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Between Deadlock and Compromise in Brussels: EU Soft Law as a Way Out?

1. EU policy-making transforms through crises

"L'Europe se fera dans les crises et elle sera la somme des solutions apportées à ces crises" – freely translated: "Europe will be made in crises and it will be the sum of the solutions brought to these crises." In his memoirs from 1976, Jean Monnet reflected on the EU's ability to transform in critical times. A thought, that unfortunately has not lost any of its relevance today. The European Union (EU) is characterised by transformation through crises: be it the euro, Brexit, the Covid-19 crisis, or now the Russian attack on Ukraine. History shows that the EU can evolve its scope of action in difficult times. Some even argue the constructional deficiencies of the treaties in the EU have repeatedly been the cause of new steps toward integration. Or to put it differently, the EU is "failing forward" in crises as Jones, Kelemen and Meunier (2016) for instance claim.

Conflicts in the EU are not new, we have seen plenty. However, through the simultaneity of the current ones, disputes between 27 Member States with very diverse preferences have become even greater. External problem pressure from war, pandemics or other crises meets the systemic challenges of the EU's multilevel system itself. In general, poor conditions for agreement between states, identified as the "joint decision trap" by Fritz W. Scharpf in 1988, especially occur when decision-makers can veto policy proposals (Scharpf 1988). The EU's multilevel system is characterized by a high degree of policy interdependences. In such systems (usually federal systems) lower units participate in the decisions of the central level but can also block them due to their specific interests and perspectives. Although the EU might only be described as a federal system to a limited extent, the 'lower' units, Member States, are significantly involved in all decisions at the European level. In this system, the diverging interests may lead to deadlock. Even though in the EU, this phenomenon does not occur as frequently as one might think given the complex mix of conflicting interests – Scharpf (2002) also points to the fact that conflict-laden decisions can be equalised, decoupled, compensated for by package deals or side payments, or defused by increasingly converging perspectives – these systemic challenges may be amplified by exogenous factors.

Thus, it is not surprising that the EU's (limited) capacity to act is repeatedly at the center of debates. Just recently, the Conference on the Future of Europe discussed how the abolition of veto rights might improve this situation. In her speech at the closing event, Ursula von der Leyen (09.05.2022) advocated a move away from unanimity in more areas of the EU. Criticism is mounting, especially from northern and eastern EU Member States, which consider extending the decision-making power of the EU as endangering their national interests. It is debatable whether a further move away from unanimity really could improve the EU's ability to act, or putting it differently: if the Member States do not agree on certain matters, they will find other ways and means to assert their interests also within the current frameworks for decision-making – be it qualified majority voting (QMV) or unanimity. This makes it all the more interesting to take a closer look at which mechanisms the EU resorts to in times of deadlock or crises, respectively what has developed over the past decades in the wake of the calls for more efficient decision-making in Brussels. Because the EU has already developed an extensive repertoire of actions for reaching agreements even under difficult conditions. One might even say, the European Union has become creative in preserving its capacity to act.

2. Governing the EU softly

Softer forms of governance are one such mechanism worth taking a closer look at. Guidelines, communications, notices or recommendations coming from Brussels are usually not at the center of major public debates, however, 'soft law' has now become more visible, for example in the course of the EU's response to the war in Ukraine in the area of state aid. A recent communication from the Commission (2022) introduces a temporary crisis framework that gives national authorities wide discretion to use state aid rules to support the economy in the context of Russia's invasion of Ukraine. At the same time, additional reporting obligations are imposed via soft law. The Commission makes extensive use of the fast, flexible, and informal features of soft law to adapt the existing legal framework to the changing realities in the Member States. Also, over the last two years, soft law was widely used as a tool to cope with the COVID-19 pandemic in diverse policy areas, from immigration, transport and tourism to the digital single market. Here, soft law can be a practical instrument that can be used unbureaucratically, flexibly and quickly in exceptional situations. Thus, one might ask: Could soft law be a way out of compromise and deadlock in Brussels?

But what is 'soft law' exactly? A minimum definition by Francis Snyder (1993, 32) states soft law as "rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects". EU soft law as a concept is not mentioned in the treaties, but Article 288 TFEU states recommendations and opinions as legal EU acts without binding force. However, a variety of

instruments also outside of recommendations and opinions such as guidelines, reports or communications exist. What is more, those documents can serve diverse functions, e.g. soft law can be used as an alternative to hard law or to explain and interpret a hard law instrument, it can have a 'steering' nature, meaning it establishes new governance ideas or processes related to EU policies, to name only a few of many functions. Several researchers have tried to distinguish soft from hard law. Fabien Terpan (2015) for example assumes a continuum in which soft law lies in between non-legal positions and legally binding and judicially controlled commitments. He includes non-binding instruments that show some degree of formalization and enforcement into the category of soft law. Formalization refers to a "law-like" structure in the documents, e.g. a structured sequence of goals and standards which are formulated in a precise way. Enforcement relates to the prescription of legal consequences in the instrument (see EU soft law examples that vary in terms of hardness/softness in figure 1).

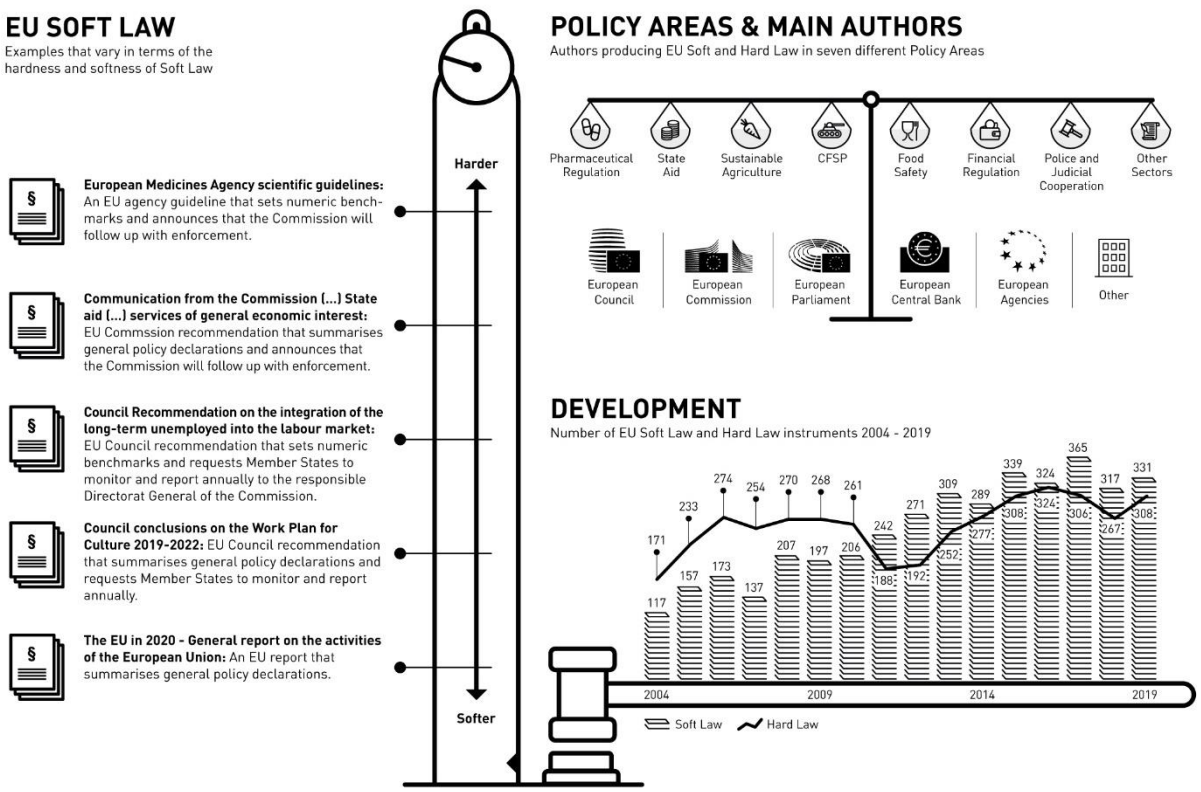

Figure 1: EU soft law, examples and development over time (source: www.efsolaw.eu).

But how common is this phenomenon of soft governance in the EU? It has especially emerged since the launch of the Lisbon agenda in the early 2000s and is one effect of the increasing complexity of EU policy-making and heterogenous interests clashing. Today, the scope and depth of EU integration vary greatly depending on the policy area and are in some even differentiated. While, for example, economic policies are deeply integrated, other areas such as culture or education, are much less

regulated via EU law. In the latter case, EU legislation plays a subordinate role, there rather is a coordination of national policies. In such areas, soft modes of governance are more frequently used as a tool to reach common understandings. The Open Method of Coordination (OMC), a form of soft law that does not result in binding EU legislative measures and does not require the EU Member States to introduce or change national law, for example, was developed in the late 1990s. It was perceived as an exit of the then-standard 'Community Method' and presented as a suitable tool for an integrated approach to better and faster achieve ambitious economic and social goals. While the simpler consensus-building process, as well as the flexibility of this new form of intergovernmental governance, was praised by some, others raised questions of legitimacy and accountability. OMC is based on the voluntary cooperation of the Member States who do not have to fear direct sanctions in the case of non-compliance and thus rather relies on 'peer pressure' (naming and shaming), expecting that the Member States do not want to be perceived as 'the only bad pupil in the class'.

Today, it is empirically visible that EU legislation increasingly takes softer forms. In 2004, around 11% of the legal acts produced by the EU had a "non-binding operating mode" according to an estimation based on CELEX data by von Bogdandy, Arndt and Bast (2004, 112). Within the "EfSoLaw"-project, Cappellina et al. (forthcoming) even discovered a ratio of roughly 43% with a rising tendency by counting EU hard and soft law acts in seven different policy fields between 2004 and 2019. The flexibility of soft law and its simplified adoption can be perceived as highly efficient, especially in sectors where agreements often are very hard to reach or in situations where rapid action is needed, such as crises. This is also why the advantages of these instruments have been drawn upon, specifically in European competition policy because of high demands for fast regulation or in the economic policy co-ordination due to rising uncertainties and national diversities (Stefan et al. 2018, 21).

3. Why it is not that simple

However, it is not that simple. Independent from softer or harder forms of governance and away from debates on formal decision-making processes, the history of European integration shows that far-reaching conflicts of interest could only be overcome when the Member States agreed that European solutions are also in the national interest. This prerequisite is especially important for soft law due to its non-binding nature. It draws attention to those factors that explain why the Member States use these norms anyway. The practical and legal effects of soft law can be manifold and reach from subtle changes at the level of discourses to policy change. The effects are dependent on the national arena. Research on this use of soft law at the domestic level indicates that diverse factors

matter, respectively explain when and why EU soft law triggers effects in the Member States: Be it the strategic behaviour of actors who expand their opportunities for policy-making at the national level through soft law (Bérut 2021), the maturity of a policy field (national actors are more routined with EU rules and more likely to be socialized into responding to norms coming from Brussels) or soft law's relation to hard law (does it explain hard law and is thus more likely followed because of a legalistic logic?) (Hartlapp and Hofmann 2021).

But the assessment of the impact of soft law is rather difficult. Because of its non-binding nature the enforceability of such instruments remains unclear which in turn increases uncertainties. Also, when do informal mechanisms run the risk of being too informal, therefore raising questions of democratic legitimacy? This becomes particularly relevant if soft law is deliberately used as an alternative to hard law. While empirical observations find that this form of soft law is rather rare (according to the 'EfSoLaw'-project only 14% of EU soft law acts are not connected to a hard law instrument and have a steering nature, meaning that they establish a new process or even governance idea), more critical voices point to the lack of transparency of these instruments. Eliantonio and Stefan (2021), for example, identify a deficiency of input legitimacy in their study of several Covid-19 soft law instruments. They find that the European Parliament is hardly ever involved in the decision-making processes of this soft law and there was nearly no stakeholder involvement, respectively there is little knowledge on whether and how stakeholders could participate.

The European Parliament itself also recognized the potential dangers of soft law in a Resolution from 2007: "the use of soft law is liable to circumvent the properly competent legislative bodies, may flout the principles of democracy and the rule of law under Article 6 of the EU Treaty, and also those of subsidiarity and proportionality" (European Parliament 2007, X.). This lack of transparency, the unsystematic adoption and formulation of soft law, and the question of whether interest representation is balanced are all aspects that should be taken into account when soft law is used to broaden the EU's scopes for action in situations of deadlock or times of crisis.

4. Summary

The need for fast and flexible governance tools such as soft law is rising, on the one hand, because heterogeneous interests within the EU's multilevel system make it difficult to take decisions efficiently when quick action is required. On the other hand, soft law may be a flexible solution to increase the EU's systemic shortcomings and with it its capacity to act. Already for decades, softer forms of governance have been used, be it in the form of OMC in the late 1990s to better and faster achieve ambitious economic and social goals or more recently through guidelines, recommendations and

notices as flexible tools to regulate competition or economic policies. In this regard, it can be a mechanism to find a way out of deadlock and compromise in Brussels. Beyond that, it can even lead to a greater room for maneuver during crises. But there are several caveats.

If soft law that serves as an alternative to hard law is increasingly used outside of times of crisis, the advantages of more flexible policymaking through non-binding norms could fade. However, empirical evidence shows that soft law comes in many different colours. Soft instruments which are connected to and 'explain' hard law often have a more 'technical' nature, for instance when they are used by national administrative staff interpreting a regulation or directive. The 'EfSoLaw'-project finds this sort of soft law to dominate in policy fields such as pharmaceutical regulation or food safety. It is also quantitatively the most common. Other instruments have more far-reaching (political) effects and might serve a steering purpose in policy areas that are less supranationally regulated, e.g. the Common Foreign and Security Policy. Hence, the functions of soft law vary greatly depending on the policy field and can be of different relevance which results in a need for a differentiated evaluation.

What is more, soft law is not always as 'informal' as it seems. Member States are heard and sometimes involved in the formulation, e.g. through national officials as well as other stakeholders participating in expert groups. Even though research points out that this is very unsystematic, this lack of transparency likewise stands in the centre of debates circulating the EU's democratic deficit outside of soft law. Also, there are cases where soft law simply fizzles out at the national level and loses its relevance or output legitimacy might be achieved when Member States implement the soft rules via national law. In addition, especially the more frequently criticised 'crisis soft law' often only is temporary. Its scope is determined for a certain specified period and loses validity afterward.

This trade-off between the different functions of soft law as well as their very diverse implications has to be taken into account when debating whether soft law could be a way out of deadlock and compromise in Brussels. Still, it is unclear whether there is a bias towards certain groups or actors in terms of participation, respectively whether we can identify clear 'winners' and 'losers' of soft law. This is notably important for politically sensitive issues where Member States have not agreed on a further integration at the EU level. Especially when Europe is made in crisis, a balanced participation of interets should not be lost sight of.

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