towards less than perfect harmonization of national legislations and relaxed the obligations of conformity for framework directives³⁷.

The emergence of ‘soft’ law inside the Union is not limited to the OMC and policy areas in which the OMC has already been deployed. In fact, it has influenced the wider context of the activities of European integration. As a consequence, the

³² Jorg Monar, “Institutionalizing Freedom, Security, Justice”, in John Peterson, Michael Shackleton, *The Institutions of the European Union* (Oxford University Press, 2002) pp. 186-209

³³ Renaud Dehousse, Joseph Weiler, “EPC and the Single Act: From Soft Law to Hard Law?”, in Martin Holland (ed), *The Future of European Political Cooperation* (Macmillan, 1991) p. 161

³⁴ David Hodson, Imelda Maher, “The Open Method of Coordination as a New Mode of Governance. The Case of Soft Economic Policy Coordination”, *Journal of Common Market Studies* 39:4 (2001) p. 16

³⁵ “The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed” Art. 164 EC Treaty

³⁶ Brendan Flynn, “Subsidiarity and the rise of ‘soft’ law in EU environmental policy: beyond who does what, to what it is they actually do?”, *Occasional Papers* 40, University College Dublin (1997)

departure from the formal rule-making, uniform interpretation, and top-down enforcement of enacted rules has already happened not only within the realms regulated by the Community method, but also in areas covered by intergovernmental logic. 'Soft' law can be considered as an evolving concept, as it is neither confined to specific areas nor has precise boundaries in the context of the EU³⁸.

As such, 'soft' law can be used in ambivalent ways: either to avoid stronger integration or to promote it. The legal arsenal of the Commission has always included both 'softer' legal instruments and tools whose legal effect is constraining. Less formal instruments, such as recommendations, resolutions and codes of conduct, have grown and prospered alongside with rigid regulations, directives and decisions, which have a clear 'hard law' aura. Moreover, the use of 'hard' instruments did not, in spite of their formal binding effects, ensure prompt and effective implementation of the Community law³⁹. Due to resistance to the harmonization approach, the Commission converted itself to the virtue of 'soft' law in the early 1980s by introducing self-regulation and voluntary standardization⁴⁰. The Commission has customarily used other rule-making procedures than the Community method in order to overcome rigidities of the traditional decision-making process. These steps were primarily motivated by the search for flexibility. Moreover, guidelines⁴¹ and communications⁴² have been used by the Commission to colonize and incorporate fields outside 'hard' Community law, often with the collaboration of the ECJ.

³⁷ David Grimeaud, "The EC Water Framework Directive – An instrument for integrating Water Policy", *Review of European Community & International Environmental Law* 13:1 (2004) pp. 27-39

³⁸ For a review of the problems of this concept in Community law see K. C. Wellens and G. M. Borchardt, "Soft Law in European Community Law" *European Law Review* 14 (1989) pp. 267-321. pp. 296-302. They also provide classification of Community's soft law according to forum, form and content.

³⁹ Alberto Gil Ibanez, "The Administration, Supervision and Enforcement of EC Law: Powers, Procedures and Limits" *European Law Review* (2000) p. 211-235

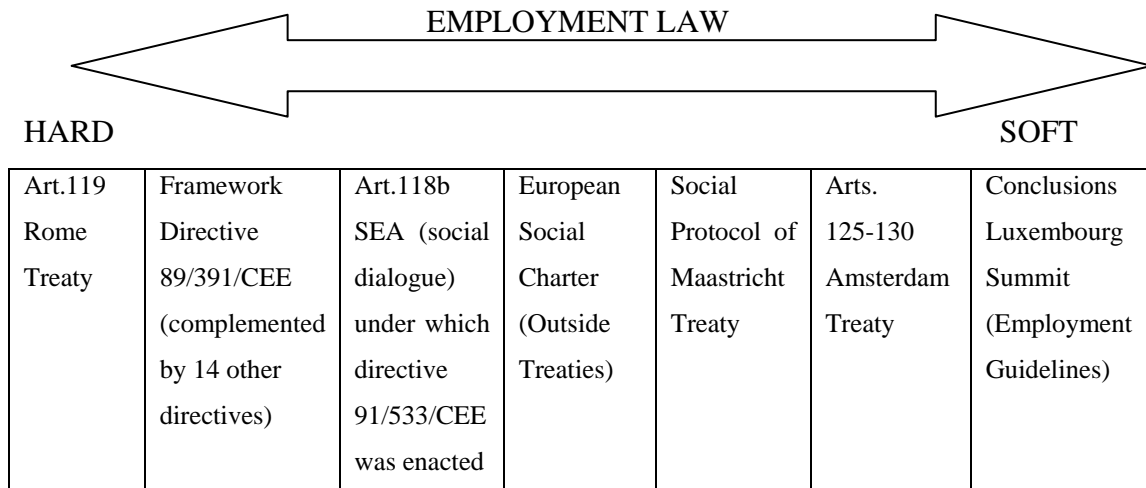
Giuseppe Azzi Ciavarrini, "The Slow March of European Legislation: the Implementation of Directives" in Karlheinz Neunreither and Antje Wiener, (eds.), *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy*, (Oxford University Press, 2000) pp. 52-67

⁴⁰ Michelle Egan, *Constructing an European Market* (Oxford University Press, 2001)

⁴¹ Michelle Cini, "The soft law approach: Commission rule-making in the EU's state aid regime", *Journal of European Public Policy* 8:2 (2001) pp. 192-207

⁴² Anne-Marie Tournepiche, "Les communications : instruments privilégiés de l'action administrative de la Commission européenne", *Revue du Marché commun et de l'Union européenne* 454 (2002) pp. 55-62

Therefore, in the process of European integration, broad headings of ‘hard’ and ‘soft’ law are not coterminous with supranational and/or intergovernmental character of European politics. A more detailed analysis reveals contradictory and complex evolution of the use and practice of ‘hard’ and ‘soft’ law⁴³. As mentioned earlier, this situation is particularly well exemplified in the field of employment. SEE GRAPH BELOW



The following sections of the article will provide further explanation concerning the emergence of ‘soft’ law (a) and its evolution in the EU context (b). The main hypothesis is that if a diversity of legal arrangements is a result of intergovernmental bargain, institutional context in which ‘soft’ law is introduced should be geared towards transformation from ‘soft’ to ‘hard’ law. This evolution is due to three elements: path-dependent trajectory of regulation, presence of organizations committed to such patterns, and normative expectations created by the EU institutional environment. The expectations of actors, shaped by institutional environment, are particularly important in the absence of material incentives or sanctions related to non-compliance with the rules.

⁴³ Joanne Scott, David Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, *European Law Journal* 8:1 (2002) pp. 1-18

a) The emergence of soft law

Since the 1970s⁴⁴, legal and political scholars alike have been interested in the so-called ‘legalization of international politics’, that is proliferation of international law and activism of international organizations⁴⁵. The growing importance of international organizations has had substantial impact on the increasing formalization of practices and legalization of behavior in international governance.

Because of its perceived uniqueness, the EU legal system is often analyzed with the help of a specific normative model⁴⁶. Scholars of regional studies often argue that European integration is a unique phenomenon, limited to Western Europe⁴⁷, thus it requires particular patterns of explanation⁴⁸. Their main argument is that this regional phenomenon is the product of a very specific conjuncture in historical and political terms. As a consequence, it needs to be considered in isolation from external trends and situations. Specifically, the characteristics of the EU law are perceived to be direct derivatives from the characteristics of the Community law present in the first pillar. A less dogmatic definition of the European law is needed so that a simple resort to *sui generis* argument would not be used to resolve contradictions of the EU legal system.

This article argues that some interesting insights can be brought from outside such an EU-centric perspective. The introduction of the OMC has polemically been presented as an irruption of international law inside the realm of European integration. Following this approach, it is important to understand how ‘soft’ law originated in the international realm, as a legal concept and a political practice. According to the

⁴⁴ Christine Chinkin, "The Challenge of Soft Law: Development and Change in International Law," (1989) *International and Comparative Law Quarterly* 38 (1989) p. 850; Pierre-Marie Dupuy, "Soft Law and the International Law of the Environment", *Michigan Journal of International Law* 12 (1991) p. 420; Alan E. Boyle, "Some Reflections on the Relationship of Treaties and Soft Law", *International and Comparative Law Quarterly* 48 (1999) p. 901

References cited in Jutta Brunnée, Stephen J. Toope, "Persuasion and Enforcement: Explaining Compliance with International Law", *Finnish Yearbook of International Law* (2002) pp. 273-295

⁴⁵ Kenneth Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter, Duncan Snidal, "The Concept of Legalization", *International Organization* 54:3 (2000) pp. 401-419

⁴⁶ Kamiel Mortelmans, "Community Law: more than a functional area of law, less than a legal system", *Legal issues of European Integration* (1996) pp. 23-49

⁴⁷ William Wallace, *Regional Integration: the West European Experience* (Brookings Institution, 1994)

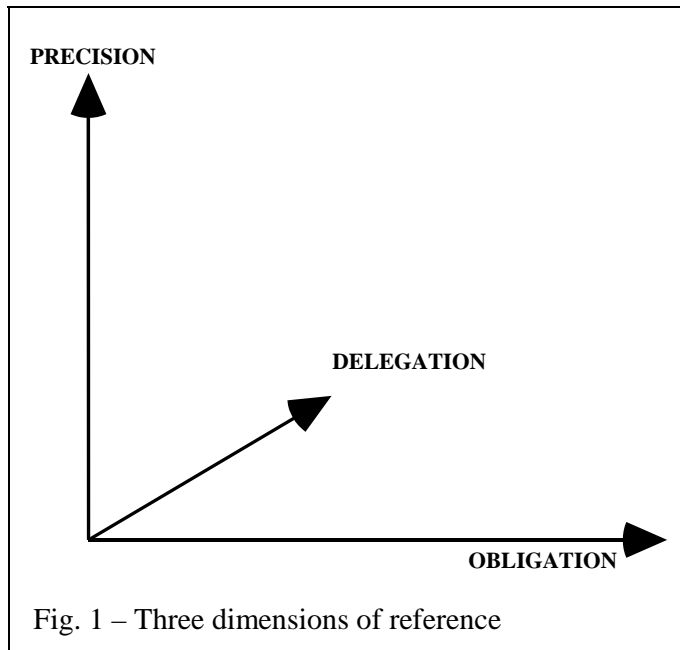
authoritative analysis made by Kenneth Abbott and Duncan Snidal, legal instruments available to states vary alongside three different dimensions running from a ‘hard’ to a ‘soft’ pole: precision of the rules, gradation of the obligation, and form of delegation to a third party for adjudication and enforcement. Accordingly, ‘hard’ law is a strongly institutionalized instrument at the disposal of international actors, which is aimed at solving political problems. The two authors, however, add that ‘hard’ law introduces non-state actors in interstate relations. They come in the form of agents with delegated authority in pursuit of principals’ interests:

“The term hard law...refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law. Although hard law is not the typical international legal arrangements, a close look at this institutional form provides a baseline for understanding the benefits and costs of all types of legalization. By using hard law to order their relations, international actors reduce transactions costs, strengthen the credibility of their commitments expand their available political strategies, and resolve problems of incomplete contracting. Doing so, however, also entails significant costs: hard law restricts actors’ behavior and even their sovereignty.”⁴⁹

In their perspective, differences between ‘hard’ and ‘soft’ legalized arrangements are a matter of degree. The ‘continuum argument’ provides a useful analytical grid, which can easily be operationalized to study specific rules and norms pertinent to an issue area. Generally, all international rules and legal orders involving inter-state cooperation could be analyzed in one reference system, using three dimensions.

⁴⁸ Robert O. Keohane, Stanley Hoffmann (eds.), *The New European Community: Decision-making and institutional change* (Westview, 1991)

⁴⁹ Kenneth Abbott, Duncan Snidal, “Hard and Soft law in International Governance”, *International Organization* 54:3 (2000) pp. 421-422



Such referential system can be especially useful in the context of the EU, because EU law covers all possible hues and nuances of the legal spectrum, spreading from the Community law, in its various forms, to EU law ranging from Treaties to *gentlemen's agreements*.

The continuum argument is convenient for analytical purposes, but it also exhibits serious problems⁵⁰. Firstly, the politics of choosing legal instruments is assumed to follow a rationalist functional logic. The use of a particular kind of rules is perceived to be dependent on the goals to be achieved. The consequent conceptualization of law is deeply instrumentalist and thus is conducive to the view of law as a tool in the hands of its users⁵¹. Consequently, the symbolic power of the resort to law is neglected and, by the same token, the higher legitimacy of 'hard' law in respect of 'soft' law is not considered as a relevant dimension of the equation⁵². Nonetheless, the rule of law, subjected or not to the control of a judicial body, is considered to be a value in itself. The EU defines itself specifically as a 'Community of Law'. This definition implies a reference to a certain identity and values, thus respect for the rule of law is a specific criterion for any state seeking accession to this club.

⁵⁰ For general criticisms, see Martha Finnemore, Stephen J. Toope, "Alternatives to 'Legalization': Richer Views of Law and Politics", *International Organization* 55:3 (2001) pp.743-758

⁵¹ Judith Goldstein, Miles Kahler, Robert O. Keohane, Anne-Marie Slaughter, "Introduction: Legalization and World Politics" *International Organization* 54:3 (2000) p. 391

Secondly, such a referential system fails to answer the basic question of what law is and which criteria characterize it in respect of non-law. Once the absolute boundary between legal norms and other rules is abandoned by adopting a continuum conceptualization, the only possible distinction among degrees is based on relative criteria. Abbott and Snidal solve this problem by assuming that one of the poles of the spectrum is approximating law-like features. In this way, 'hard legalization' is taken as the essential model of legal arrangement, to which 'soft' law relates as a shadow. Whereas 'hard' law, characterized by precise and binding obligations as well as delegation to third parties for enforcement, resonates with the traditional image of domestic law, 'soft' law dwells in the realm of political promises. In other words, the 'lawness' of international 'hard' law is based on the projection of the image of domestic law onto the international level. However, if one pole of the continuum is firmly anchored in the analogy with domestic law, the other end of the spectrum is not so well defined. As a consequence, 'soft' law can be confused in this scheme with any rule that is not backed by external force. As intrinsic characteristics of law as such are not defined, it is impossible to grasp the specific normative value of legal rules in respect of non-legal ones.

Political scientist are often accused of entering the legal field without due consideration of the nature of law. But even legal scholars, who have the benefit of centuries-old disciplinary tradition, have not completely settled the problem of differentiating between law and other normative systems⁵³. So far, the positivist distinction between law and non-law, based on the existence of force backing for the application of rules, is the default solution. It is not, however, completely satisfactory for several reasons. For instance, following such a definition, categorization of rules as international law and the Community law is elusive⁵⁴. Moreover, even in the domestic arena, the needs of the welfare state have created ambiguous legal

⁵² Renaud Dehousse, Joseph H. H. Weiler, "Legal Dimension of European Integration" in William Wallace, *The Dynamics of European Integration* (Pinter, 1990) pp. 242-260

⁵³ See the famous debate between Lon Fuller and Herbert Hart in *Harvard Law Review*.

⁵⁴ Michael Zurn, Dieter Wolf, "European Law and International Regimes: the features of law beyond the nation", *European Law Journal* 5:3 (1999) pp. 272-292

instruments without any clear status of enforceability, which do not fit with this clear-cut distinction⁵⁵.

These objections have to be considered seriously before applying the ‘continuum argument’ to the EU legal arrangements. A different understanding of ‘lawness’ is needed to overcome weaknesses of the positivist lenses adopted in legalization studies. A possible alternative is to take into account thick sociological and institutional layers that give a contextual meaning to the use of law, ‘hard’ or ‘soft’. The intrinsic quality of law is connected to the context in which the creation of norms takes place. Accordingly, law can be appreciated as the product of a joint enterprise of regulation, produced by interaction amongst different actors and organizations. Its results are determined at different paces and degrees:

“First, law should be viewed as a creative activity...formed through continuing struggles of social practices...This leads to a second implication, that...law can exist by degrees, so it is possible to talk about law that is being constructed.”⁵⁶

Following this view, law is an artificial construct evolving through social practice⁵⁷. Due to constant interaction, however, relatively stable patterns of expectations emerge to allow the application of norms in specific contexts. The assumption here is that compliance with legal rules is functioning on a persuasive, and not coercive, basis. Only legal systems that are congruent with the practices and expectations of their context of application can be perceived as legitimate and promoting compliance. Such a view is compatible with an historical institutionalist account of the evolution of the phenomenon of ‘soft’ law in the context of the EU, as it helps to explain how ‘soft law’ manages to transcend the intergovernmental dynamics of its origins.

⁵⁵ Daniel Mockle, “Gouverner sans Droit”, *Les Cahiers de Droit* 43:2 (2002) pp. 143-211

⁵⁶ Jutta Brunnée, Stephen J. Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law”, *Columbia Journal of Transnational Law* 39 (2000) pp.46-47

For a short overview, see Jutta Brunnée, Stephen J. Toope, “Interactional International Law”, *International Legal Forum droit international* 3:3 (2002) pp. 186-192

⁵⁷ Jutta Brunnée, Stephen J. Toope, “Persuasion and Enforcement: Explaining Compliance with International Law”, *Finnish Yearbook of International Law* (2002) p. 278

b) The evolution towards hard law

In theory, as demonstrated in previous sections, the boundary between ‘hard’ and ‘soft’ legal rules is unclear. In practice, the analytical distinction between formal and informal rules also does not seem to imply a threshold too difficult to cross. Once it is passed, however, it is difficult to reverse the course of action. In fact, the evolution of ‘soft’ law is subject to an independent course, notwithstanding its original intention. As a consequence, European actors encounter the unexpected and unintended dynamics of institutionalization at the European level. In the short term, the use of ‘soft’ instruments can be favored over other forms of regulation due to uncertainties linked to intractable or fluid conditions that do not allow for the definition of rigid forms of regulation. In the long run, however, the net effect of the adoption of ‘soft’ law leads to facilitating the adoption and acceptance of ‘hard’ law. The use of ‘soft’ law is facilitating the passage to more precise, clear and enforceable norms, because repeated interactions and conflicts under informal rules are pushing towards a higher degree of institutionalization of these rules⁵⁸. Moreover, ‘hard’ law seems to enjoy more legitimacy in respect of ‘soft’ law, at least in the eyes of the European *elites*. This additional factor can push more easily ‘soft’ law towards further institutionalization, especially once it entered the process of being formalized.

The resulting pattern is the use of ‘soft’ law in the context of the EU legal order as part of a slippery slope towards ‘hard’ law. In such a scenario, the emergence of ‘soft’ law can be a first step, necessary but not sufficient, towards the crystallization of ‘harder’ forms of regulation, which are equipped with binding effect and deemed to be more legitimate and ultimately more efficient. As a consequence, because of its apparently innocuous constraints and incentives for benign cooperation, ‘soft’ law could be an attractive solution for member states. Due to contextual features, however, the unintended consequences of its use are subtler than its apparent vices and virtues. In other words, the OMC based on ‘soft’ law is a choice made by member

⁵⁸ Alec Stone Sweet, Wayne Sandholtz, “Institutionalizing the Treaty of Rome” in Alec Stone Sweet, Wayne Sandholtz, Neil Fligstein (eds.), *The Institutionalization of Europe* (Oxford University Press, 2001)

states for a range of short-term reasons⁵⁹. At the same time, however, the adoption of ‘soft’ law puts in motion a process that is not entirely under their control due to the environmental complexity in which it evolves. The OMC is used in areas where the EU, according to the division of formal competences, has none or little competence to act. In such a situation, the OMC may or may not be the best available approach to rule-making, but it is the only way in which EU standards can penetrate in a reserved national field. In the most favorable scenario, *elites* can be socialized and opportunities can be built for further intervention of supranational bodies and consequently for the emergence of ‘hard’ law. In the latter case, the OMC can even pave the way to spreading European rules in new fields.

The argument for such an evolution is based on three factors: the specific EU institutional context, legal mechanisms in place, and the set of values and norms inside the EU. Firstly, the EU ‘soft’ law is operating in a legal constitutional framework. Detailed and precise legal rules define the framework in which all parties are embedded. The coexistence of ‘soft’ and ‘hard’ legal styles is maintained under a single institutional umbrella, which is provided by the legal arrangements of the Treaties and go beyond the subdivision of areas into intergovernmental and supranational. Secondly, even in the case of consented targets where obligations of third parties are based primarily on voluntary performance, law plays a distinctive role. Traditional emphasis on legal norms and the presence of institutionalized rule-making inevitably casts a shadow on the use of EU ‘softer’ instruments. Even when ‘hard’ law is not employed, it enters in the picture by virtue of its existence and provides some parameters of reference. Finally, the presence of the ECJ and the Commission as autonomous and authoritative bodies inside the EU calls into question the maintenance of their fuzzy *status* inside the present legal order of the EU. This view is confirmed by the reactions of these supranational bodies towards the proliferation of ‘soft’ law within the Community law.

⁵⁹ Different reasons can be listed: avoiding principal-agent dynamics, minimizing costs of exit from the agreement, shifting blame for national decisions to the European level, performing symbolic politics and increasing flexibility.

In its White Paper on Governance of 2001, the Commission accepted the need for flexibility and the use of non-legislative and non-constraining instruments⁶⁰. Concerning the nature of legal mechanisms to be used, however, the Commission favored only such ‘soft’ legal instruments that are already under its control: framework directives, regulatory standards, and voluntary codes of conduct. The approach of the White paper towards the emergence of the OMC was mainly defensive: it focused on the shortcomings of this method and the perceived incompatibility of the Community method with the OMC⁶¹. In direct opposition to the enthusiasm of the European Council towards dissemination of the OMC, the Commission showed strong reservations and reacted negatively to the possibility that its role in initiating and implementing legislation could be undermined or eroded. In fact, the OMC processes leave each member state to set its own objectives and decide its own pace in attaining them. The most important OMC coordination forum at the EU level is the European Council in its spring meeting⁶². Despite the fact that the Commission plays a growing role in coordinating and steering the system, the inclusive and bottom-up approach of the OMC dilutes the role of the Commission.

The ECJ is equally involved in tackling challenges, which are presented to the Community law by the proliferation of ‘soft’ law. Even according to formalist understanding, ‘soft’ law comprises every category of act that, though identified as not binding, is capable under certain circumstances of having legal effect. According to the accepted standards of ECJ judicial practice⁶³, ‘soft’ law is not enforceable in courts and is not generating rights and obligations in judicial proceedings, but it can have legal impact on the proceedings in front of courts as supplementary help to the interpretation of ‘hard’ law. In such a way, atypical instruments are a potential source of law, although in a subordinate position. Accordingly, the ECJ has already engaged with ‘soft’ law, albeit in a selective and hardly systematic manner⁶⁴. For a start, the ECJ has pragmatically recognized the shift towards differentiated regulation and has eschewed a strict construction of the objectives of framework directives. Conversely,

⁶⁰ Commission, *European Governance: a white paper*, COM (2001) 428, Brussels 25 July, p. 4

⁶¹ *Idem*, p. 28

⁶² Council of the European Union, *2004 Spring European Council*, 7631/04 Brussels, March 23, 2004

⁶³ Francis Snyder, “Soft Law and Institutional Practice in the European Community” in Stephen Martin, *The Construction of Europe. Essays in Honour of Emile Noël* (Kluwer, 1994) pp. 197-225

⁶⁴ Jan Klabbers, “Informal Instruments before the European Court of Justice”, *Common Market Law Review* (1994) pp. 907-1023

given the fact that an increasing number of fuzzy legal instruments have been appearing in its forum, the Court has adopted a case-by-case approach, interpreting the relevant provisions for the purposes of a case at hand⁶⁵.

Therefore, insofar as the traditional values and routines continue to be valid inside the EU, collective preferences are likely to favor legal approaches that maintain some degree of Union-wide uniformity. Moreover, European *elites* share a common normative background, namely the commitment of governments to formal norms and procedural rules as a strategy for conflict prevention and, eventually, solution.

Since the end of WWII, Western European *elites* developed a seemingly startling “cult of the rules”, placing emphasis on the limitation of absolute sovereignty through legal means, especially international law⁶⁶. As a consequence, at the root of all policy methodologies applied during the history of European integration, there is a common emphasis on rules as the underlying instrument for promotion of integration. It was first applied within the intergovernmental framework of the Council of Europe, which proved to be a powerhouse for international treaties and legal conventions that covered progressively all its members⁶⁷. Subsequently, the emphasis on the necessary legal framework was retained in the supranational European Community of Steel and Coal (ECSC). Jean Monnet in his address to the ECSC Assembly in 1952 noted: “the union of Europe cannot be based on goodwill alone: rules are needed”⁶⁸. Finally, the European Communities, as a subset of Western Europe, developed a particularly strong conception of the need of legal rules, consistent with closer integration. Walter Hallstein, as the first President of the Commission, underlined the importance of the

⁶⁵ Historically, this has been the case for resolutions (ECJ, Case 32/79 *Commission v. United Kingdom* [1980] E.C.R. 2403, para. 11), communications (ECJ, Case C-325/91 *France v. Commission* [1993] E.C.R. I-3283, para. 14-30; ECJ, Case C-57/95 *France v. Commission* [1997] E.C.R. I-1627), a code of conduct (ECJ, Case C-303/90 *France v. Commission* [1991] E.C.R. I-5315, para. 15-35) and conclusions of the Council (ECJ, Case 22/70, *Commission v. Council* [1971] E.C.R. 263, para. 53), which were qualified as binding acts whose legality in respect of the Treaties could be checked by the judges.

⁶⁶ Renaud Dehousse, “Conclusion : du bon usage de la méthode ouverte de coordination”, in Renaud Dehousse (ed), *L'Europe sans Bruxelles ?* (L'Harmattan, 2004), pp. 157-180

⁶⁷ Renaud Dehousse, “Un Nouveau Constitutionnalisme”, in Renaud Dehousse (ed), *Une Constitution pour l'Europe?* (Presses de Science Po, 2002) pp. 19-38

⁶⁸ *Assemblée commune CECA*, session d'ouverture, 4e séance, 11 September 1952, p. 41

legal framework for the existence of the European Economic Community (EEC), which “is a creation of the law, it is a source of law; and it is a legal system”⁶⁹.

Thus, in spite of diverse modalities concerning policy formulation and implementation, European integration has been marked by an underlying emphasis on the creation of rules for the advancement of the process. This emphasis is still present at the EU level, as a principled course of action pervading the process of European integration. The common thread unifying ‘hard’ and ‘soft’ forms of regulation is the strategy of integration through rules, above disagreement on their substantive content and beyond localized resistance to their specific application.

This ideological confidence in the power of rules and especially legal norms as an integrative instrument has been tested in practice. To a certain extent, this was accomplished by the interpretative action of the ECJ, which ‘hardened’ the rather flexible nature of the Community law from its international origins towards a more rigid texture, coupled with the attributes of ‘hard’ legality. Legitimation of this transformation relied upon a *sui generis* argument, building on the unprecedented nature of the Community experiment. This experimental project, however, was modeled on the familiar characteristics of domestic law. In fact, the assumptions on which the Community law was built by the Court resonated with Kelsenian ideas of a complete legal order: a unitary source of ultimate authority, a hierarchical ordering of multiple legal orders, and a uniform and centralized interpretation of law provided by judicial structures⁷⁰. By using this blueprint, the ECJ developed the features of the Community law: direct effect, supremacy, pre-emption, uniform interpretation, and *effet utile*.

The dynamics towards formalization and legalization of politics of the European integration process, which is led by the ECJ according to its specific understanding of the nature of these rules, continues to have positive and negative consequences for the process of integration as a whole. On the one hand, the success of integration pursued through the Community method can be viewed as a result of its legalist style. The

⁶⁹ Walter Hallstein, *Europe in the Making* (George Allen & Unwin, 1972) p. 33

Community law is full of legal concepts created by the jurisprudence of the ECJ in order to deal with a diverse and complex set of concrete problems arising at the national legal level⁷¹. In addition to this, the categories of Community law are a conveniently neutral jargon for the culturally heterogeneous *fonctionnaires* at the European level⁷². The remarkable success of transnational integration under such a legal *aegis* has reinforced among national legal *elites* the authority of the ECJ and belief in the virtues of its action. On the other hand, emphasis on legal categories and reasoning hinders political aspects. Contentious matters are often reduced to technical points of law and practical problems are exorcised with formalist solutions. Conversely, when issues are framed in political terms, the process of decision-making can be easily stalled and the solution becomes awkward⁷³. Moreover, the Community law is biased in favor of further integration. The early judicial doctrine and academic writings on the Community law, which over the years had shaped an influential jurisprudence⁷⁴, were produced by a cohesive interpretative community of scholars committed to further integration.

To sum up, the use of ‘hard’ law at the service of integration has been, for better or worse, an enduring feature of the process of European integration. It is largely due to the context, actors and culture of the EU. These factors will also certainly cast a long shadow over its future development. In that respect, the situation inside the EU is very different from circumstances in which ‘soft’ law operates in the wider international realm.

The use and impact of ‘soft’ law depend on the normative and organizational conditions in which it operates. Accordingly, the legal status of ‘soft’ law in the international sphere has more to do with the context in which it has been deployed than with its intrinsic characteristics. In fact, the absence of a clear hierarchy of

⁷⁰ Constantinos N. Kakouris, “La relation de l’ordre juridique communautaire avec les ordres juridiques des Etats membres” in Liber Amicorum Pierre Pescatore, *Du Droit International au droit de l’intégration* (Nomos Verlag, 1987)

⁷¹ Josse Mertens de Wilmars, “La jurisprudence de la Cour de Justice comme instrument de l’intégration communautaire”, *Cahiers de droit européen* 1 (1976) pp. 135-148

⁷² Chris Shore, *Building Europe: The Cultural Politics of European Integration*, (Routledge, 2000)

⁷³ Marc Abeles, *En attente d’Europe*, (Hachette, 1996) pp. 33-41

⁷⁴ Harm Schepel, Rein Wesseling “The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe”, *European Law Journal* 3:2 (1997) pp. 165-188

norms, the rarity of judicial settlement of disputes and the conflation of legal and political considerations are inherent to the nature of international ‘soft’ law. Therefore, one can argue that different contextual conditions of the EU can be favorable to an alternative path of development of ‘soft’ law within the EU.

A pragmatic mix

The emergence and evolution of ‘soft’ law inside the EU is a major symptom of the on-going process of transformation of the Community law and related decision-making practices. On the one hand, the growing use of ‘soft’ law in a bewilderingly wide set of policy areas is following the desires and preferences of the member states that wish to enact guidelines of coordination of their behavior and at the same time preserve their freedom of action for themselves. On the other hand, the evolution of these instruments is influenced by their coexistence with the traditional Community law. New instruments emerge under the shadow of old arrangements, which subsequently influence their evolution. As a result of these conflicting trends, the EU normative environment, which is shaped by the interests of the member states but operating according to its own autonomous logic, is in a flux.

According to Knill and Lenschow, modes of regulation that are currently available to the EU member states can be displayed alongside two axes: obligation and discretion. Each of these modes of regulation has its own advantages and disadvantages as well as different mechanisms underlying its implementation⁷⁵.

	DISCRETION	LOW	HIGH
OBLIGATION			
	HIGH	Regulation	Framework Directive
	LOW	Voluntary Code of Conduct	Open Method Coordination

⁷⁵ See Christoph Knill, Andrea Lenschow, “Modes of Regulation in the Governance of the European Union: Towards a Comprehensive Evaluation”, *European Integration online Papers* 7 (2003)

Several possible scenarios concerning the future cohabitation of these different legal techniques in the EU could be presented. One possible scenario refers to the incompatibility of ‘soft’ law with ‘hard’ law, or at least to their irreducibility. Consequently, such reasoning leads to an eminently teleological view, which portrays an evolutionary path to an expected end-state of the EU integration, characterized by the predominance of a specific legal style. The precedent scenario does not capture the possibility of a fluid coexistence of both ‘hard’ and ‘soft’ forms of law in the EU. However, this is the state of legal affairs in a growing number of areas where both the older Community method and the newer OMC are operating alongside each other, for instance, in the field of social policy. Statistical analysis of the types of instruments used in this policy field show that the use of one legal style is not phasing out the other. For instance, statistical analysis of the types of instruments used in the field of social policy shows that the use of one legal style is not phasing out the other, but that they are rather both growing in strength and presumably interacting⁷⁶.

Thus, it is not possible to substantiate the claim that the emergence of new modes of policy-making and non-traditional rule-making, such as the OMC, has replaced or reduced either the classical Community method or its legal output in the EU. The presence of the classical Community method and its legal output does not, however, exclude the resort to the OMC. On the contrary, traditional legal instruments are transforming themselves under the pressure from the newer ones. The use of the OMC is not replacing but rather complementing the Community method as a way of cooperation beyond the limitations and restrictions associated with the latter. Instead to being merely exclusive, their diverging legal forms appear to embody complementary principles needed for the conduction of policy: on the one side, obligation and credibility, and on the other side, discretion and flexibility. Viewed from this angle, their interaction is possible.

Presently, the development of ‘hard’ and ‘soft’ law hybrids in different EU policy sectors is the most likely scenario. This development depends on the levels of discretion and obligation needed as well as on the operational conditions present. To

⁷⁶ Christine Arnold, Madeleine Hosli, Paul Pennings, “Social Policy-Making in the European Union: a New Mode of Governance?”, Paper presented at the Conference of Europeanists, Chicago, March 11-13, 2004

use an ecological metaphor⁷⁷, the EU is a normative environment able to sustain different populations of rules. Instead of a fierce evolutionary battle involving ‘hard’ and ‘soft’ law, a certain level of competition and cohabitation of the respective populations can be expected at any given moment. Because of the growing complexity and maturity of European integration, more hybrid forms of instruments and ‘soft’ principles can be expected to develop. The possibility of a creative coexistence is voiced in official debates. During the Convention on the Future of Europe, this view was strongly expressed:

“The open method of coordination therefore proves to be an instrument of integration among others. For the same subject matter and within the limits of the treaties, it can therefore be combined with and linked to other instruments of Community action, including traditional Community legislative action.”⁷⁸

Along similar lines, but from a more academic perspective, Fritz Scharpf highlighted the opportunity of combining framework directives with the OMC in order to balance political discretion of national governments and supranational legal uniformity⁷⁹.

From an instrumental point of view, the most likely scenario involves growing interpenetration and hybridization between different kinds of legal instruments, according to their effectiveness and capacity to bring home the expected result, rather than a homogenous legal style. The effectiveness of these instruments, however, depends on the context in which they are embedded and the conditions in which they operate. According to the contextual approach, ‘soft’ law, even without having formal binding effect, can nonetheless have some effect on the behavior of the parties that are subject to these rules, and therefore creates expectations concerning compliance⁸⁰. Factors other than formal characteristics have to be taken into account while judging

⁷⁷ Simon Deakin, “Evolution for our time: a theory of legal memetics”, in Michael Freeman, *Current Legal Problems* 55 (2002) pp. 1-42

⁷⁸ Report to the European Convention (2002) cited in David Trubek, Louise Trubek, “Hard and Soft Law in the Construction of Social Europe”, Paper for EUI Workshop *Opening the Open Method of Coordination* (2003) p. 23

⁷⁹ Fritz Scharpf, “The European Social Model”, *Journal of Common Market Studies* 40:4 (2004) p. 665

⁸⁰ Francis Snyder, “Soft Law”, in David O’Keefe, Nanette Neuwahl, Jorg Monar (eds.), *Butterworths Expert Guide to the European Union* (Butterworths, 1996) pp. 277-278. This author argues that the existence of law is gauged by the influence it exerts rather than by the formal features of normative acts.

the overall dynamics. Consequently, any final evaluation of a regulatory tool depends on the features of the policy area under consideration. While a discretionary policy design may be acceptable in some areas, particular problems may demand a more uniform approach in all member states. Weighing of the relevant criteria has to be done on a case-by-case basis. Moreover, such a balancing act is shaped by the constellation of interests and actors present in a particular field. In fact, interests of the decision-makers as well as their power position in the institutional system determine the choice of policy instruments. In addition to that, the functionality of regulatory instruments in terms of outcomes and impact is also a factor to be taken into consideration. As a consequence, mutual growth and reciprocal cross-fertilization of 'hard' and 'soft' law do not allow for a simple reading and unilateral interpretation of their evolution. It is rather subject to the context and configuration of interests in a given situation. Therefore, it is not possible to estimate *a priori* the optimal equilibrium between 'soft' law and 'hard' law that is appropriate for each specific field⁸¹.

Conclusions

The article argued that the on-going evolution of the legal style of the EU fosters complex pluralism in regulatory approaches that can be used to tackle policy problems at the European level. This analysis was supported by evidence drawn from the field of social policy⁸². The argument was presented in several stages. Firstly, the article introduced the OMC as part of the integration strategies inside the EU and presented its legal peculiarities. Secondly, the origins and development of a 'soft' brand of the Community law were contextualized in order to highlight the existence of different legal styles across EU policy areas. Finally, the article argued that the actual practice of European integration departs from the traditional features of the Community law and is moving towards a pragmatic mix of different legal techniques.

The main stance of the article is that the EU is a regulatory platform in flux, experimenting with the adaptation of an institutional structure geared towards law-

⁸¹ This perspective is reinforced by findings on international soft law made by a 3-year research project summarized in Dinah Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford University Press, 2000)

making purposes to a system more oriented to policy coordination. As part of a larger debate on governance, which was induced by the perceived crisis of legitimacy, the EU is experimenting with a variety of different regulatory approaches. As a consequence, pressure from new political and functional imperatives generates internal tensions. We are witnessing the introduction of new strategies of integration by a new generation of decision-makers and policy experts, who are intent on reforming the working methods at the European level. In this respect, it is possible to observe the emergence of less authoritative, less interventionist, and more participatory forms of regulation at the European level. At the same time, the EU as a 'regulatory state', which was originally complementary to the national welfare state⁸³, is gradually changing the scope of its competences. The EU is penetrating into realms traditionally reserved for the states, and its coordination tasks are expanding⁸⁴.

Regarding the nature of EU policy instruments, they are also evolving from authoritative top-down procedures towards more indirect steering mechanisms of influence on markets and societies. The process of regulation, particularly, is being decentralized, widening formal access to economic and societal actors⁸⁵. While this trend is a general one in developed economies⁸⁶, the EU is especially fertile ground for such experiments. Regulatory mechanisms are taking new forms, moving away from chains of control and mechanisms of accountability towards more diffused responsiveness and self-responsibility. Accordingly, the already complex picture of the EU normative environment is enriched by differentiated means of regulation, ranging from classical legal instruments of the Community method to 'softer' forms of policy steering. Nevertheless, the older patterns and instruments are resistant to this process, due to their acquired legitimacy, and resilient, due to their institutional entrenchment. As a whole, the EU remains a densely regulated institutional environment.

⁸² David Trubek, Louise Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination", *European Law Journal* 11:3 (2005) pp. 343-364

⁸³ Giandomenico Majone (ed), *Regulating Europe* (Routledge, 1996)

⁸⁴ Keith Sisson, Paul Marginson, *European Integration and Industrial Relations* (Palgrave, 2004)

⁸⁵ Kenneth Armstrong, "Tackling Social Exclusion through OMC: Reshaping the Boundaries of European Governance" in Tanja Borzel, Rachel Chicowski (eds.), *The State of the European Union, vol. 6: Law, Politics and Society* (Oxford University Press, 2004) pp. 170-193

⁸⁶ Charles-Albert Morand (ed), *L'Etat propulsif. Contribution à l'étude des instruments d'action de l'Etat*, (Publisud, 1991)

From the institutional point of view, the Commission and the ECJ have vested interests in the path of reform, as this legal evolution could encroach on their position in the decision-making system and influence the resources at their disposal. As actors in charge of the institutional setting, they act in order to preserve the established order and in the process develop narratives and strategies to advance their organizational interests.

The EU integrative experiment rests on a dynamic equilibrium of intergovernmental and supranational features. The current challenge lies in finding ways to maintain its capacity to operate and, at the same time, transform its problem-solving instruments to adapt to changing conditions. The case of the OMC and its application within the institutional framework of the EU is a particularly good illustration of possible solutions to such a challenge.