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## Summary

After a brief review of the history and typology of soft law in public international law, we approach the concept deductively. We reject the binary view and subscribe to the continuum view. Building on the idea of graduated normativity and on the prototype theory of concepts, we submit that soft law is in the penumbra of law. It can be distinguished from purely political documents more or less readily, depending on its closeness to the prototype of law.

Insights gained by the study of public international soft law are relevant to EC and EU soft law despite some differences between those legal orders. European soft law is created by institutions, Member States, and private actors. The legal effects of soft law acts can be clustered according to their relation to hard law. Both practical and normative considerations motivate reliance on soft law.

An examination of the soft legal consequences of a disregard of soft law shows that compliance control mechanisms for hard and soft international law are converging. Moreover, some factors of compliance are independent of the theoretical hardness or softness of a given norm.

In a legal policy perspective, the proliferation of soft law carries both dangers and benefits. Especially soft acts with a law-plus function do not weaken the respective regimes, but perfect them.

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## I. Introduction: Soft Law as a New Mode of European Governance

European modes of governance can be analyzed along the two dimensions of steering methods and of actors. Modes may be called (relatively) “new”, when their steering function is characterized by (1) informality and (2) lack of hierarchy, and when (3) private actors (both profit- and non-profit entities) are systematically involved in policy formulation and/or implementation.<sup>1</sup>

The juridical concept of soft law is often framed as displaying these three features and therefore somehow aligns with those “new” modes of governance. Of course, both in international law and on the EU-level, governance by means of soft law is not new at all. However, two novel features have emerged and evolved only recently. First, soft forms of international and European governance are proliferating dramatically.<sup>2</sup> Second, they increasingly involve non-state actors.

These novel quantitative and qualitative aspects justify to consider soft law (notably private or hybrid (public-private) soft law) a “New Mode of Governance” as defined above.

## II. Foundations

### 1. Working Definitions and Hypothesis

In this paper, we submit that soft law is, for analytical and practical purposes, a useful category. In order to unfold the argument, we must explain the relevant notions and how we use them throughout our contribution.

*Legal* norms are a special type of social norms. By norms, we understand prescriptions (ought-phrases), as opposed to descriptions. Social norms seek to guide human behaviour. What we have so far called soft law are unquestionably norms (prescriptions/ought-phrases). However, it is contested whether these soft norms are properly and usefully called (soft) law. In the alternative, the soft norms would be non-legal norms. The most important norms besides the legal norms are, notably in the context of international and European relations and governance, political norms.

We argue that soft law is (as the noun in the compound term suggests), a special kind of law. Our working definition of soft law builds on case-law and scholarship. Here it is widely accepted that the term soft law characterizes texts which are *on the one hand not legally binding in an ordinary sense, but are on the other hand not completely devoid of legal effects either.*

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<sup>1</sup> Börzel/Guttenbrunner/Seper (2005). Joanne Scott and David Trubek highlight the following characteristics of new modes of governance: Participation of civil society/of the private sector and therefore a greater degree of power-sharing than traditional legislation (process of mutual problem solving); multi-level integration (involvement of various levels of government); diversity and decentralisation (acceptance of coordinated diversity instead of creating uniformity across the Union); extended deliberation among stakeholders which serves to improve problem-solving capabilities and to provide some degree of democratic legitimation; flexibility and reversibility (open-ended standards, flexible and revisable guidelines and other forms of soft law); experimentation and knowledge creation (Scott/Trubek (2002), 5-6). See also Héritier (2003); Treib/Bähr/Falkner (2005) at 13 *et seq.*, proposing a new typology for four Modes of Governance, see further illustrative tables at p. 21-22.

<sup>2</sup> But note that, e.g. in EU social policy “the proliferation of soft governance mechanisms does not crowd out more traditional hard governance. Although the open method of co-ordination very much dominates both public and academic discourse nowadays on EU-level social affairs, the number of binding legal instruments (Directives and Regulations) has not yet declined...” Falkner/Treib/Hartlapp/Leiber (2005), at 350.

In this paper, we analyze only those norms which are “soft” in a form-based sense. Our narrow notion of soft law includes only texts whose form precludes a strict (hard) legal quality. We do not deal with texts which satisfy traditional formal requirements, but whose substance lacks precision and therefore hardness in a substantial sense, such as the majority of social, economic, and cultural rights in the respective UN Covenant of 1966, or most provisions of Part IV of the GATT.<sup>3</sup> Although these provisions are hortatory and aspirational and do not create *concrete* rights and duties, they legally oblige States Parties to undertake to take steps in a certain direction or to strive to realize progressively certain goals. Because the status of these provisions as “law” is now settled, they must be qualified either as “‘legal’ soft law”<sup>4</sup> or as hard law. In this paper, we do not include “‘legal’ soft law” in our analysis, because it gives rise to legal obligations.<sup>5</sup>

## 2. History and Typology in Public International Law

The concept of soft law has emerged in public international law and was transferred to the European realm only decades later. A first type of soft law-texts are those issued by organs or special bodies within *International Organizations*. A second type of international soft law are Statements, Resolutions, and Action Plans adopted by *Governments* at global conferences or summits, often as a Final Act. An example is the Helsinki Final Act of 1 Aug. 1975.<sup>6</sup>

Soft law should be distinguished from older concepts which are similar to or overlap with the concept of soft law, or which have been replaced by the new term, such as gentlemen’s agreements, comity, non-binding agreements, or – in English constitutional law – constitutional Conventions.

An important recent phenomenon is the “privatization” of Soft Law. International and European instruments authored or co-authored by private actors have emerged. An example is the Wolfsberg Statement on the Suppression of the Financing of Terrorism of January 2002, issued by the so-called Wolfsberg group of leading international banks in collaboration with the NGO “Transparency International” and experts.<sup>7</sup> We suggest to include these private or semi-private acts into our investigation.

This broad view of soft law accommodates the historical fact that resort to novel types of acts by political actors has been a means to alleviate (if not to overcome) a *lack of formal law-making capacity*. It is crucial that those actors are not competent to create hard international or European norms binding on third parties (as opposed to private contracts which bind only the parties). Due to their lacking capacity, they can not create hard general norms in the relevant legal order, even if they observed the proper procedures and acted with the intention to be legally bound. Because the option of hard law is foreclosed to these actors, the creation of soft law is here not a deliberate choice between a hard and a soft instrument, but is the strong-

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<sup>3</sup> See, e.g., Art. XXXVI (3) GATT: “There is need for *positive efforts* designed to ensure that less developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.” (emphasis added); Art. XXXVII (1) GATT: “1. The developed contracting parties shall *to the fullest extent possible* that is, except when compelling reasons, which may include legal reasons, make it impossible, give effect to the following provisions: ...” (emphasis added).

<sup>4</sup> The terms “legal” and “non-legal soft law” are borrowed from Chinkin (1989), 851.

<sup>5</sup> As in this paper, numerous scholars exclude provisions which satisfy the usual formal requirements, but which lack specificity from the concept of soft law: Hillgenberg 1999, 500; Marquier (2003), 30; Raustiala (2005), 558-89 (suggests the term “shallow treaties” instead).

<sup>6</sup> [http://www.osce.org/documents/mcs/1975/08/4044\\_en.pdf](http://www.osce.org/documents/mcs/1975/08/4044_en.pdf).

<sup>7</sup> <http://www.wolfsberg-principles.com/standards.html>.

est available form of norm-generation or commitment. The functions of “private” or “public-private” soft law therefore differ from the functions of traditional “public” soft law, emanating from competent legal subjects.

### III. Deductive Approach: Binary versus Graduated View

With regard to the concept of soft law, two fundamentally contrary assessments have been formulated by lawyers: the binary view and the idea of graduated normativity (often called the continuum view).<sup>8</sup> The binary view leads to the rejection of the concept of soft law for reasons of legal logic. In contrast, the continuum view holds that normativity may be graduated, and that therefore soft law is conceptually possible.

#### 1. The Binary View

##### a) Legality no Matter of Degree?

The underlying assumption of the binary view is that *the essence of law is its normativity (or: legal bindingness or legal validity as synonyms)*,<sup>9</sup> and that normativity (or legal bindingness) cannot be graduated: “[L]egality like virtue is not a matter of degree”.<sup>10</sup> In this view, a prescription can only be legally binding or not.<sup>11</sup> In the first case, it is law, in the second case, it is not law, and *tertium non datur*. In this perspective, the concept of soft law has been called “logically impossible”, a “logical contradiction”,<sup>12</sup> a paradox or a contradiction in terms.

Worse even, the concept of soft law is, in the binary perspective, misleading, because it sells something as law which is in fact not law. It thereby falsely slides legally non-binding texts into the realm of the law, which ultimately obscures the meaning of law and undermines its normative power. Using the label of “law” to in that context – so the critique – is particularly misleading and confusing and should therefore be avoided.<sup>13</sup> The principal argument is that the ascription of a (however soft) legal status to these instruments allows for degrees of normativity. It thereby *erodes the normative power of the international (or European) legal order as a whole*.<sup>14</sup> Such a relativized normativity of law is – in the eyes of the critics – pernicious as such and particularly obnoxious for weak states, which are highly depending on the rule of law.<sup>15</sup> Although this observation is important, we shall see that normativity is relative in any case. Therefore, the denial of shades of law appears to be an over-simplification.

<sup>8</sup> Dinah Shelton summarizes the scholarly debate as follows: “In respect to ‘relative normativity’ scholars debate whether binding instruments and non-binding ones are still strictly alternative or whether they are two ends on a continuum from legal obligation to complete freedom of action, making some such instruments more binding than others. If and how the term ‘soft law’ should be used depends in large part on whether one adopts the binary or continuum view of international law.” Shelton (2003), 167.

<sup>9</sup> See Kelsen (1989/German orig. 1960), 10 on validity as “the specific existence of a norm.”

<sup>10</sup> Gross (1965), 56.

<sup>11</sup> Shelton (2003), 168: “[L]aw does not have a sliding scale of bindingness ...”.

<sup>12</sup> Heusel (1991), 288.

<sup>13</sup> See, e.g., Bothe (1981), 769: “Der Ausdruck ist nicht glücklich, da er das mit ihm zu beschreibende Phänomen nur unvollkommen wiedergibt. Es handelt sich nicht um ‘law’, sondern um Normen nicht-rechtlicher Art, die je nach dem politischen Kontext mehr oder weniger gewisse Verhaltenserwartungen schaffen, in diesem Sinne also mehr oder weniger ‘hard’ oder ‘soft’ sein können.”

<sup>14</sup> Weil (1983).

<sup>15</sup> Heusel (1991), 289.

A theoretical foundation of the binary view can be found in general systems theory as formulated by Niklas Luhmann. Here law appears as an “autopoietic” or “self-referential” system. It observes itself, generates itself, and supports itself through a mode of operation specific to that system.<sup>16</sup> (International) law, conceived of as a specific system, is distinguished from politics (conceived of as a different system) by its specific legal code. This code is a binary one which observes and qualifies acts according to the values legal/illegal.<sup>17</sup> By making a choice in terms of a legal code, the act of choice is separated from its political environment.<sup>18</sup> *The assumption of a system-specific legal binary code matches the assertion that an act can only be legally binding or not.*

A second argument in favour of the binary view has been formulated in a strictly juridical perspective. The argument is that the technique of legal reasoning as used both in legal practice and in legal science must work with a binarist simplification in order to fulfil the jurist’s job. In this vein, Prosper Weil argued more than 20 years ago: “A system builder by vocation, *the jurist cannot dispense with a minimum of conceptual scaffolding*. It is impossible, therefore, for him not to feel disturbed by a development that – whatever its merits from other view-points – subjects normativity to gradations of strength .... To succumb to the heady enticements of oversubtlety and lose thinking is to risk launching the normative system of international law on an inexorable drift towards the relative and the random. It is one thing for the sociologist to note down and allow for the infinite gradations of social phenomena. It is quite another thing for his example to be followed by the man of law, to whom a *simplifying rigor* is essential.”<sup>19</sup>

## b) Critique

In order to assess the merits of the binary view, we must reflect the legal technique. Political makers, practical users, and academic analysts and constructors must, in the course of their work, steer between two dangers. The first danger is that of black-and-white painting, of construing dichotomies, in short: the danger of over-simplification. The contrary danger is that of losing oneself in endless subtle distinctions and overly fine shades and gradations. Over-simplification and dichotomic arguing may prevent lawyers from adequately capturing the much more complex reality and may thereby contribute to unsound legal analysis and unfair results. Over-subtleties, on the other hand, may hinder the formulation of general concepts, leads lawyers to produce single-case solutions and forecloses generalizable and workable legal constructs. Therefore, a too nuanced approach may give rise to injustice as well. Lawyers must avoid both extremes. This requires to balance the merit of clear structures against the danger of losing sight of the non-dichotomic reality.

The binary view provides us with clear, dichotomic structures by outlawing the category of soft law as an in-between of law and non-law. However, a ban on the term soft law will not prevent governments and other political actors from continuing to rely on unusual instruments and acts. Legal analysis should be informed by the empirical observation that acts which at least *prima facie* do not fit into the traditional categories of purely legal or purely political acts are being adopted in abundance. Because legal scholarship must, as law, capture reality, in order not to become meaningless, a special juridical term of art appears appropriate in order

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<sup>16</sup> Luhmann (1984), 57–70.

<sup>17</sup> Luhmann (1993), 60, 67, and 106.

<sup>18</sup> Oeter (2001), 84.

<sup>19</sup> Weil (1983), 440-41 (emphasis added).

to describe a special phenomenon.<sup>20</sup> The binary view does not take this into account. It is under-complex and too far away from reality.

## 2. Graduated and Diverse Normativity

The perspective opposing the binarist view is the idea of graduated and diverse normativity.<sup>21</sup> It holds that law can have a variety of legal impacts and effects, direct and indirect ones, stronger and weaker ones. Seminally, Richard Baxter argued more than 20 years ago: “Written international understandings,... have, ... been divided into two categories – those norms that are binding and those norms that are not. My thesis has been that the *differences are not qualitative but quantitative* – that different norms carry a variety of differing impacts and legal effects.”<sup>22</sup> “Normal ‘normativity’ is not ... monolithic or unidimensional.”<sup>23</sup> “[W]e should recognize that legal obligation – whether national or international – also may involve ‘degrees’”.<sup>24</sup>

Graduated normativity means that law can be harder or softer, and that there is a continuum between hard and soft (and possibly other qualities of the law). “[D]istinctions range along a continuum which is much more inflected than can be described by the diad ‘hard’ and ‘soft’. Those terms are not only inadequate for description, but are also insufficient for evaluation.”<sup>25</sup> “[C]ategories of hard and soft law are not polarized but lie within a continuum that itself is constantly evolving...”<sup>26</sup>

The most important theoretical underpinning of the graduation view is the “policy-oriented jurisprudence” as developed by the *New Haven school*.<sup>27</sup> Its adherents define laws as (1) policy statements which meet (2) expectations of authority and which are (3) backed up by control intention.<sup>28</sup> Prescriptive texts which display the three mentioned elements qualify as law. The policy-oriented legal analysis considers the “concept of ‘obligation’, as ordinarily used, ... a mystical one. The relevant inquiry is an empirical one: What expectations are created in the general community about the course of future decision?”<sup>29</sup> Degrees of normativity are possible; they “depend on attitudes, expectations and compliance.”<sup>30</sup> Clearly, this approach does not allow to (and probably does not purport to) distinguish legal from non-legal (moral, political, customary) norms. Its (calculated) risk is to negate an independent and distinct normative quality of the law.

<sup>20</sup> Klabbers (1998), 385 has objected that such a description turns into something normative. “[F]rom there, it is only a short step to saying that if instruments can be described as soft law, then it must be possible to intentionally create such instruments.” While it is true that academic qualifications may have some impact on practice, the inverse influence is probably stronger: Governments have intentionally created novel types of instruments, and scholarship has reacted to this.

<sup>21</sup> See for this position in more recent scholarship notably Chinkin (2000), 32; Neuhold (2005), 47-48; Mörth (2006 forthcoming, manuscript p.2): “I argue, however, that soft law is often a function of authoritative rule-making and that it therefore challenges the traditional dichotomy between law and non-law.”

<sup>22</sup> Baxter (1980) 563, emphasis added.

<sup>23</sup> Reisman (1992), 136.

<sup>24</sup> Schachter (1968), 322.

<sup>25</sup> Reisman (1992), 138.

<sup>26</sup> Chinkin (2000), 32.

<sup>27</sup> See McDougal (1953).

<sup>28</sup> Reisman (1992), 135; see also Wiessner/Willard (2001), 101.

<sup>29</sup> See typically McDougal (1985), 256.

<sup>30</sup> Schachter (1968), 322.



However, it seems that this risk must be incurred in order to remain “realist” in the sense of accepting the complexity of real life as the basis of analysis. The graduation view accords with State practice which is too diverse to be adequately captured by too simplifying categories.<sup>31</sup> To deny soft law means “*closing the eyes to the reality* that rules which do not fully meet the criteria required by the recognised sources, the norm-creating processes of international law, have been playing an increasingly important role in international practice and are complied with by states and other subjects of international law.”<sup>32</sup>

Moreover, we have not yet found a compelling justification of the binarist assertion that “legality” is like virginity. Notably, “legality” or “legalness” does not equal “validity”. The distinction between soft law and hard law does not turn on the validity of a norm, but on the scope of its claim to validity. Put differently, the question is not “whether” the norm is valid, but “how” it is valid. In this perspective, “legality” is not “validity”, but is rather closely associated with “justice”, “legitimacy”, and “efficiency”. Just as a norm can be more or less “just” or “efficient”, it can also be more or less “legal.”

Important manifestations of graduated normativity in contemporary law are distinctions between *rules, principles, and standards*.<sup>33</sup> While there is no uniform terminology and no agreement on the exact criteria for distinction of these potentially different types of legal commands in legal scholarship, it is basically agreed that these types belong to the sphere of law. Without going into details of the multiple discourses relating to these types of norms, we merely mention the idea of rules and principles as elaborated by Ronald Dworkin and (slightly differently) by Robert Alexy. According to these two authors, principles are not, like rules, “all-or-nothing”-prescriptions, but call for optimization. They can be observed and fulfilled more or less. When principles intersect, one who must resolve the conflict must attempt to take into account both sides, so that both colliding principles are satisfied to the maximum extent possible.<sup>34</sup> This type of balancing and the implicit acknowledgment of a *relative hardness* and weight of the involved norms constitute the everyday practice of constitutional courts dealing with conflicts of fundamental rights.

Our overall conclusion is that “[s]ome laws are less binding than others.”<sup>35</sup> Put differently: Legality, as virtue, *can* be graduated, and both have little to do with virginity.

#### **IV. Inductive Approach: Distinctions between Non-legal Norms, Soft law, and Hard Law**

An *inductive strategy* to identify a given document a soft law-text would be to check potential parameters of distinction. Such a parameter-based distinction would have to be drawn in two

<sup>31</sup> Legal analysis must build on real phenomena, because the function of law is to order reality and to guide real behaviour. If real phenomena are ignored or over-simplified by legal scholarship, then law as such is devaluated and loses its prescriptive power.

<sup>32</sup> Neuhold (2005), 47 (emphasis added); see in this sense also Brownlie (1980), 42: “One should not insist on distinctions between law and other things because it is unrealistic. ... There is no sharp line between law and other things”.

<sup>33</sup> See on rules and principles notably Esser (1956), 51-52 and 93-55; Dworkin (1977); Alexy (2002). See on standards as opposed to rules and principles notably Pound (1965, orig. 1922), 56-59. According to Pound, standards involve a margin of discretion. “They are not formulated absolutely and given an exact content, ... but are relative to times and places and circumstances and are to be applied with reference of the facts at hand.” (id. at 58).

<sup>34</sup> Dworkin (1977), esp. at 22-3; Alexy (2002), Chap. 3, I (“Rules and Principles”).

<sup>35</sup> Alder (2005), 52 (on English constitutional law).

directions: Between soft law and hard law on the one side, and between soft law and non-legal (political, moral, ethical, customary) norms on the other side.

## 1. In Search for Distinguishing Parameters

In order to draw (even though) approximative lines between hard and soft law (or harder and softer) law, and between legal and political norms, we must first identify the core characteristics of (hard) law, because only those characteristics may usefully serve as parameter of distinction. However, the core characteristics of law are contested.<sup>36</sup> In consequence, it is contested what accounts for the “hardness” of legal norms and for the “law-likeness” of social rules determining human behaviour. Nevertheless, we will now briefly discuss the least contested and most popular candidates. It should be noted that all parameters are more or less relevant for both distinctions.

### a) Material Parameters

We begin with material parameters. In our view, the substance and contents of a norm (including precision or vagueness) do not determine its legal bindingness. Programmatic and hortatory provisions, such as economic and social rights guarantees, enjoy the status of hard law which is, however, not easily justiciable.<sup>37</sup> On the other hand, some social rules, such as the rules of cricket are very precise, but are manifestly not law. Neither is the material importance of a norm relevant. Some acts on life and death, such as in the field of disarmament, are soft law documents.

### b) Formal Parameters

We now move to formal distinctions. The designation of an instrument does not determine its legal nature. Different parties to a single agreement may even name it differently. Other formal features (such as a preamble, the existence of articles with numbers or a final clause, the designation of the parties to an arrangement, registration, the locus publicandi etc.) are not decisive. In contrast, relevant factors of distinction seem to be outsiders’ perceptions, the circumstances of the adoption, the subsequent conduct, and the author of an act in question.

### c) The Intention to be Legally Bound

A further potential parameter to distinguish non-legal norms from softer and from harder law is the authors’ intention to produce direct or merely indirect (legal) consequences.<sup>38</sup> The focus on the actors’ intention is justified because voluntarism is inherent in the concept of a treaty as a legal instrument. A treaty is — in international as in domestic law — essentially a meeting of the minds.<sup>39</sup> Correspondingly, the intention to bind oneself legally is decisive for legally binding unilateral acts as well. Because the author’s intention is a subjective fact, it can only be ascertained by means of interpretation and must ultimately be inferred from exterior aspects. Such exterior aspects comprise the instrument’s language (imprecision and generalities, final clauses, expressed reservations (which are in turn formal parameters)), but also the negotiation history, the circumstances of its conclusion and subsequent behaviour.<sup>40</sup> What

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<sup>36</sup> See for a lexical account of the notion “law” with numerous references Herberger/Riebold/Grawert (1992).

<sup>37</sup> As already pointed out, we do count “legal” soft law as soft law in a proper sense.

<sup>38</sup> Chinkin (2000), 38-39.

<sup>39</sup> See for public international law treaties McNair (1961), at 6; Reuter (1995), paras. 65-68.

<sup>40</sup> ICJ, *Aegean Sea Continental Shelf (Greece v. Turkey)*, ICJ Reports 1978, 3, para. 96; cited in ICJ, *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, ICJ Reports 1994,

counts is the reasonable interpretation of these exterior signs by other involved actors and/or by the public.

However, to consider the authors' intention to be legally bound a decisive criterion for the qualification of a given normative text would amount to a *circular reasoning*. The authors' intention, directed at producing legal effects, must be based on some pre-existing conception of law. That underlying conception cannot be constituted by those intentions.

#### **d) Sanction Potential**

Throughout history, it has been argued that an essential feature of law is its enforceability. However, the claim that law is in essence a coercive order (and that non-coercive orders can therefore not be law),<sup>41</sup> is outdated and in policy terms unhelpful. Such a narrow understanding of law had led to a negation of the legal quality of international law as a whole near the end of the 19<sup>th</sup> century.<sup>42</sup> Meanwhile, the quarrel whether international law is law has been, with the abandonment of the narrow, sanction-focused understanding of law, settled.

Contemporary sociology of law does not insist on physical sanctions, but is satisfied with the existence of some scheme of securing compliance with norms.<sup>43</sup> To conclude, sanctions are no constitutive element of law. Moreover, even hard law is increasingly accompanied by soft compliance mechanisms, while new forms of compliance control for soft instruments are becoming increasingly hard (see in detail below). Consequently, the availability of "hard" sanctions is no criterion to distinguish law from non-law, or hard law from soft law. Effectiveness and legal quality are two distinct issues.

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112, para. 23: In determining the binding nature of an agreement, one must "have regard above all to its actual terms and to the particular circumstances in which it was drawn up." See in this sense the German Constitutional Court on the "New Strategic Concept" of the NATO, judgment of 22 Nov. 2001, at paras. 133-138.

<sup>41</sup> See für the classical voices of legal positivism Austin (1911), 88: "Laws are commands"; Kelsen (1989, German orig. 1960), in Chap. II, Para. 9 at p. 62: "A difference between law and morals cannot be found in *what* the two social orders command or prohibit, but only in *how* they command or prohibit a certain behaviour. The fundamental difference between law and morals is: law is a coercive order, that is, a normative order that attempts to bring about a certain behaviour by attaching to the opposite behaviour a socially organized coercive act; whereas morals is a social order without such sanctions." From the point of view of legal sociology: Max Weber (1921/1972), at 17: "Eine Ordnung soll heissen ... Recht, wenn sie äusserlich garantiert ist durch die Chance [des] (physischen oder psychischen) Zwanges durch ein auf Erzwingung der Innehaltung oder Ahndung der Verletzung gerichtetes Handeln eines eigens darauf eingestellten Stabes von Menschen." Geiger (1947/1987), 297: Law is "die soziale Lebensordnung eines zentral organisierten gesellschaftlichen Großintegrats, sofern diese Ordnung sich auf einen von besonderen Organen monopolistisch gehandhabten Sanktionsapparat stützt."

<sup>42</sup> The most pronounced "denier" of public international law was Hegel's disciple Georg Lasson. Lasson (1871), at 4 sought to realize peace through the "Abnahme des täuschenden Scheines, ... der sich bisher als eine Rechtsordnung über den Staaten geberdet hat". At 23: "Eine Rechtsordnung mit zwingender Gewalt, der die Staaten unterworfen wären, wäre selber ein Staat, ... Statt der vielen Staaten hätten wir somit einen Universalstaat, und das kann doch und soll doch nicht sein. Mit ihm verschwände alle Freiheit von der Erde, und für das Menschengeschlecht bliebe nichts anderes übrig, als die gemeinsame Fäulniss und Verwesung in dem für alle gleichen Verderben. Nun und nimmer kann sich also ein Staat einem Rechtsurtheil unterwerfen. Was er zu tun und lassen hat, kann er allein wissen." At 28: "So liegen denn also die Dinge, dass zwischen den Staaten jede rechtliche und sittliche Verbindung unmöglich ist ... [29] Denn dächte man sich auch im Princip solche Verpflichtung des Staates aufgestellt und anerkannt, der Staat bleibe immer mächtig genug, um sich ihr in jedem Augenblicke zu entziehen, wo es ihm sein Interesse zu gebieten schiene."

<sup>43</sup> Seelmann (2004), 74.

To conclude, our search for parameters has turned out futile. Lawyers must admit that precise delimitations, not only between hard and soft law, but also between legal and non-legal norms are untraceable. No relevant parameter is fully conclusive, and most of the usual criteria may be more or less present. In consequence, parameters do not allow for precise delineations. The reason is that conceptualization in reality does not function on the basis of parameters, but rather by orientation at prototypes, as will be explained now.

## **2. The Prototype Theory: Law (Soft or Hard) Cannot be Identified by a Fixed Set of Necessary and Sufficient Conditions**

The concept of law has, as all concepts, a core meaning and a penumbra. (Well-known German legal terms of art for this are “*Begriffskern*” and “*Begriffshof*” (Philipp Heck)<sup>44</sup>). The idea of a core meaning and a penumbra of the concept of law can rely on the psychological prototype theory on the representation of concepts as transferred to word semantics.<sup>45</sup> The prototype theory builds on the psychological and philosophical insights that concepts are not characterized by necessary and sufficient conditions, but rather in terms of clusters of predicates. None of the predicates is *per se* necessary for the application of the concept. Some of the predicates are more salient than others, so that individual items displaying them are more readily recognized as falling under the concept. In contrast, the application of the concept to items lacking these central predicates is more problematic, even if they possess a sufficient number of relevant predicates that qualify them as belonging to the class. For instance, a robin is a prototypical bird, whereas a penguin is a more borderline case. The consequence of the prototypical representation of concepts is that the boundaries between concepts are blurry. A famous example for this blurriness is the distinction between cup and mug.

The upshot is that, although it is not possible to distinguish these concepts by an enumeration of predicates, one can recognize and distinguish them more or less readily, depending on their closeness to the prototype. The famous dictum of US Supreme Court Justice Potter Stewart on pornography, “I know it when I see it”,<sup>46</sup> illustrates this recognition technique.

Building on the idea of graduated normativity and on the prototype theory of concepts, we submit that *soft law is in the penumbra of law*. It should and can be distinguished from purely political documents more or less readily, depending on its closeness to the prototype of law. On the other hand, there is no bright line between hard and soft law. Legal texts can be harder or softer.

## **V. European Community/Union Soft Law**

### **1. Transfer of Public International Law Insights to the EC/EU?**

A preliminary question is whether insights gained by the study of public international soft law are at all relevant to European Community and Union soft law.<sup>47</sup> Some authors have argued

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<sup>44</sup> Heck (1932), at 52.

<sup>45</sup> See Fanselow/ Staudacher (1991), 68. The most important empirical study is Rosch (1978).

<sup>46</sup> U.S. S. Ct., *Jacobellis v Ohio*, 378 US 184 (1964), *Stewart*, Justice, concurring, on the indefinability of “hard-core pornography”: “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”

<sup>47</sup> See Wellens/Borchardt (1989), 286-296 on the typical character of the European Community and typical features of the Community legal order with a view to transferring the concept of soft law. See also Snyder, Working Paper (1993), 30: “A trend in the Community towards the increasing use of soft law would be con-

that “there must be serious questioning of whether the concept of soft law carries the same meaning when the term is transplanted into the EC. The EC’s legal system and its law-creating processes are of a radically different character from those encountered in international law.”<sup>48</sup> In contrast, other investigations in specific policy areas have successfully compared soft instruments as used within the EU and in other organisations such as the IMF.<sup>49</sup>

### a) Supranationality of the EC as a Relevant Characteristic

The question of transferability arises because integration of the Member States within the European Union is, in legal, political, and even social and cultural terms, much denser than the general relations between States in public international law are. Legally speaking, the EC possesses specific features which add up to the special quality of “supranationality”.<sup>50</sup> However, supranationality is a relative, not an absolute characteristic.<sup>51</sup> There is a continuum between international and supranational organisations. Although the EC sits on the far end of the spectrum, this does not make a difference in kind, but in degree to other international organisations.

With this assertion, we take sides in the dispute between autonomist and internationalist legal scholars and join the internationalist camp. We qualify the EC as a particularly integrated (supranational) organisation, and EC and EU-law is a special branch of public international law, a kind of incrementation of public international law, not as a *sui generis* legal order.<sup>52</sup> In structure and function, the EC and the EU resemble in some aspects a traditional international

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sistent with patterns of development in national administrations and international organisations. The institutional and political context of the Community differs profoundly, however, from these other contexts.”

<sup>48</sup> Beveridge/Nott (1998), 289.

<sup>49</sup> See, e.g., Schäfer (2005), comparing the “soft” instrument of multilateral surveillance in the EU, the OECD and the IMF, concluding: “Entgegen weit verbreiteter Auffassungen konnte nachgewiesen werden, dass die EU dabei auf das klassische Instrumentarium internationaler Organisationen zurückgreift.” (id. at 216).

<sup>50</sup> Among these are its independent organs, the possibility of majoritarian decision-making, the internalization of EC law in the Member States legal orders without domestic implementing measures, the direct effect of numerous provisions of EC law (applicability by domestic courts, not only by the legislature), a wealth of competencies, financial independence, and the compulsory jurisdiction of the ECJ. See on the generally acknowledged elements of supranationality Schermers/ Blokker (2003), § 61.

<sup>51</sup> Schermers/ Blokker (2003), § 62.

<sup>52</sup> We subscribe to the internationalist view, because it accords with the genesis of the EC, and because we do not find compelling structural or policy reasons for construing EC/EU law as completely alien to public international law. The first policy objective of the autonomists is to protect the highly integrated European legal order from “infection” by an arguably less differentiated, less developed public international law with potentially disintegrative effects. In the autonomist perspective, public international law rules are inapplicable in the *inter se* relations of the Member States. In particular, the public international law rules on amendment and termination of the EU Treaty, on withdrawal from the Union, and on state responsibility and reactions to it such as reprisals or retorsion are inapplicable. However, these – in a policy perspective desirable – consequences can be achieved within public international law, namely by qualifying the EC/EU as a self-contained regime. The second objective of the autonomist school is to secure the special effects of the Community law in the internal legal order of the Member States (supremacy, internalization without implementing measures, and the direct effect of numerous provisions) and to shield it from unilateral dispositions by the Member States. This objective as well can be reached within public international law, by positing a monist relationship between European and Member State law. Cf. Pellet, *Les fondements juridiques internationaux du droit communautaire* (1994), 268 and 203 : “[I]l n’est nul besoin de se raccrocher au mythe de la rupture totale du droit communautaire par rapport au droit international général pour rendre compte de sa spécificité, qui est réelle et profonde. En réalité, l’ordre juridique communautaire, ancré dans le droit international, y trouve l’essentiel de sa force et de ses caractéristiques.” Pellet deplores the “terrorisme intellectuel” of those European legal scholars who seek to distinguish EC/EU law categorically from public international law.

organisation, in other aspects more a state, in some aspects they are unique. Correspondingly, European governance is a novel mixture of governmental, supranational and intergovernmental governance.

On these premises, we are in the position to roughly compare the law-making and law-enforcement structures of EC/EU law with those in public international law. Such a comparison may help to discern the pre-conditions and success-factors for “new” or “soft” modes of governance.

## **b) Differences, Commonalities, and Convergence between International and EC/EU Law**

On the one side, we note *relevant differences between public international and European law* which may have an impact on the theoretical usefulness of soft law as a concept and on its practical effects within the EU (in comparison to the meaning and function of soft law in public international law).

A structural difference is that European soft law is being created within the framework of an organisation, and was initially mainly inter-institutional law. In contrast, global soft law is not per se related to one organisation but may regulate the relationships between States and other actors which are not integrated within one organisation. However, a similar structure can be found in the numerous soft acts of institutions (be it the UN General Assembly or the EU Commission), addressed to Member States.

Most importantly, the EC and the EU have centralised lawmaking bodies. The law-making procedures are more specific and detailed than in public international law. While public international law makes limited use of judicial settlement, the EC has a powerful central court, the ECJ. Correspondingly, judicial enforceability is the rule in EC-law, but the exception in public international law. In contrast, non-judicial settlement of disputes prevails in public international law.

However, we also note *relevant commonalities* between public international and EC/EU-law: Although the types of legal acts in public international law and EC law are different, both legal orders contain provisions on legal sources, which do – in neither order – establish a *numerus clausus*, but are open.<sup>53</sup> The methods of legal interpretation of public international and EC/EU-law differ at best in degree, not in kind.<sup>54</sup>

Finally, both public international law and European law undergo similar general trends: (1) Non-state actors are integrated in the law-making processes. (2) Law-making and law-enforcement instruments are increasingly diversified, involving networks and learning fora, such as the Global Compact on the global level, or the OMC and the Corporate Social Responsibility Multi-Stakeholder Forum on the European level. (3) Despite different starting-points (more supranationalism within the EU), and despite the mentioned “regressions” towards inter-governmentalism or even unilateralism, a long-term process of constitutionalization can be discerned both on the European and on the global level.

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<sup>53</sup> See ECJ, *Parti écologiste “Les verts” v. EP*, [1986] ECR 1339, para. 24. See on unilateral acts in public international law, which are not mentioned in Art. 38 ICJ Statute, The possibility of unilateral acts with legally binding effect has been recognized by the PCIJ in the Eastern Greenland case, PCIJ No. 53 Ser. A/B, 1933, at 69-71; and by the ICJ in the Nuclear Test case (*Australia v. France*), ICJ Reports 1974, 253, para. 51.

<sup>54</sup> Notably, public international law is likewise interpreted in a dynamic and teleological fashion which comes close to the *effet utile*-argument of the ECJ. See Bernhardt (1981), 20-21; Wyatt (1982), 158-59; Peters (1997), 23-26 with further references.

Finally, we note a *structural convergence* of global and European law. EC/EU law is in some fields evolving towards intergovernmentalism (e.g. with the OMC), away from supranationalism. The move towards intergovernmentalism in some policy areas is not “new”, but borrows traditional instruments used in International Organisations.<sup>55</sup> Inversely, in public international law, the supranational elements, such as compulsory adjudication, are – with set-backs – gradually expanding even on the global level. Moreover, EU enlargement has increased the political, economic, social and cultural diversity among Member States and has made substantial agreement in legal and political affairs difficult for similar reasons as within larger organisations with global scope. Seen in this perspective, *both European and public international law are in structural and in value-terms converging.*

### c) Conclusion

Based on the foregoing considerations, we conclude that the most important findings on public international soft law are in principle transferable to the EU realm. However, some characteristics of the Community legal order, notably its centralised law-making procedure and the option of judicial enforcement makes the *shadow of hierarchy darker* in EC/EU law than in public international law. This shadow of hierarchy renders European soft law more operational than global soft law.

## 2. A Neglected Concept

European Community and Union practice has from the beginning on relied on a range of instruments which were not as such legally binding or whose legal status was unclear. Nevertheless, the concept of European soft law was, until the turn of the millennium, hardly discussed in legal scholarship.<sup>56</sup> Although some attention has been paid to inter-institutional agreements,<sup>57</sup> the overall phenomenon of soft regulation has been, on the EU-level, much less thoroughly explored than in public international law.<sup>58</sup>

Interest in European soft law mounted with the new millennium’s debate on European governance and better Community regulation.<sup>59</sup> Soft law and self-regulation are meanwhile, by the European institutions themselves, envisaged as regulatory alternatives (e.g. in the Commission’s 2002 Action Plan Simplifying and Improving the Regulatory Environment<sup>60</sup>).

So far, the term “(European) soft law” has not been defined in official EU documents. Scholars use to rely on the definitions as elaborated in public international law. Along these lines, soft law on the European realm can be defined as “[r]ules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may

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<sup>55</sup> See for the EU’s economic policy Schäfer (2005).

<sup>56</sup> Some articles date from the 1980s and 1990s (notably Wellens/Borchardt (1989), see also Bothe (1981), Snyder (1993a and 1993b); Klabbers (1994); Beveridge/Nott (1998).

<sup>57</sup> Snyder (1996); Hummer (2004).

<sup>58</sup> Textbooks and general courses on European Community law still either do not mention soft law at all or only treat it in an extremely cursory fashion with some few standard examples.

<sup>59</sup> See as a key document the Commission’s White Paper on European Governance, COM (2001) 428 final, 25 June 2001.

<sup>60</sup> Communication from the Commission, Action Plan Simplifying and improving the regulatory environment, COM (2002) 278 final, of 5 June 2002, at p. 11-12.

have certain (indirect) legal effects, and that are aimed at and may produce practical effects.”<sup>61</sup>

Some authors also place the non-binding Acts provided for in Art. 249 TEC, namely the European recommendation (by the Council or the Commission) and the opinion (usually issued by the Commission), under that umbrella, as a special, “formalized” or “legal” type of soft law.<sup>62</sup> Recommendations and opinions have, as Art. 249 TEC clearly states, “no binding force”. However, we will not deal with these Acts in this paper, because their legal status is not unclear, but explicitly spelled out in the EC Treaty.

### 3. Typology of EC/EU Soft Law

European documents which may be gathered under the heading “soft law” as defined above are numerous and various. They may be ordered along different lines.<sup>63</sup> We can roughly orient ourselves at the instruments’ authors (Commission, Council, Parliament, Member States, joint acts of EU institutions, private actors). In particular the acts adopted by the institutions themselves (institutional soft law) can usefully be further systematized *according to their function*.

#### a) Institutional Soft Law

A functional typology of institutional soft law establishes the following categories:

##### aa) Preparatory and informative instruments

Among the preparatory and informative instruments range *Green*<sup>64</sup> and *White Papers*<sup>65</sup> (issued by the Commission) and *Action Programmes*<sup>66</sup> (produced by the Commission and in a later stage also by the Council). A noteworthy type are *inter-institutional communications*.

<sup>61</sup> Senden, at 112 and 456. See for further definitions of European soft law Wellens/Borchardt (1989), at 285: “Community soft law concerns the rules of conduct which find themselves on the legally non-binding level (in the sense of enforceable and sanctionable) but which according to their drafters have to be awarded a legal scope, that has to be specified at every turn and therefore do not show a uniform value of intensity with regard to their legal scope, but do have in common that they are directed at (intention of the drafters) and have as effect (through the medium of the Community legal order) that they influence the conduct of Member States, institutions, undertakings and individuals, however without containing Community rights and obligations”. Beveridge/Nott (1998) describe European soft law as “measures which, while incapable of being described as law properly so called, are not entirely without legal weight, though that weight may not be constant.” “They have no binding legal effect but in practice they influence conduct”. “The concept of ‘soft law’ is used to describe a category of acts which, though not identified as binding, are capable, at least in some circumstances, of having legal effect.” (id. at p. 290-91). Trubek/Cottrell (2005), 5: “‘Soft law’ is a very general term, and has been used to refer to a variety of processes. The only common thread among these processes is that while all have normative content they are not formally binding.”

<sup>62</sup> Notably Senden (2004), 158-189; see also Bothe (1981), 761; Beveridge/Nott (1998), 290; Falkner/Treib/Hartlapp/Leiber (2005), at 178-79.

<sup>63</sup> See for a comprehensive list of European soft instruments Senden (2004), Table of Soft Law Acts, at p. xxxi-liv.

<sup>64</sup> Example: Green Paper Mortgage Credit in the EU, COM (2005) 327 final, of 19 July 2005.

<sup>65</sup> Example: White Paper on exchanges of information on convictions and the effect of such convictions in the European Union, COM (2005) 10 final, of 25 January 2005.

<sup>66</sup> Communication from the commission to the council, the European parliament, the economic and social committee and the committee of the regions on the sixth environment action programme of the European Community Environment 2010: Our future, Our choice, – The Sixth Environment Action Programme, COM (2001) 31 final, of 24 January 2001.



*Purely informative communications* are issued by the Commission.<sup>67</sup> *Individual Communications* which are likewise issued by the Commission, eventually with the involvement of other institutions.<sup>68</sup>

#### bb) Interpretative and decisional instruments

Instruments whose function is to interpret and to decide are most frequently called “Communications”. They are linked to primary or secondary EC norms. Therefore, a specific legal basis is apparently not considered necessary. Generally interpretative Communications and Notices are issued by the Commission,<sup>69</sup> occasionally also by other institutions.

An important sub-group are administrative rules which are not as such legally binding, but indicate the way in which a Community institution will interpret and apply of Community law.<sup>70</sup> The probably first case and still primary example of administrative rules are two Communications concerning the application of (ex) art. 85 first paragraph (the so-called “Christmas Communications” of December 1962.<sup>71</sup> Among the decisional instruments also range the Decisional Notices and (less frequently) Communications, issued by the Commission. Another type of decisional instrument are Decisional Guidelines, Codes and Frameworks, likewise issued by the Commission. Their objective is to furnish decisional rules in areas where the Commission is entrusted with the power to decide on individual cases, primarily in the area of state aid.<sup>72</sup> Addressees are the Member States (as a third party) and potential beneficiaries.

#### cc) Steering instruments

The final major group are steering instruments. Under this umbrella, we might gather Council Conclusions<sup>73</sup>, Council Declarations<sup>74</sup>, Joint Declarations<sup>75</sup>, Inter-Institutional Agreements<sup>76</sup>, and Council Resolutions. A final and important species are Council and Commission *Codes of Conduct or Practice*. Examples are the 1999 Code of Conduct for improved cooperation between authorities of the Member States concerning the combating of transnational social secu-

<sup>67</sup> See for example the Communication on financial services: enhancing consumer confidence. Follow-up to the Green Paper on ‘Financial Services: Meeting Consumer Expectations, COM (1997) 309 final, of 26 June 1997.

<sup>68</sup> See for example the Notice of the expiry of certain anti-dumping measures, OJ C 326 of 24 October 1998, p. 3.

<sup>69</sup> Commission Interpretative Communication on certain aspects of the provisions on televised advertising in the ‘Television without frontiers’ Directive, OJ C 102 of 28 April 2004, p. 2.

<sup>70</sup> See on this (not uncontested) concept Senden (2004), 138-143.

<sup>71</sup> Notice on exclusive dealing constructs with commercial agents, OJ 139 of 24 December 1962, p. 2921; Notice on patent licensing agreements, OJ 139 of 24 December 1962, p. 2922

<sup>72</sup> See for example the Communication from the Commission, Community Guidelines on State Aid for Rescuing and Restructuring firms in Difficulty, OJ C 244 of 1 October 2004, p. 2.

<sup>73</sup> See for example the Council Conclusions on the future framework for Community action in the field of public health, OJ C 390 of 15 December 1998, p. 1.

<sup>74</sup> Declaration by the Council (ECOFIN) and the Ministers meeting in that Council, OJ L 139 of 11 May 1998, p. 28.

<sup>75</sup> Joint Declaration on practical arrangements for the new co-decision procedure (Art. 251 of the Treaty establishing the European Community), OJ C 148 of 28 May 1999, p. 1.

<sup>76</sup> European Parliament, Council, Commission, Inter-institutional Agreement on Better law-making, OJ C 321 of 31 December 2003, p. 1.

rity benefit and contribution fraud and undeclared work, and concerning the transnational hiring-out of workers,<sup>77</sup> the 1998 Code of Conduct on arms export<sup>78</sup> or the 1993 Code of Conduct concerning public access to Council and Commission documents (internal nature).<sup>79</sup>

### **b) Member States' European Soft Law**

The Member States themselves may jointly promulgate, within the scope of Community/Union law, non-binding documents which are not totally devoid of (indirect) legal effects.

The most prominent examples are the Charter on Fundamental Rights of the European Union of 7 December 2000,<sup>80</sup> and the Luxembourg compromise of 1966,<sup>81</sup> on whose basis Council decisions were with a few exceptions taken – contrary to the wording of the Treaty – by unanimous consent from 1966 until 1974.<sup>82</sup>

### **c) Private Self-Regulation and Co-Regulation**

Another proliferating type of European soft law is soft law issued by *private* (mostly economic) entities. The most relevant entities are Europe-based transnational enterprises on the one hand and trade and industry associations in Europe on the other hand. These European private (business) actors increasingly engage in “autonomous” *self-regulation*. The Commission has defined self-regulation as follows: It “concerns a large number of practices, common rules, codes of conduct and, in particular, voluntary agreements which economic actors, social players, NGOs and organised groups establish themselves on a voluntary basis in order to regulate and organise their activities. Unlike co-regulation, self-regulation does not involve a legislative act. Self-regulation is usually initiated by stakeholders.”<sup>83</sup> A prime example is the self-regulation of advertising. In this field, we even find meta-norms on self-regulation, such as the 2004 „Advertising Self-regulation Charter“, signed by representatives of the advertising industry of Europe, in which advertisers, agencies and media, and the European Advertising

<sup>77</sup> Resolution of the Council and the Representatives of the Governments of the Member States, meeting with the Council of 22 April 1999, OJ C 125 of 6 May 1999, p. 1.

<sup>78</sup> Council of the European Union, European Code of Conduct on Arms Export, of 8 June 1998, <http://ue.eu.int/uedocs/cmsUpload/08675r2en8.pdf>

<sup>79</sup> 93/730/EC, Code of Conduct concerning public access to Council and Commission documents, OJ L 340 of 31 December 1993, p. 41.

<sup>80</sup> OJ C 364 of 18 December 2000, p. 1. See on the legal effects of the Charter Alber (2001).

<sup>81</sup> Council Agreement of 29 January 1966 on majority votes within the Council; Council Agreement of 30 January 1966 on cooperation between the Council of Ministers and the Commission Agreement following the Council meeting of 28–29 Jan. 1966, para. b) I., repr. in Bulletin of the European Economic Community, March 1966, no. 3, pp. 5–11. See for the discardment of majority voting: “Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community, ...” (id. at p.9).

<sup>82</sup> At the meeting of heads of Government of the Community in Paris on 9/10 Dec. 1974, the Heads of State agreed to renounce the Luxembourg compromise (see para. 6 of the Communiqué of 10 Dec. 1974). In 1982, decision on agricultural prices were taken against a British Veto.

<sup>83</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Environmental Agreements at Community Level, Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM (2002) 412 final, of 17 July 2002, at para. 4.1.

Standards Alliance (EASA) re-committed themselves to effective self-regulation across the European Union.<sup>84</sup>

An interesting variant of the privatization of soft law is the emergence of *mixed public-private acts*, sometimes referred to as “hybrid”, or “multi-stakeholder”-acts or *co-regulation*. An example is the “Social Dialogue” under which the initiative for proposing legislation rests with the social partners (representatives of employers and employees).<sup>85</sup> They are allowed to enter into voluntary agreements which are *subsequently enacted as directives by the Council*.

It must be pointed out that self-regulation and co-regulation is not necessarily soft in all respects. Private actors may, among each other or with Community institutions or with Member States, conclude agreements which are binding on the participants.

The currently most important space for so-called *voluntary agreements* is present in environmental policies.<sup>86</sup> Under the umbrella of voluntary environmental agreements (VEA), both legally binding ones and non-binding ones are gathered.<sup>87</sup> Only the latter variant is soft-law like and therefore relevant for our inquiry.

A very important feature of self-regulation and co-regulation is the (potential) involvement of formal law-making institutions. Notably the Commission may indicate its intent to act in the given area under the Community Method if the social partners cannot reach agreement by their own. This “*threat to legislate*” is a highly effective stimulus for self-regulation.

#### **d) Technical and Financial Standard-setting by or with Private Bodies**

A very important form of private or semi-private regulation which overlaps with self-regulation as described above, is standard-setting.<sup>88</sup> Standard-setting currently happens most intensely in the area of technics and finances. These technical and financial standards are, crucially, established by private bodies, either solely or in collaboration with government institutions.

The European body with the broadest mandate is the European Committee for Standardization (CEN).<sup>89</sup> CEN is a multi-sectorial organisation producing standards in numerous business domains ranging from chemistry over food and health care to transport and packing. Another

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<sup>84</sup> [http://www.easa-alliance.org/about\\_easa/en/Charter.html](http://www.easa-alliance.org/about_easa/en/Charter.html). The Charter was framed under the auspices of the EASA, a Bruxelles-based NGO (<http://www.easa-alliance.org/>) and signed in the presence of a Commission representative.

<sup>85</sup> See [http://europa.eu.int/comm/employment\\_social/social\\_dialogue/index\\_en.htm](http://europa.eu.int/comm/employment_social/social_dialogue/index_en.htm)

<sup>86</sup> See the 1996 Communication by the Commission establishing a general framework for voluntary environmental agreements, be it at the national or at the European level (Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM (1996) 561 final, of 27 November 1996) and the 2002 Commission Communication (Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Environmental Agreements at Community Level, Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment, COM (2002) 412 final, of 17 July 2002). See in scholarship Bailey (1999); Van Calster/Deketelaere (2001).

<sup>87</sup> Bailey (1999), at 172 distinguishes “between environmental agreements that legally bind parties, and those that are truly of a voluntary nature, in that they completely rely on the goodwill of the signatories to comply with them. The latter, sometimes called ‘gentlemen’s agreements’ are often signed by trade associations on behalf of their members....”.

<sup>88</sup> See on international standardization notably Schepel (2005); also Mattli (2003); Nobel (2005).

<sup>89</sup> See <http://www.cenorm.be/cenorm/index.htm>. CEN was founded in 1961 by the national standards bodies in the EEC and EFTA countries.

example is CENELEC (European Committee for Electrotechnical Standardization),<sup>90</sup> which seeks to achieve a coherent set of voluntary electrotechnical standards as requested both by the market and by European legislation. Another case in point is the European Telecommunications Standards Institute (ETSI), which produces telecommunications standards.

Finally, financial standards may be incorporated into (European) “hard” law. For instance, the International Financial Reporting Standards (IFRS), adopted by the International Accounting Standards Board (IASB),<sup>91</sup> have been incorporated into a Commission Regulation of 2003 whose annexes containing the standards are continuously amended.<sup>92</sup>

The relation between standards and (hard) law is complex and raises similar problems as soft law. Notably, standards deploy – as soft law – *indirect legal effects*. When technical standards are incorporated into or referred to by legal documents, the producer or manufacturer is legally obliged use these standards.

The fact that standards are normally sold, and only in part offered to the public for free is an important difference to law made by States or International Organizations. Moreover, this fact raises questions of legitimacy, because not all users are in an equal position to comply with the norms.

#### 4. Soft Law as a Core Element of the Open Method of Coordination

The proliferation of soft law is paralleled by the emergence of the Open Method of Coordination (OMC).<sup>93</sup> Despite important differences between the “old soft law” and the “new” OMC (which will be pointed out below),<sup>94</sup> commonalities exist. The OMC is being used since the European Council of Lisbon in 2000. Legal bases can be found in the provisions of Art. 99 TEC (member States’ economic policies as a matter of common concern) and Art. 128 TEC (Member States’ employment policies taking into account Council guidelines).<sup>95</sup> On the latter Treaty basis, the European Employment Strategy (EES) was developed as the first and still most important OMC. In the Whitebook on Governance, the Commission explains the OMC

<sup>90</sup> CENELTEC was created in 1973 as a result of the merger of two previous European organizations: CENELCOM and CENEL. It is a non-profit technical organization set up under Belgian law and composed of the National Electrotechnical Committees of 28 European countries. In addition, eight National Committees from Eastern Europe and the Balkans are participating in CENELEC work with an affiliate status. CENELEC works with 15,000 technical experts from 28 European countries. See <http://www.cenelec.org/Cenelec/Homepage.htm>.

<sup>91</sup> The IASB is an independent, privately-funded accounting standard-setter based in London, UK. The Board members are private persons selected on account of their professional competence and practical experience. The IASB is committed to developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require transparent and comparable information in general purpose financial statements. See Kirchner/Schmidt (2005).

<sup>92</sup> Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ L 261 of 13.10.2003, p. 1.

<sup>93</sup> See on the OMC the monographs by Schäfer (2005); Pochet/Zeitlin (2005); see already Hodson (2001); Telò (2002); Regent (2003); Ashiagbor (2004); Schäfer (2004a); Schäfer (2004b).

<sup>94</sup> See for a distinction between the OMC and ‘old soft law procedures’ notably Borrás/Jacobsson (2004); Jacobsson (2004); Diedrichs, Udo, Overview Paper on Classification and Mapping of Governing Modes, 31 August 2005, [http://www.eu-newgov.org/database/DELIV/D01D08\\_Overview\\_classifying\\_NMGs.pdf](http://www.eu-newgov.org/database/DELIV/D01D08_Overview_classifying_NMGs.pdf).

<sup>95</sup> See for an overview with the the precise treaty bases of the OMC in different policy areas Borrás/Jacobsson (2004), ‘Table 2 Features of the OMC in different policy areas’; Laffan/Shaw (2005): ‘Table 3.1 Analytical table of OMC processes by policy area’.

as follows: “The open method of co-ordination is used on a case by case basis. It is a way of encouraging co-operation, the exchange of best practice and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others”.<sup>96</sup> Put differently, “the OMC aims to coordinate the actions of the several Member States in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence. Under the OMC, the Member States agree on a set of policy objectives but remain free to pursue these objectives in ways that make sense within their national contexts and at different tempos.”<sup>97</sup>

Mere cooperation in the framework of the OMC is a less intrusive strategy than harmonization, let alone unification of law and policy. Therefore, Member States participate more readily. It is hoped that on the long run, this soft strategy might achieve a similar or even greater degree of policy convergence than the traditional modes of European governance. However, the OMC risks to upset the institutional balance, to dilute the achievement of common objectives, and to exclude the European Parliament from the European policy process, to name only a few problems. Overall, the OMC might constitute a significant step back to intergovernmentalism as opposed to supranationalism. This is not the place to assess the benefits and shortcomings of the OMC in a comprehensive fashion, but only to examine potential links between soft law and the OMC.

Notably Borrass and Jacobsson have *distinguished* the OMC and traditional soft law as follows:<sup>98</sup> The open method of co-ordination is an intergovernmental approach which the Council monitors politically at the highest level. It systematically links policy areas, and interlinks EU-action and national public action. It seeks the participation of social actors and aims at enhancing learning processes.

In contrast, traditional European soft law has been employed within the supranational sphere. The Commission and the Court of Justice role had a dominant role. It was monitored only on an administrative monitoring. It did not explicitly seek to link neither policy areas nor the EU-level with national levels, and did not explicitly state enhancing learning as an objective. The authors stress that the OMC functions differently from the previous uses of soft law in the EU in, *inter alia*, being a political rather than a legal process, building on a different set of actors, and being an ongoing process entailing a refined system of monitoring and follow-up.<sup>99</sup>

Noting these differences, we find that they make a *difference in degree, but not in kind*. Both modes of governance consist of law-like and other elements. Even if the OMC may be situated more in the political than in the legal sphere (“soft governance”),<sup>100</sup> traditional soft law as well is characterized by its dubious status in the grey zone between law and politics. Both modes share the feature of non-bindingness. The open and “soft” method of coordination is to

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<sup>96</sup> Commission of the European Communities, European Governance, A White Paper, COM (2001) 428 final, of 25 July 2001, at pp. 21-22.

<sup>97</sup> Scott/Trubek (2002), 4-5.

<sup>98</sup> Borrass/Jacobsson (2004) at 188.

<sup>99</sup> Borrass/Jacobsson (2004), at 197.

<sup>100</sup> Jacobsson (2004).

a large extent realized through instruments which resemble soft law. Our conclusion is therefore that *soft law is one important component of the OMC*.<sup>101</sup>

## VI. The Functions of International and European Soft law

Soft law texts may, in the words of international courts and tribunals “even if they are not binding, ... sometimes have normative value.”<sup>102</sup> While they have “a certain legal value, this legal value differs considerably, depending on the type of resolution and the conditions attached to its adoption and provisions.”<sup>103</sup> That normative value consists in *specific legal effects* apart from outright legal bindingness.<sup>104</sup>

Political actors use soft law because they expect and desire these specific indirect legal effects. The legal effects can be clustered as a *triad of functions, depending on the relation of soft law to hard law*.<sup>105</sup> Most functions of and motives for soft law-making are more or less relevant for both levels of governance, the global and the European level, and will therefore be discussed jointly.<sup>106</sup>

### 1. Pre-law Functions

Soft instruments fulfil a pre-law function when they are adopted with view to the elaboration and preparation of future international treaties or Community legislation. In a situation where binding rules are unavailable or for other reasons inopportune, soft agreements are expected to provide normative guidance, to build mutual confidence, and to concert political attitudes.<sup>107</sup> It may thereby give an impulse to further negotiation. The pre-law function of soft law arguably encompasses two indirect legal effects:

(1) “*Internationalization*” or “*Europeanization*” of the subject matter? The probably most fundamental and uncontested effect of inter-state soft law is the “internationalization” of the subject matter it deals with. The adoption of a soft law instrument removes the respective subject matter from the *domaine réservé* of States.

However, the “internationalizing” (or “Europeanizing”) effect via soft law functions differently within an *international organization*. Here, the *domaine réservé* of the Member States is defined by the Founding Treaties. It ends where competences have been transferred to the organization. Strictly legally speaking, organs and institutions can not, by means of soft law in

<sup>101</sup> Cf. Senden (2004), 22, 179. See for the association of the OMC with soft law also Trubek/Trubek (2005), 344.

<sup>102</sup> ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 70 (referring to General Assembly Resolutions).

<sup>103</sup> Arbitral Tribunal, Award on the merits in the dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic of 19 January 1977, para. 86 (ILM 17 (1978), 1, at 29), with regard to UN Resolutions.

<sup>104</sup> See specifically on the legal effects of European soft law notably Senden (2004), 235-449; Wellens/Borchardt (1989), 281-82.

<sup>105</sup> See Senden 2004, 457-461 on the triad of functions in the European realm.

<sup>106</sup> Some motives for the preference of soft law over hard law appear to be irrelevant on the European level and are therefore not discussed here. Among these are concerns about territorial status (states are willing live with territorial situations without formally recognizing the status quo), or the concern that international relations will be overburdened by a “hard” treaty, with the risk of failure and a deterioration in relations (Hillgenberg (1999), 501).

<sup>107</sup> See, e.g. Wellens/Borchardt (1989), 303; Hillgenberg 1999, 501.

itself, increase the formal competences of the organisation. Nevertheless, the production soft law by organs and institutions, even if outside the competences of the organization, appears to be tolerated by Member States and is normally not criticised (as it would happen in the event of hard law making) as being *ultra-vires*.

So-to-speak-“ultra vires”-soft law can therefore in practical terms pave the way to a formal extension of the competences of the organization which will be effected by a revision of the founding treaty. This has indeed happened in the EC (see below in the context of normative considerations motivating the use of soft law).

(2) The second pre-law function, and probably the most important function generally attributed to soft law is its *promoting function*. The promulgation of soft law declarations and the conclusion of soft agreements may indicate a growing *opinio iuris* in the direction of those instruments.<sup>108</sup> Soft law thereby contributes to the development of hard law (treaties, customary law) and is thus a *pacemaker of legalization*.<sup>109</sup>

## 2. Law-plus Functions

Soft law and hard law increasingly intermesh and add up to more or less coherent normative regimes. Within such “mixed” regimes, soft law effectively *complements hard law*. Moreover, it is generally accepted that soft law can *make concrete and guide the interpretation of hard law*. These legal effects of complementing, support and interpreting existing international treaties, or primary and secondary Community law, fulfil – in relation to hard law – a law-plus function.

## 3. Para-law Functions

Soft law instruments used as a substitute for legislation can be said to fulfil a para-law function. However, the para-law function does normally *not* mirror a “regulatory choice” between hard and soft law. First, those actors which do not possess legal capacity in the respective legal system can not enact hard law. Therefore they do not have any regulatory choice. Also among legally competent actors, the alternative to soft law is in most cases not hard law, but no regulation at all. Soft regulation is therefore often the escape from a no-go situation, and not a deliberate “alternative” to hard law. Soft law may – especially in international law – be “the only alternative to anarchy”. A soft solution can overcome deadlocks in the relation of states when efforts at firmer solutions have failed.<sup>110</sup> Powerful States may favor soft solutions which allow them to retain their liberty of action while at the same time displaying a cooperative attitude. Weak states might promote a soft law instrument on matters of concern to them selves as the best they can politically achieve.<sup>111</sup> In the European realm as well, soft law is more often than not only the second-best solution. In that sense, soft law is “realistic”.

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<sup>108</sup> Shelton (2003), 168: “Non-binding norms have complex and potentially large impact on the development of international law. Customary law ... requires ... State practice ... as constitutive, essential part of the process by which the law is formed. In recent years, non-binding instruments have provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have assisted to establish the content of the norm. The process of drafting and voting for non-binding normative instruments also may be considered a form of State practice.”

<sup>109</sup> We here use the term “legalization” in an unspecific way to denote the process of expanding and intensifying the legal component of European or international governance.

<sup>110</sup> Reisman (1992), 138-39.

<sup>111</sup> Chinkin (2000), 34.

It is often argued that soft law has the legal significance to *protect legitimate expectations* and to bind actors on the basis of the principle of good faith. In this argument, soft law is presented as a source of legal obligation, through acquiescence and estoppel, perhaps against the intention of the parties.<sup>112</sup>

However, this appears to be a circular reasoning. The involved parties deliberately do not adopt a soft legal instrument. Expectations created by such an instrument and reliance can not, in the style of Munchhausen pulling himself up from the swamps by his own hair,<sup>113</sup> create legal obligations.

Proponents of a sociologically oriented approach to international law point out that although non-compliance with soft law by a party is no ground for a claim for reparation and judicial remedies, this does not mean that the soft agreement need not be observed or that the parties were free to act as if no such agreement existed. Actors may consider a nonbinding undertaking as controlling as a binding one.<sup>114</sup> This may be true and in political terms important, but does not signify a legal obligation. However, within the EU, the *general duty to cooperate* (Art. 10 TEC), appears to be the source of a *legal obligation* to take soft law into account in some way or the other.

#### 4. Practical Considerations for Reliance on Soft Law

Additional practical and normative considerations, arising from the reality of international and European relations, steer Governments towards soft law, which will be treated now.<sup>115</sup>

(1) A first rather practical reason is the *increasing complexity of global problems and scientific uncertainty about causalities*. This complexity affects the consensus on issues on the Global and European level. Effective legal responses are often not clearly identifiable, while at the same time civil society demands that at least “something must be done”. In these fluid situations, a “soft” response appears particularly useful, as it preserves the freedom of action of the political elites.<sup>116</sup> Environmental protection and disarmament are issue areas where this calculus plays a part.

(2) A related aspect is that states are cautious to commit themselves legally. In that perspective, the rise of soft law can be interpreted as a sign of “respect for hard law, which states and other actors view cautiously. They may use the soft law form when there are *concerns about the possibility of non-compliance*, either because of domestic political opposition, lack of ability or capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norm.”<sup>117</sup> Firm commitments are likewise avoided when it is difficult to predict factual developments. This is typical for certain subject areas, e.g. monetary policy.

(3) A final very important motive of governments is that the endorsement of soft agreements is *more rapid and simpler* than the conclusion of binding treaties (or of binding EU instru-

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<sup>112</sup> Chinkin (2000), 31.

<sup>113</sup> Bürger (2002/engl. orig. 1785), 64.

<sup>114</sup> Schachter (1977), 300.

<sup>115</sup> These considerations are closely linked to the objective functions (as anticipated by the relevant actors) which are served by soft law, but deserve separate mentioning.

<sup>116</sup> Bothe (1980), 91; Shelton (2000), at 13; Gomma (2001), 249: soft law as a “rapid first approximation of a legal response”.

<sup>117</sup> Shelton (2000), 12 (emphasis added).



ments),<sup>118</sup> and that they are more flexible and easy to revise, precisely because of their reduced bindingness.<sup>119</sup>

## 5. Normative Considerations for Reliance on Soft Law

We hold four normative considerations to be crucial motivations for reliance on soft law: competency, legitimacy, sovereignty, and subsidiarity.

### a) Competency

First, both on the international and the European level reliance on soft law may be motivated by lacking legal powers (competencies) and may result in “*competence creep*”. Soft law is a resort in cases when the powers of an involved actor, e.g., a government agency, an autonomous municipality or sub-units of a federal state, to represent or legally bind the state on the international plane are doubtful.<sup>120</sup> Similarly, European institutions have frequently regulated in a soft manner areas in which the EC/EU lacked legal authority vis-à-vis the Member States, or where the division of competences between the EC/EU and the Members was unclear. Thereby, the European institutions were able to initiate new policies which had no legal basis in the Treaties.<sup>121</sup>

Classic examples are environmental policy, research and technological development, culture and public health issues, which were tackled mainly by means of Action Programmes, research programmes, framework programmes and declarations, until in 1986 and 1992, the respective competences were transferred to the Community.<sup>122</sup> Soft law here performed its promoting function and indeed paved the way to hard law. Today, the Open Method of Coordination is applied without any Treaty base in the field of social exclusion and pensions.

### b) Legitimacy

Second, resort to soft law may be interpreted as the States’ attempt *to gain (or feign) legitimacy* and alleviate (or cover up) democratic deficiencies. It has been argued that, due to its indirect legal effects and the high level of compliance, soft law amounts to hard law “in disguise”.<sup>123</sup>

However, it may be politically convenient to avoid the term “law” and to describe and present these programmes, Action Plans and Memorandums as non-law for two reasons. One is that

<sup>118</sup> Constitutional economics calls this “lower transaction costs” (Abbot/Snydal (2000), 434-436).

<sup>119</sup> See e.g. Bothe (1980), 92; Hillgenberg (1999), 501; (Gomma (2001), 249; Shelton (2000), 13.

<sup>120</sup> Bothe (1980), 92; Gomma (2001), 250.

<sup>121</sup> Wellens/Borchardt (1989), 302-303.

<sup>122</sup> Competences in the field of environmental policy and in research and technological development were in 1986 transferred to the Community by the Single European Act. See for environmental policy ex Art. 130 r-t EC-Treaty (currently Art. 174-176 TEC). Before 1986, four environment action programmes had been adopted (OJ 1973 C 112/1; OJ 1977 C 139/1; OJ 1983 C 46/1; OJ 1987 C 328/1). They were later implemented through the development of hard law (directives), e.g. Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40. See for research and technological development ex Art. 130f-q (currently Art. 163-174 TEC). Before 1986, the first soft instrument were research programmes (see e.g. OJ 1974 C 7/2), from 1983 on framework programmes (e.g. OJ 1983 C 208/1). Competences in culture and public health were in 1992 transferred to the Community by the Treaty of Maastricht. See for culture ex Art. 128 (currently Art. 151 TEC). The new competence for public health policy was ex Art. 129 (now Art. 152 TEC). Before 1992, public health action programmes (see, e.g. OJ L 175/26) and declarations (see e.g. OJ 1991 C 170/1) had been adopted.

<sup>123</sup> Mörth (forthcoming 2006), manuscript at p. 10/11.

the term “law” has unwanted connotations of coercion and hierarchy, which may in political terms, be inopportune. Second, avoidance of the label “law” avoids a discussion of the democratic deficiencies lying in the fact that important decisions are made outside the traditional and formal government system.<sup>124</sup> This strategy might be called sneaking into (democratic) legitimacy. It is highly relevant within the EU, but becomes increasingly acute for international governance as well, whose democratic deficiencies are being discussed only recently.

### c) Sovereignty

Third, reliance of soft law instead of hard law *lowers “sovereignty costs”*.<sup>125</sup> As it is not legally binding as such, soft agreements entail a smaller loss of authority for the cooperating states than hard legal acts. Thereby, soft law presents itself as a “compromise between sovereignty and order”.<sup>126</sup>

### d) Subsidiarity

Fourth, the growing bureaucratization of international and European institutions naturally entails an explosion of soft law, because many of the new institutional actors (sub-units, programmes etc.) lack the formal law-making capacity within the international legal order and within the EC/EU.<sup>127</sup> They can only act through soft policy instruments. Thereby, soft law *integrates transnational non-state actors* which are not (yet) formal subjects of law (such as TNCs and NGOs) into the fabric of international relations, and likewise into the fabric of Community and union law. In a soft way, they act as co-law-makers and -enforcers. This devolution allows the formal legislators to concentrate on essential aspects and to benefit from the experience of the private entities.<sup>128</sup> The (partial) delegation of law-making authority to societal actors thereby satisfies the ideal of *subsidiarity*. From the point of view of deliberative democratic theory, it even makes the process more democratic because of granting a voice to the representatives of the affected private parties in the democratic discourse. However, the absence of democratic structures of these private actors raises concerns of democratic representation.

## VII. Soft Legal Consequences of a Disregard of Soft Law

Because soft law is not directly binding, non-compliance with soft norms is not illegal in a traditional sense, but entails only “soft” illegality. As hard sanctions are no constituent of law (see above), the absence of “hard” sanctions does not kick a given normative text out of the realm of the law.

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<sup>124</sup> Mörth (forthcoming 2006), manuscript at p. 11.

<sup>125</sup> Abott/Snidal (2000), 436-441.

<sup>126</sup> Bothe (1980), 90.

<sup>127</sup> Shelton (2000), 12. See also Chinkin (2000), 28: Case studies show that the use of soft law forms has been closely associated with the growth of international institutions.

<sup>128</sup> In a 2002 Communication by the Commission on Environmental Agreements, the Commission praised co-regulation (by private actors with Community institutions) as follows: “With a view to *simplifying legislation*, the Commission remains convinced that it is a method whose implementation – circumscribed by criteria laid down in a joint interinstitutional agreement – can prove to be a relevant option when it comes to *adjusting legislation to the problems and sectors concerned*, reducing the burden of legislative work by *focusing on the essential aspects of legislation*, and *drawing on the experience of interested parties*, particularly operators and social partners.” (Commission Communication 2002 (note 86), para. 4.2., emphasis added).

## 1. Converging Novel Compliance Control for Hard and Soft Law

Increasingly, international legally binding, hard law treaties, e.g. in international environmental law, establish novel non-compliance mechanisms which have been called “soft enforcement”.<sup>129</sup> On the other hand, soft regimes have put in place novel effective supervisory organs and enforcement mechanisms. For instance, the Commission on Sustainable Development supervises the implementation of the Agenda 21.<sup>130</sup> Another example are the OECD Guidelines on Multinational Enterprises. They are not legally binding, but the implementation of and compliance with the guidelines is secured by a more or less functioning decentralized system of “National Contact Points”.<sup>131</sup> A final example is the evolution of the World Bank’s operational standards. They have been characterized by an expert in the field as “quasi-administrative in nature, for internal use by the Bank to guide its staff in their activities. However, they are also applied in the framework of financing development projects through loan and credit agreements negotiated between the Bank and the borrowing countries. As such, they gain an external dimension, potentially affecting the behaviour of the borrower.”<sup>132</sup> The examples support the conclusion that compliance control mechanisms for hard and soft international law are converging.

## 2. Factors of Compliance with Hard and Soft Law

On the *EU level*, case studies on compliance with soft legal instruments do not allow general conclusions, but rather suggest that both sector- and country-specific differences exist.<sup>133</sup> One explanation for compliance with European soft law might be the threat to enact hard law in the event of non-compliance with the former. This “*shadow of the law*” is real in the EU in those areas where the Commission can take action. This is an important difference to the international realm where hard law is less readily available.

So what about compliance with *international* soft law? Not surprisingly, here as well, institutional mechanisms for monitoring and supervising compliance with legal obligations are crucial.<sup>134</sup> On the one hand, the threat of sanctions, such as resort to legal enforcement of binding norms, fosters compliance. However, even “soft” review mechanisms may increase the likelihood of compliance.

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<sup>129</sup> Francioni (1996), 176-178.

<sup>130</sup> See the mandate of the Commission on Sustainable Development (CSD), General Assembly resolution 47/191, A/RES/47/191, 29 January 1993, para 3. a): “To monitor progress in the implementation of Agenda 21 and activities related to the integration of environmental and developmental goals throughout the United Nations system through analysis and evaluation of reports from all relevant organs, organizations, programmes and institutions of the United Nations system dealing with various issues of environment and development, including those related to finance”.

<sup>131</sup> OECD Guidelines for Multinational Enterprises, DAFFE/IME/WPG(2000)15/FINAL. Since 2003, the NGO “OECD-Watch” monitors compliance with the guidelines (see <http://www.oecdwatch.org/index.htm>). Worldwide, since 2000 about 45 cases have been brought to the attention of national contact points (as of November 2005). (<http://www.oecdwatch.org/docs/Update%20cases.pdf>).

<sup>132</sup> Boisson de Chazournes (2000), 281 et seq.

<sup>133</sup> Falkner/Treib/Hartlapp/Leiber (2005) have studied compliance with selected recommendations which are in turn included in directives in the field of EU social policy (see id. at 178 et seq.). They conclude that “it depends on the preferences of domestic governments and/or social partners whether a specific recommendation is implemented as hard law, adopted in the form of a soft recommendation, or ignored completely. The country patterns also imply that cultural factors are at work when it comes to domestic reactions to EU soft law.” (id. at 189). See also Zürn/Joerges (2005) on compliance with European law (mostly hard law).

<sup>134</sup> See Shelton (2000), 13-17; Brown Weiss (2000), 535-553 on factors of compliance with international soft law.

Interestingly, we find – on both levels of governance – factors of compliance which are independent of the theoretical hardness or softness of a given norm.<sup>135</sup> These are the targets of the norm, the content of the norm, the perceived economic costs of compliance or non-compliance, the relationship among the participants, reputational concerns, and shared interests and values.

States may find it easier to comply with norms that govern official behaviour than with obligations to regulate non-state behaviour. The more precise the content of the obligation, the better compliance is likely to be. Ambiguity and open-endedness of international standards can limit efforts to secure compliance. If it is costly to comply with soft law, because of economic costs or the lack of technical, administrative, or other capacity, compliance is less likely. If there is a continuing long-term relationship among the participants in which they must interact, they are likely to comply. The concern about reputation may render binding contacts unnecessary. A shared desire to maximize welfare and minimize transaction costs may lead to compliance with informal norms without the need for legal enforcement. Finally, consensus about the norm positively affects compliance. Because these factors play equally for hard and soft law, soft law *may be equally effective (or ineffective)* as international hard law.

## VIII. Conclusions

Soft law is a special type of law with special normative effects. It is in the penumbra of law. The international-law concept of soft law is transferable to the EU, because both legal orders are – despite important differences – in relevant respects similar. The “privatization” of soft law is a rather novel phenomenon on all levels of governance. Also hybrid (public-private) acts are becoming important.

The various normative effects of soft can be regrouped into a triad of functions, depending on its relation to hard law (*cf.* Senden (2004)): The *pre-law function* (1) is the preparation of hard law. The *law-plus function* (2) is the completion, complementation, the spelling out and the interpretation of hard law. The *para-law function* (3) is the substitution of non-available hard law. Policy benefits and dangers of soft instruments vary according to their function.

The proliferation of soft law, which we take as an empirical fact, may be *pernicious or at least undesirable in a legal policy perspective*. In fact, the adoption of non-binding act with a dubious normative value may constitute *window-dressing* and present an excuse for not pursuing hard regulation. Moreover, the “softening” of the law risks to freeze the status quo of power constellations. Seen that way, soft law is a “fig leaf for power”.<sup>136</sup> Generally speaking, the softening of a legal order might be a sign of weakness of the normative order. It is the consequence of a lack of consensus and of reluctance to give up authority and control which prevents the adoption of hard regulation.

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<sup>135</sup> Shelton (2000), 13-17; Brown Weiss (2000), 535-553.

<sup>136</sup> Klabbers (1998), 387 and 391: “By creating uncertainty at the edges of legal thinking, the concept of soft law contributes to the crumbling of the entire legal system. Once political or moral concerns are allowed to creep back into the law, the law loses its relative autonomy from politics or morality, and therewith becomes nothing else but a fig leaf for power ... In other words: unless we insist that law can only be made through the procedures that themselves have been created to regulate the creation of law, the resulting norms, no matter how nobly inspired, will always remain suspect. ...we need to insist on a degree of formalism, because it is precisely this formalism that protects us from arbitrariness on the part of the powers that be.”

On the other hand, the softening of a legal order might also be an indicator of its strength and maturity. In mature societies, not all relations need to be governed by law, but some may be left to social discourse and informal commitments.<sup>137</sup> In fact, the existence of a strong and broad political, social and cultural consensus in a polity may (although it facilitates agreement on hard rules), paradoxically render hard regulation unnecessary in some domains, because the societal consensus facilitates the functioning of soft rules. This also means that stable polities built on a solid political and cultural consensus can “afford” soft law rather than instable ones.

The European legal order might be considered a “mature” order. It appears more stable and consensus-based than the global order and can on this basis afford soft law. In contrast, the global actors in the instable global legal order frequently rely on soft law, because the hard alternative is unavailable. They count on the promotional effect of soft law. However, this technique bears the risk of further eroding the fragile international order further.

One might therefore conclude that the proliferation of soft law is on the European level a sign of strength, and on the global level both a result and a cause of weakness. In this vein, the Commission, which recently “examined the scope of soft law approaches at international level”, was driven to “assess the *global environment and policy domains* as less secure and less transparent than the EU environment, and *in greater need of ‘hard law’* providing the necessary security and transparency.”<sup>138</sup>

Although it seems correct to interpret the proliferation of soft law on the global level rather as a sign of weakness and on the European level rather as a sign of strength, we note converging trends. On the one hand, within the EU, increased reliance on soft law corresponds to the (“backwards”) trend towards intergovernmentalism. Inversely, on the international level, the proliferation of soft law, especially in its “law-plus function”, is in some domains clearly a positive development. “Mixed tool-boxes”, consisting in hard law completed and concretized by means of soft rules, do *not* weaken the respective regimes, but perfect them. Examples in point are the World Bank’s operational guidelines<sup>139</sup> and the differentiated and well developed environmental treaty regimes, which consist of a multilateral environmental agreement (MEA), complemented by an immense body of more or less soft secondary law, whose legal status is disputed.<sup>140</sup> These very detailed guidelines specify the sometimes vague treaty provisions and contribute decisively to the functioning of the regimes in place.

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<sup>137</sup> See for the global level Shelton (2000), 12; for the European level Trubek/Trubek (2005).

<sup>138</sup> Report from the Commission on European governance, COM (2002) 705, 11 December 2002, at p. 26, para. 4 (emphasis added).

<sup>139</sup> Boisson de Chazournes (2005) on “treaty-making in a vertical perspective”, asserting the “the inadequacy of a treaty format in the day-to-day life of an International Organisation” (id. at 469, 471).

<sup>140</sup> See Ott (1998), 209 et seq. Moreover, the Kyoto Protocol to the Climate Change Convention envisages that parties can engage in international emission trading, but delegates the design of this emission trading regime, which is not only a technical matter, to the Conference of the Parties (COP), see Article 17 Kyoto Protocol: “The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. (...)”. See further Brunnée (2005), 110 claiming that COP decisions on emissions trading “have at least a *de facto* effect on parties’ legal positions” and that they “are at least *de facto* lawmaking”.

It would therefore be too simplistic to conclude that the proliferation of soft law is on the international realm a sign of weakness and on the European realm unequivocally a sign of strength.<sup>141</sup> The message remains mixed on both levels of governance.

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<sup>141</sup> A recent study on the European OMC suggests that reliance on soft instruments in the European economic, social and employment policy is a sign of weakness and a move towards intergovernmentalism (Schäfer (2005)). See on the other hand for a positive assessment of the mix of hard and soft law on the global level in the domain of arms control Williamson (2003).

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