4/21/05

"Soft Law," "Hard Law," and European Integration: Toward a Theory of Hybridity

by

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In the discussion of new governance in the European Union, the concept of "soft law" is often used to describe governance arrangements that operate in place of, or along with, the "hard law" that arises from treaties, regulations, and the Community Method. These new governance methods may bear some similarity to hard law. But because they lack features such as obligation, uniformity, justiciability, sanctions, and/or an enforcement staff, they are classified as "soft law" and contrasted, sometimes positively, sometimes negatively, with hard law as instruments for European integration. This chapter explores the concepts of hard and soft law in order to illuminate this important aspect of the new governance phenomenon.

Of course, there is nothing new about "soft law": it has always played a role in European integration. "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. Francis Snyder provided the classic treatment of soft law in the EU in 1994.[2] In his definition, Snyder describes soft law as "rules of conduct which in principle have no legally binding force but which

[1] The authors wish to acknowledge the invaluable assistance and advice of Imelda Maher for the sections of the Stability and Growth Pact.

[2] Other early studies include F Snyder "The Effectiveness of EC Law," in T Daintith (Ed.) *Implementing EC Law in the UK* (1995) and KC Wellens and GM Borchart, "Soft Law in EC Law" (1989) *European Law Review* 14: 267-321.

nevertheless may have practical effects." In recent years there has been an increase in interest in soft law in the EU. Several studies have appeared recently.[3] Several major books that deal with soft law are coming out.[4]

While soft law has drawn increasing attention, it has not received uniform support. Thus in recent years there have been significant attacks on the use of soft law in various settings. Objections to the use of soft law in the EU include:

- It lacks the clarity and precision needed to provide predictability and a reliable framework for action;
- The EU treaties include hard provisions that enshrine market principles and these can only be offset if equally hard provisions are added to promote social objectives;
- Soft law cannot forestall races to the bottom in social policy within the EU;
- Soft law cannot really have any effect but it is a covert tactic to enlarge the Union's legislative hard law competence;
- Soft law is a device that is used to have an effect but it by-passes normal systems of accountability;
- Soft law undermines EU legitimacy because it creates expectations but cannot bring about change.[5]

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[3]D Trubek and L Trubek, "Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination." (2005) *European Law Journal* 11; K Jacobsson, "Between Deliberation and Discipline: Soft Governance in EU Employment Policy" in U Mörth (ed.) *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham, Edward Elgar, 2004); C Joerges and F Rödl, "'Social Market Economy' as Europe's Social Model?" (2004) EUI Working Paper LAW 2004/8; D Chalmers and M Lodge, "The OMC and the European Welfare State" (2003) Economic and Social Research Council, LSE, Discussion Paper NO: 11. June; H Cosma and R Whish, "Soft Law in the Field of EU Competition Policy" (2003) *European Business Law Review* 14; J Scott and D Trubek, "Mind the Gap: Law and New Approaches to Governance in the European Union" (2002) 1 *European Law Journal* 8: 1-18; J Klabbers, "The Undesirability of Soft Law"(1998) 1 *Nordic Journal of International Law* 36: 381-391; A Héretier, "New Modes of Governance in Europe: Policy Making Without Legislating?" in Héretier (ed.), *Common Goods: Reinventing European and International Governance* (Rowman & Littlefield, 2001); M Cini, "The Soft Law Approach: Commission Rule-Making in the EU"s State Aid Regime" (2001) 2 *Journal of European Public Policy*, 8: 192-207; K Sisson and P Marginson, "Soft Regulation—Travesty of the Real Think or New Dimension?" (2001) ESRC Working Paper 32/01; J Kenner, "The EC Employment Title and the "Third Way": Making Soft Law Work," (1999) 1 *International Journal of Comparative Labor Law and Industrial Relations* 15: 33-60; H Hillgenberg, "A Fresh Look at Soft Law," (1999) 3 *European Journal of International Law* 10: 499-515; and so forth.

[4] See for example U Mörth (ed.) *Soft Law and Governance and Regulation: An Interdisciplinary Analysis* (Cheltenham, Edward Elgar, 2004).

[5] For these and other critiques, see, e.g: Klabbers (1998); Joerges and Rödl (2004); Chalmers and Lodge (2003); and S Smismans, "EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?" (2004) EUI Working Paper LAW No. 204/01.

Note that most of these critiques are based, explicitly or implicitly, on the view that hard law is required to achieve whatever EU objectives are in question. The authors of these critiques believe that integration requires clear guidance, uniform treatment, sanctions to deter non-compliance, and justiciability and thus can only come about through treaties, regulations, or directives.

Just as hard law proponents have questioned the efficacy of soft law, so those who see merit in new governance and thus soft law have raised questions about the utility of traditional forms of hard law in the context of many of the issues confronting the EU today. Among the critiques of hard law one finds the following observations:

- Hard law tends toward uniformity of treatment while many current issues demand tolerance for significant diversity among Member States.
- Hard law presupposes a fixed condition based on prior knowledge while situations of uncertainty may demand constant experimentation and adjustment.
- Hard law is very difficult to change yet in many cases frequent change of norms may be essential to achieve optimal results.
- If actors do not internalize the norms of hard law, enforcement may be difficult; if they do, it may be unnecessary.

As we can see, arguments about hard and soft law are based largely on pragmatic and functional questions: how do these processes work; which one works best? Because the issue is pragmatic, the debate about hard and soft law cannot be resolved in the abstract or in a general way. Different domains have different needs, and "hard" and "soft" legal processes come in many different shapes and forms. Therefore, the discussion must be carried out in the context of particular policy domains and in light of the actual or potential operational capacities of the respective instruments in that domain.

Further, by casting the issue as a pragmatic one, we immediately recognize that the question is not necessarily one of hard versus soft law: there is also the issue of the possible interaction between these two approaches to governance and thus of "hybrid" constellations in which both hard and soft processes operate in the same domain and

affect the same actors. For that reason, this chapter looks at issues concerning the relationship between hard and soft law in two specific domains and explores both their relative effectiveness and their actual and potential interaction.[6]

a) Employment policy

The first policy domain we shall investigate is EU employment policy. The EU only has competence to regulate in only a few of the areas that affect employment. But the employment issue in Europe is so serious, and so related to basic goals of the Union, that the Union has decided it must coordinate Member State efforts to reduce unemployment and increase the percentage of the population in the workforce even though this necessarily includes activity in areas of exclusive Member State competence. To that end, the EU has created the European Employment Strategy (EES), a set of non-binding guidelines designed to govern the reform of national laws, policies, and institutions in order to make them more employment-friendly. The EES includes a complex system of periodic reporting, indicators, and multilateral surveillance, as well as mechanisms for benchmarking, peer review, and exchange of best practices. A classic form of new governance, the EES has been a model for similar systems which now are all denominated the "Open Method of Coordination" or OMC.

The EES itself is soft law, in that the guidelines are general, they are not binding, and there is no way to mount a court challenge to any failure to follow the guidelines. The EES, however, overlaps with EU "hard law" in some areas, thus creating the possibility for interaction and hybridity. Among these is the field of employment discrimination, a topic that is both regulated through a hard law directive and covered by an EES guideline. Thus in this domain there exists the possibility for a "hybrid" constellation. [7]

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[7] This chapter was completed before the issuance of Commission Recommendations for Integrated Guidelines for Growth and Jobs (2005-2008). COM (2005) 141 Final. These guidelines bring together the Broad Economic Policy Guidelines and the Employment Guidelines into one structure. They put more emphasis on the integration of macro-economic, micro-economic and employment polices at the Member State level. While the Guidelines are now put together, because it does not appear that major policy changes have occurred and separate processes for fiscal coordination and employment promotion still exist, it is premature to say what effect these new developments would have on the issues analyzed here should the Commission's recommendations be adopted.

b) Fiscal policy coordination

The second domain to be explored is fiscal policy coordination. In this domain, we not only see both soft and hard law measures that deal with the same objective; we also see what appears to be a conscious effort to deploy them together to achieve maximum effectiveness. The goal of fiscal coordination in the EU is to ensure that states in the eurozone pursue and maintain the sound fiscal policies necessary for the sustainability of the euro. To that end, eurozone states are expected to keep their budgets in balance over the medium term and avoid excessive deficits in the short term.

Two very different mechanisms are deployed to achieve these goals. The first is a "soft law" system of Broad Economic Policy Guidelines (BEPGs) that establishes non-binding standards for fiscal prudence and includes a system of multilateral surveillance designed to encourage adherence to the standards. In theory, the BEPGs and multilateral surveillance should by themselves lead to fiscal policies that would prevent excessive deficits. But the fiscal coordination system also includes a set of fixed rules that define what constitutes an excessive deficit and provides sanctions for noncompliance with these rules. Thus it includes both soft and hard elements.

Ideally, the two systems of fiscal coordination should work together. The general and non-binding BEPGs allow substantial flexibility in methods to reach sustainability thus permitting states to find paths to fiscal prudence that fit with their national needs and traditions. At the same time the fixed and binding excessive deficit rules and the sanctions for the breach of these rules would serve as deterrents. The threat of sanctions should increase the pressure on Member States to obey both the guidelines and any specific recommendations that might emerge from the multilateral surveillance system. If the deterrent worked, it would be unnecessary to impose the sanctions.

In this chapter, we develop a conceptual framework for the analysis of hard and soft law that is drawn in part from recent work in the field of international relations (IR). We look at the literature on the role of soft law, noting that scholars have approached this

phenomenon in very different ways. We explore the relative roles of hard and soft law in the two domains under study, and examine questions of hybridity.

The framework developed in this chapter is based on a synthesis of two different conceptual approaches to European integration and the application of that synthesis to the study of law. We seek to unite insights from constructivist and rationalist theories of integration and apply them to the understanding of the role law and other normative orders and governance processes may play in integration. We deploy this synthesis to analyze the two case studies, exploring the roles that law plays and paying special attention to the operation of hybrid constellations where hard and soft operate in the same policy domain.

II. The Discovery of Soft Law in International Relations Theory

In the literature in international relations (IR) and international law (IL) we see increasing attention being paid to the role of soft law in multilateral governance. However, there is no genuine agreement as to what soft law means, largely due to debates over whether soft law is actually "law" and the difficulties in defining the parameters of "hard" and "soft" law. These concepts appear to be relatively clear, but are in fact much more complicated.[8]

In the international relations literature, the conventional conceptual definition of hard and soft law is laid out in a special issue of *International Organization* entitled "Legalization and World Politics," which delineates three dimensions of legalization: obligation, precision, and delegation.[9] In this context, obligation means that states are legally bound by the regime and therefore subject to scrutiny under the rules and procedure of international law. Precision means that the regime's "rules unambiguously define the conduct they authorize, require, or proscribe."[10] Delegation means that third parties have been granted authority to implement, interpret, and apply the rules such that

[8]For this reason, a prominent treatment of soft law in the legal realm brackets the deeper conceptual debate and settles for a binding (hard) versus non-binding (soft) distinction. See D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford, Oxford University Press, 2000).

[9] K Abbott, R Keohane, AM Slaughter, and D Snidal, "The Concept of Legalization" (2000) 3 *International Organization* 54.

[10] *Ibid* p. 401.

a dispute resolution mechanism and an amendment process exist. Abbott and Snidal use hard law to refer to "…legally binding obligations that are precise and that delegate authority for interpreting and implementing the law" while soft law "begins once legal arrangements are weakened along one or more of the dimensions."[11] While these definitions might not offer a sharp distinction between hard and soft law, this does not seem to be a high priority of the authors, as they caveat their definition by stating explicitly that "soft law comes in many varieties: the choice between hard and soft law is not a binary one."[12]

The treatment of hard and soft law put forth in the special issue has come under fire for ignoring crucial constitutive aspects of law. For example, Finnemore and Toope offer a compelling constructivist critique, arguing that the authors fail to account for the role of customary international law, provide no discussion of how "obligation" is generated,[13] and disregard "the processes by which law is created and applied—adherence to legal process values, the ability of actors to participate and feel their influence, and use the legal forms of reasoning."[14] This constructivist perspective emphasizes law as "a broad social phenomenon deeply embedded in the practices, beliefs, and traditions of societies, and shaped by interaction among societies."[15] Despite these differences, however, both sides of the debate argue that soft law can be important.

The tension between the treatment of law as a tool for *constraining* behavior of actors with fixed preferences versus law as a *transformative* tool capable of changing behavior of actors by altering their identity is derivative of a broader paradigmatic divide between rationalism and constructivism in IR. Given the theoretical relevance of this divide and its potential application to soft law outside of the IR sphere, a brief digression seems appropriate in order to unpack the theoretical premises of these approaches, which will facilitate the analysis of how each conceptualizes soft law and whether they are indeed complementary.

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[11] K Abbott and D Snidal. "Hard and Soft Law in International Governance" (2000) 3 *International Organization* 54: 421-422.
[12] Abbott et al. (2000).
[13] On this point, see also C Reus-Smit, "The Politics of Legal Obligation" (2003) 4 *European Journal of International Relations* 9.
[14] M Finnemore and S Toope, "Alternatives to 'Legalization:' Richer Views of Law and Politics" (2000) 3 *International Organization* 55: 746-750.
[15] *Ibid*, p. 743.

A. Rationalism and Constructivism Compared

Rationalist approaches[16] are unified by their emphasis on material factors, states as the central units of analysis, exogenous and fixed preferences of actors, rational utility maximization, and the constraining effects of an anarchic international environment. Or as Ruggie puts it, rationalist approaches comprise a "neo-utilitarian" worldview in which the world is comprised of self-regarding units with fixed identities and material interests. These approaches follow a "logic of consequences" in which agents try to realize their preferences through strategic behavior.[17] Outcomes are therefore typically explained in terms of individual goal-seeking under constraints.[18]

Abbott and Snidal's conceptualization of hard and soft law is rooted in the predominant strand of rationalism, so-called "rational functionalism" (or neoliberal institutionalism), which assumes that international institutions and legal arrangements are established for states to advance their mutual interests by solving collective action problems. Rules and institutions function to stabilize expectations, reduce transaction costs, raise the price of defection by lengthening the shadow of the future and providing a basis for issue linkage, increase transparency, provide or facilitate monitoring, settle disputes, increase audience costs of commitments, provide focal points, and increase reputational costs and benefits related to conformity of behavior with rules.[19] Institutions can be designed to help solve a specific collective action problem, such as problems of collaboration (i.e. reducing actors' incentives to defect) and coordination (i.e. helping actors' choose among multiple equilibria or possible solutions).[20]

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[16] Broadly conceived, rationalist approaches include classical- and neo-realism, neoliberal institutionalism, and other economics-based theories.

[17] For further discussion, see J March and J Olsen, *Rediscovering Institutions* (NY, Free Press, 1989); and T Risse "Constructivism and International Institutions: Toward Conversations across Paradigms," in I Katznelson and H Milner (eds.) *Political Science: The State of the Discipline* (NY, Norton, 2002).

[18] D Snidal, "Rational Choice and International Relations Theory," in W Carlsnaes, T Risse, and B Simmons (eds.) *Handbook of International Relations* (London, Sage Publications, 2002): 74.

[19] B Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 *Michigan Journal of International Law* 345.

[20] L Martin and B Simmons "International Organizations and Institutions" in W Carlsnaes, T Risse, and B Simmons (eds.) *Handbook of International Relations* (London, Sage Publications, 2002): 196. For a rational functionalist account of regime design, see B Koremenos, C Lipson, and D Snidal, "The Rational Design of International Institutions" (2001) 4 *International Organization* 55.

For rationalists, hard law plays a particularly important role in securing cooperation because it hedges against the mistrust that characterizes the anarchic international environment. Legally binding rules deter potential violations because actors are more likely to factor in such disincentives as reputation costs, issue linkage, reciprocity, and the shadow of the future into their calculus of whether or not to remain in compliance. In addition, hard law often forces actors to consider the threat of sanctions.

Although rationalists often treat states as unitary actors, there is a growing interest in exploring the relationship between international institutions and domestic politics.[21] These scholars propose accounts of international cooperation and compliance that show how domestic institutions respond to individuals and groups in different ways and aggregate preferences, which in turn affects state behavior.[22] Writing about Europe, Andrew Moravcsik addresses a central puzzle in the study of European integration: why have sovereign governments "chosen repeatedly to coordinate their core economic policies and surrender sovereign prerogatives within an international institution?"[23] The conventional wisdom, Moravcsik argues, has given far too much weight to geopolitics and supranational actors. He instead suggests that the EC emerged as the result of rational decisions made by member governments in pursuit of core economic interests. Over the course of forty years, choices for Europe crystallized not because of supranational influence, but from the relative bargaining power of the largest member states.

Unlike rationalist approaches, which draw heavily on economic theory, constructivism is more influenced by sociology and emphasizes social context, ideational factors, the role of collectively held understandings of subjects and social life, and a "logic of appropriateness" whereby actors try to figure out the appropriate rule for a given situation. Constructivism depicts the social world as intersubjectively and

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[21] See L Martin and B Simmons, "Theories and Empirical Studies of International Institutions" (1998) 4 *International Organization* 52. For example, Martin and Simmons suggest that IR scholars have neglected domestic politics and they need to put this on the research agenda. They pose three central questions: First, under what conditions might domestic actors be willing to substitute international for domestic institutions? Second, are particular domestic actors regularly advantaged by the ability to transfer policymaking authority to the international level? Third, to what extent can international institutional decisions and rules be enforced by domestic institutions, and what are the implications for compliance?

[22] See for example A Moravcsik "The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe" (2000) 2 *International Organization* 54: 217-52.

[23] A Moravcsik *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht.* (Ithaca, N.Y., Cornell University Press, 1998): 1.

collectively meaningful structures and processes.[24] Thus, social actors do not exist independently from their social environment and its collectively shared systems of meanings.[25] The social environment in which we interact defines (constitutes) who we are, our identities as social beings. Concurrently, "human agency creates, reproduces, and changes culture through our daily practices."[26] In this broad social sense, constructivism can be distinguished from other approaches to politics and law in its emphasis on the role of ideas and knowledge.

> "Unlike positivism and materialism, which take the world as it is, constructivism sees the world as a project under construction, as becoming rather than being."[27]
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> "At bottom, constructivism concerns the issue of human consciousness: the role it plays in international relations, and the implications for the logic and methods of social inquiry of taking it seriously. Constructivists hold the view that the building blocks of international reality are ideational as well as material; that ideational factors have normative as well as instrumental dimensions; that they express not only individual but also collective intentionality; and that the meaning and significance of ideational factors are not independent of time and place."[28]

From an epistemological standpoint, the constructivist approach is not interested in how things *are*, but in how they *became* what they are.[29] Thus, whereas rationalist approaches treat identity and interests of actors as exogenously given or inferred from a given material structure, constructivists ask how actors come to acquire their current identity and interests, and seek to demonstrate how interests are not objectively derived but rather are "socially constructed and dependent on historically bounded social roles occupied by knowledgeable actors."[30] A constructivist perspective therefore leads

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[24] E Adler, "Constructivism and International Relations Theory" in W Carlsnaes, T Risse, and B Simmons (eds.) *Handbook of International Relations* (London, Sage Publications, 2002).
[25] T Risse, "Social Constructivism and European Integration" in A Wiener and T Dietz (eds.) *European Integration Theory* (Oxford: Oxford University Press, 2004): 160.
[26] *Ibid* p.161.
[27] Adler (2002): 95
[28] J Ruggie, "What Makes The World Hang Together" (1998*)* 3 *International Organization* 52 quoted in T Christiansen, KE Jorgensen, and A Wiener, "The Social Construction of Europe" (1999) 4 *Journal of European Public Policy* 6: 530.
[29] Adler (2002): 100-101, italics are original.
[30] J Ruggie and F Kratochwil, "International Organization: A State of the Art on an Art of the State" (1986) *International Organization* 40.

scholars to ask questions about the role of law in promoting processes of norm diffusion, socialization, and learning.

The alternative analytical lenses of rationalism and constructivism provide a useful starting point for thinking about the different facets of law: its meanings, its functions, and its applications. When employed to analyze the relative merits of soft law, these lenses illuminate the different dimensions of soft legal instruments and offer distinct and compelling arguments in their favor. However, despite their distinctiveness, rationalist and constructivist approaches to soft law do not appear to be mutually exclusive and may, in fact, be complementary.

B. Rationalist and Constructivist Accounts of Soft Law

The IR/IL literature offers a variety of general explanations for why soft law might be preferable to hard law in some circumstances, largely from a rationalist standpoint. At least seven general (and related) explanatory themes can be drawn from the broader literature[31]:

1) *Lower "contracting" costs*. The creation of almost any agreement entails negotiation or "contracting" costs—coming together, learning about the issue, bargaining, and so forth. When these costs are high (e.g. when the issue is complex or contentious), soft law might be more appropriate because non-binding norms lower the stakes for the parties involved in negotiations.[32]

2) *Lower sovereignty costs.* Legally-binding agreements involve costs to Member States such as differences in outcomes on particular issues, the loss of authority of decision-making in an issue area, and the diminution of sovereignty. Soft law is better equipped to promote cooperation while preserving sovereignty.

3) *Coping with diversity*. Soft law allows states to adapt their commitments to their particular situations rather than trying to accommodate divergent national circumstances within a single text. It can be used to break a deadlock in negotiations where disparities

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[31] See especially Abbott and Snidal (2000); C Lipson, "Why Are Some International Agreements Informal?" (1991) 4 *InternationalOrganization* 45; W Reinicke and JM Witte, "Interdependence, Globalization, and Sovereignty: The Role of Non-Binding Legal Accords" in D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford, Oxford University Press, 2000); C Chinkin, "Normative Development in the International Legal System" in D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford, Oxford University Press, 2000); and H Hillgenberg, "A Fresh Look at Soft Law," (1999) 3 *European Journal of International Law* 10: 499-515..

[32] Abbott and Snidal (2000): 434.

in wealth, power, and interests make binding agreements impossible. Different cultural and economic structures and interests can be accommodated through the subjective application of "soft" language such as "appropriate measures," "best efforts," "as far as possible," or "with a view toward achieving progressively."[33]

4) *Flexibility*. The greater flexibility of non-binding legal instruments allows for renegotiation or modification of agreements as circumstances change; can accommodate diverse legal systems; and can cope better with uncertainty (e.g. when the underlying problems might not be well understood, so states cannot anticipate all of the possible consequences of a legalized arrangement). Flexibility is particularly important in the fast changing and technology driven environment that is characteristic of globalization.[34]

5) *Simplicity and speed*.[35] Soft law might be motivated by the desire to avoid formal and visible pledges by states, to avoid ratification or other cumbersome domestic procedures (in case of amendments, etc.), or to induce even the least committed states to participate.[36] It is also useful if there is potential need to reach agreements quickly (e.g. on a contingency basis).

6) *Participation*. In principle, soft law permits the integration of all interested parties in the process of transnational law-making.[37] Increased openness allows for more active participation of non-state actors, promotes transparency, enhances agenda setting, and facilitates the diffusion of knowledge.

7) *Incrementalism*. Soft law can also represent a first step on the path to legally binding agreements or hard law.[38]

From the rationalist perspective, soft law promotes material and normative goals by reducing the costs of cooperation and facilitating the bargaining process upon creation of the agreement and over time. Although perhaps not as robust as hard law in its ability to constrain behavior through credible threats of enforcement, soft law reduces barriers to cooperation and might be a precursor to harder forms of law.

Unlike rationalist approaches, constructivists have done surprisingly little to engage directly debates over the relative merits of soft law and the conditions in which soft can

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[33] Chinkin (2000): 41.
[34] Reinicke and Witte (2000), pp. 94-95.
[35] See Lipson (1991).
[36] This aspect of soft law raises "race to the bottom" concerns.
[37] Reinicke and Witte (2000): 94-95.
[38] *Ibid*: 95.

be effective.[39] Nevertheless, constructivism has much to offer in this regard. A growing body of constructivist research looks at how international institutions and legal norms can have an independent, constitutive effect on actors, focusing on "the social content of the organization, its culture, its legitimacy concerns, dominant norms that govern behavior and shape interests, and the relationship of these to a larger normative and cultural environment."[40] Like many proponents of the OMC (as will be discussed below), constructivist scholars look at how institutions facilitate constitutive processes such as persuasion, learning, argumentation, and socialization.[41] With sustained interaction over the course of time in an institutional environment these processes influence actors' behavior and eventually result in the creation of intersubjective knowledge and a "norms cascade" where a critical mass of states subscribe to new norms and rules.[42]

Changes in state behavior can also come through processes of socialization within groups that incorporate new members through the expansion of norms, ideas, and principles.[43] Constructivist scholars also underscore the importance of transnational actors in the institutional and policy processes, and are particularly mindful of the role of epistemic communities and transnational networks of policy professionals who share common values and causal understandings, which often facilitate the development and dissemination of ideas embedded in given institution.[44] From this perspective, soft law may be better equipped to promote transformative processes of norm diffusion, persuasion, and learning that have a positive impact on policy outcomes by allowing a wider spectrum for deliberation in the governing process.

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[39] It is worth noting that for constructivists, soft law, like customary law, is not always viewed as being "chosen" in a meaningful strategic sense intended to be effective, but can evolve over time based on general practice and principle. See Finnemore and Toope (2001), fn 23.

[40] M Barnett and M Finnemore, "The Politics, Power and Pathologies of International Organizations" (1999) 4 *International Organization* 53: 707-708.

[41] See for example I Johnston, "Treating International Institutions as Social Environments" (2001) 4 *International Studies Quarterly* 45 and M Finnemore, *National Interests in International Society* (Ithaca, Cornell University Press, 1996).

[42] See M Finnemore and K Sikkink, "International Norm Dynamics and Political Change" (1998) 3 *International Organization* 52.. Note that states need not follow the same paths toward implementation of policies consistent with these norms and rules.

[43] See Johnston (2001).

[44] See for example T Risse, Thomas, S Ropp, and KSikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (NY, Cambridge University Press, 1999) and ME Keck and K Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y., Cornell University Press, 1998).

While rationalist and constructivist approaches in IR each offer a framework from which to construct theories and make inferences about the relative value of soft law, little work has been done to explore the possible relationship between the two. Each perspective sees value in soft law, but looks at it through very different analytical prisms. Moreover, there has as yet been effort to develop a synthetic approach that would allow scholars to deploy rationalist and constructivist insights simultaneously to deal with situations that call both for change and stability, flexibility and uniformity, change and constraint, and thus hard and soft law.

III. Different Scholarly Approaches to Soft Law in the EU

As argued above, soft law means something different to constructivists and rationalists; perceptions of soft law are dependent on theoretical orientation. To some extent, these differences are reflected in academic discussion concerning two cases we examine in some detail in this paper. We look at arguments that support the use of the OMC in social policy and at the efforts to explain and justify the use of soft law in the effort to avoid excessive Member State budget deficits. While the case for soft law in the OMC context reflects a relatively constructivist orientation, the analysis of soft law in the context of the fiscal policy coordination reflects a more rationalist perspective.

A. Employment policy, the OMC, and constructivism

The European Employment Strategy and the Open Method of Coordination (OMC) of which it is the exemplar, are part of a broader movement toward "new governance" and democratic experimentalism in the United States and European legal communities.[45] For advocates of the OMC and other "new governance" approaches, traditional forms of command and control governance are viewed as exclusive, incapable of addressing societal complexity, static and unable to adapt well to changing circumstances, and limited in their production of the knowledge needed to solve problems. They cite the need to move from centralized command and control regulation consisting of rigid and

[45] See J Zeitlin and D Trubek (eds.) *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford, Oxford University Press, 2003), especially Chapter 1.

uniform rules and hard law, toward a system of governance that promotes flexibility and learning through the uses of soft law.

The OMC can be seen as "soft law" in contrast to the "hard" approach of the Classic Community Method (CCM). The OMC employs general objectives and guidelines for Member State behavior that are non-binding and non-justicable while the CCM provides more or less uniform rules that are binding on Member States, are justiciable, and include sanctions for non-compliance.[46]

While the CCM has worked well in many areas, it has proven less desirable in areas like employment and social policy. Given the diversity of national welfare states, which differ not only in levels of economic development, but also in their normative aspirations and institutional structures[47], and the complexity and uncertainty shrouding the social problems states must cope with at the national and local levels, top-down regulation from the EU is often not a viable way to solve social problems efficiently or effectively. In this sense, the demand for good governance in social Europe exceeds the supply provided by the traditional CCM model. In order to address broad common concerns while respecting national diversity, Europe has begun to employ different governance strategies, the most notable of which is the Open Method of Coordination (OMC).

i. How does it work?

The OMC is based upon at least six general principles: participation and power sharing, multi-level integration, diversity and decentralization, deliberation, flexibility and revisability, and experimentation and knowledge creation.[48] It provides a soft framework that accommodates diversity, facilitates mutual learning, spreads good practices, and fosters convergence toward EU goals.[49] Zeitlin and Sabel (2003) summarize the essential elements of the OMC as follows:

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[46] Trubek and Scott (2002): 1;Trubek and Trubek (2005).
[47] F Scharpf, "The European Social Model: Coping with the Challenges of Diversity" (2002) 4 *Journal of Common Market Studies* 40.
[48] Trubek and Scott (2002): 5-6.
[49] K Jacobsson and H Schmid, "The European Employment Strategy at the Crossroads: Contribution to the Evaluation" in D Foden and L Magnusson (eds.), *Five Years Experience of the Luxembourg Employment Strategy*, (Brussels ETUI, 2003).

1) Joint definition by the member states of initial objectives (general and specific), indicators, and in some cases guidelines;

2) National reports or action plans which assess performance in light of the objectives and metrics, and propose reforms accordingly;

3) Peer review of these plans, including mutual criticism and exchange of good practices, backed up by recommendations in some cases;

4) Re-elaboration of the individual plans and, at less frequent intervals, of the broader objectives and metrics in light of the experience gained in their implementation.

Because it systematically and continuously obliges Member States to pool information, compare themselves to one another, and reassess current policies in light of their relative performance, scholars have contended that the OMC is a promising mechanism for improving governance in Europe.[50] The OMC first achieved prominence in the European Employment Strategy,[51] and has since spread into a number of areas of EU policy-making, including social inclusion, pensions, health care, education and training, and immigration and asylum.[52]

Proponents have noted three major reasons why the OMC should be accepted as an appropriate tool for EU governance. First, many social issues confronting Europe are complex, politically sensitive, and involve a high degree of uncertainty as to which solution will achieve the desired results. OMC scholars argue that soft law allows a range of possibilities for interpretation and trial and error without the constraints of uniform rules or threat of sanction. This enables diverse Member States to develop tailored solutions to their specific problems and provides feedback mechanisms to share and build knowledge. Second, soft law processes are appropriate when the gap between the aspired norm and existing reality is so large, that hard regulatory provisions will be meaningless. Softer mechanisms allow minimum levels of adherence to be established and formalize progressive advancement toward higher standards. Finally, softer forms of governance such as the OMC increase the social basis of legitimacy of the EU by

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[50] Zeitlin and Trubek (2003): 5.
[51] See D Trubek and J Mosher, "New Governance, Employment Policy, and the European Social Model" in J Zeitlin and D Trubek (eds.) *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford, Oxford University Press, 2003).
[52] Zeitlin and Trubek (2003), Ch. 1.

allowing stakeholders to participate in the policy process and thereby facilitating knowledge diffusion and engendering a feeling of enfranchisement and investment in the system.

ii. How can soft law make a difference?

Given these broad characteristics of the OMC, what specific mechanisms facilitate policy change and help to solve problems? A number of scholars have contributed to the effort construct an account of how the soft OMC mechanisms might operate. A major contribution to this literature can be found in the work of the Swedish sociologist Kerstin Jacobsson whose work has many affinities with constructivist scholarship.[53] Drawing on the work of Jacobsson and others, all with theoretical roots in constructivism, Trubek and Trubek (2005, forthcoming) outline six ways that the OMC might affect change and channel behavior:

1) *Shaming.* Member states will seek to comply with guidelines in order to avoid negative criticism in peer review and Council recommendations.

2) *Diffusion through mimesis*. The guidelines and information provided by the Commission and peer states put before national policy makers a coherent policy model they are encouraged to copy; the iterative nature of the OMC, benchmarking, and peer review reinforce is this process.

3) *Diffusion through discourse.* The OMC process might result in the construction of a new cognitive framework or a "new perspective from which reality can be described, phenomena classified, positions taken, and actions justified." Broadly conceived, discursive transformation may also include the development of a common vocabulary, use of symbols (e.g. indicators), and changes in ordering assumptions and views on causality.[54]

4) *Networking*. The creation of new policy networks through the OMC within national governments (through correspondence in the formulation of National Action Plans, for example) and outside of government (soliciting input from civil society and social partners) will capitalize on a more robust and diverse body of knowledge, and facilitate social processes of deliberation and learning.

5) *Deliberation.* The process of deliberation among this diverse set of actors fosters exchange of policy knowledge and experience, allows actors to get to know each other's

[53] Jacobsson (2004).
[54] For a detailed discussion, see Jacobsson (2004).

governing systems and ways of thinking, and promotes a common identity through continued interaction, socialization, and persuasion.[55]

6) *Learning.* Hemerijck and Visser define learning operationally as "a change of ideas and beliefs (cognitive and/or normative orientations), skills, or competencies as a result of the observation and interpretation of experience."[56] Trubek and Mosher observe that the OMC facilitates policy learning by a series of mechanisms:

> "…that destabilize existing understandings; bring together people with diverse viewpoints in settings that require sustained deliberation about problem-solving; facilitate erosion of boundaries between both policy domains and stakeholders; reconfigure policy networks; encourage decentralized experimentation; produce information on innovation; require sharing of good practice and experimental results; encourage actors to compare results with those of the best performers in any area; and oblige actors collectively to redefine objectives and policies."[57]

iii. Evidence of effectiveness

However plausible these mechanisms may be, measuring the OMC's impact and verifying its success or failure is more difficult and has fueled debate over the efficacy of soft law. How do we know if these soft legal instruments actually work? If they do work, how and why, and do they necessarily lead to changes in the direction of the guidelines? A number of critics have argued that because it lacks "hard" elements, the OMC is powerless to effect real change.

There has been some effort to assess the efficacy of the OMC. Zeitlin offers a valuable heuristic by dividing the impact of the OMC into four areas: 1) substantive policy change (including broad shifts in policy thinking); 2) procedural shifts in governance and policy making (including administrative reorganization and institutional capacity building); 3) participation and transparency; and 4) mutual learning.[58] In each of

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[55] Note that Zeitlin (in unpublished comments on Jacobsson and Vifell) argues that alternative theoretical frameworks such as Cohen and Sabel's conception of directly-deliberative polyarchy, in which ends and means are continuously refined in relation to one another though discursive yet disciplined comparisons of different approaches to practical problem-solving, might be better suited to capturing the interpenetration of these elements within the OMC.

[56] A Hemerijck and J Visser, "Policy Learning in European Welfare States" (2003) Unpublished manuscript, Universities of Leyden and Amsterdam, October: 5.

[57] Trubek and Mosher (2003): 46-47.

[58] J Zeitlin, "Conclusion: The Open Method of Coordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy" in J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005).

these areas, there is some evidence that OMC processes are having impact but the extent of the impact varies among the areas. One can see some shifts in policy thinking of Member States (e.g. wide adoption of EU concepts and categories)[59] and in forms of administrative reorganization (e.g. better horizontal integration of interdependent policy fields, increased decentralization of policy services within Member States, and greater attention to vertical coordination between levels of governance).[60] Further, there is some evidence that OMC processes are increasing levels of participation and transparency (e.g. increased involvement of non-state and sub-national actors)[61] and promoting mutual learning among Member States.[62]

While recent empirical findings suggest that the OMC and other new modes of governance in Europe exert some positive influence through the mechanisms described above, it is difficult to establish a causal relationship between new governance processes and policy outcomes.[63] For example, changes in Member States' policy orientations might precede the launch of OMC processes, Member States themselves helped to define OMC guidelines (i.e. endogeneity problems), and improvements in OMC indicators

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[59] See for example, JC Barbier, "The European Employment Strategy: A Channel for Activating Social Protection?" J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005); C Ehrel, L Mandin, and B Palier, "The Leverage Effect: The Open Method of Coordination in France" in J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005); K Jacobsson, *Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy* 2002/4, SCORE (Stockholm, Stockholm Center for Organizational Research, 2002); K Jacobsson and A Vifell, "New Governance Structures in Employment Policy-making? Taking Stock of the European Employment Strategy" in I. Linsenmanns, C. Meyer and W. Wessels (eds.), *Economic Governance in the EU* (Palgrave Macmillan, London, 2005).

[60] See for example M Lopez-Santana, "How 'Soft' Pressure From Above Affects The Bottom: Europeanization, Employment Policy And Policy (Re)Formulation (The Spanish Case)," (2004) unpublished paper; Ehrel et al. (2005); and O'Donnell and Moss (2005).

[61] See for example, C de la Porte and P Pochet, "Participation in the Open Method of Coordination: The Cases of Employment and Social Inclusion" in J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005); D Foden, "The Role of the Social Partners in the European Employment Strategy" (1999) 4 *Transfer* 4; J Goetschy, "The European Employment Strategy, Multi-level Governance, and Policy Coordination" in J. Zeitlin and D. M. Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford, Oxford University Press, 2003); and Jacobsson and Vifell (2005).

[62] Trubek and Mosher (2003) documented the presence of learning-inducing mechanisms in the EES and shown that policies have changed over time in line with the guidelines. See also M Ferrera and S Sacchi, "The Open Method of Coordination and National Institutional Capabilities: The Italian Case" in J Zeitlin and P Pochet (eds.), *The Open Method of Coordination in Action: The European Employment and Social Inclusion Strategies* (P.I.E.-Peter Lang, 2005); M Ferrera, M Matsaganis, and S Sacchi, "Open Coordination Against Poverty: The New EU "Social Inclusion Process"" (2002) *Journal of European Social Policy* 12; and Jacobsson and Vifell (2005).

[63] Zeitlin (2005).

might be caused by many other factors (e.g. macroeconomic changes). These empirical difficulties pose considerable problems for OMC proponents because there simply is not a wealth of concrete evidence to substantiate claims that soft law mechanisms employed by the OMC have a positive and independent effect on outcomes, which may lead some to fall back on traditional arguments in favor of hard law.

Finally, few would argue that the OMC has fully realized its promise as a change-inducing process. For those who look at the OMC through a constructivist prism, this is no surprise. For constructivists, policy changes result from transformative processes such norm diffusion, social learning, and persuasion that are all time dependent and gradual. In this sense, it is understandable that the effects of soft forms of governance are not discernable in the short or even medium term because it takes a considerable amount of time for constitutive effects or a "norms cascade" to take place. However, viewing the OMC from a constructivist perspective does not discount the possibility that softer forms of governance may usefully be integrated with harder forms. In fact, in employment policy, arguments can be made that hybrid forms of governance already exist.

iv. Hybridity—the EES, hard law, and the structural funds

Most discussions of the OMC tend to present the OMC as a separate governance tool that is used instead of other possible EU governance tools, namely the hard law of EU employment legislation. The perception of the OMC as an alternative to harder forms of governance is so pervasive that the European Commission argued in its White Paper on Governance that the OMC "should not be used when legislative action under the Community method is possible."[64] Claire Kilpatrick argues that this perception of the OMC ignores "the most significant characteristic of the new EU employment governance: it is already a self-consciously integrated regime where the OMC, ESF, and employment law measures each play distinctive and overlapping roles in realising social justice and competitiveness objectives. From this perspective, one of the most central

[64] European Commission (2001), quoted in C Kilpatrick, "New EU Employment Governance and Constitutionalism," this volume.

achievements of the EES is that it builds bridges between employment legislation…and the European Social Fund."[65]

Kilpatrick develops her ideas about hybridity in employment governance by analyzing both the separate contributions of the OMC, the structural funds, and various forms of hard law. In this complex model, the OMC can promote actions that complement the effect of enforcing hard law as well as providing benchmarks and indicators that measure success in meeting goals that are shared by the OMC and various directives. And the structural funds not only provide resources to help effectuate their goals; they also have a procedural dimension that complements the procedural requirements of the OMC.

Kilpatrick views the most prominent characteristic of EU employment governance to be integration. Each component—the EES, employment legislation, and the structural funds—plays an important role in the single domain of employment policy; failure by one part of the whole can skew the objectives and balance of the overall hybrid regime. The trick, as Kilpatrick points out, will be choosing the appropriate policy mix to deliver an employment objective, particularly when it is unclear whether one or all of the governance tools is not, or is perceived not to be, working.

B. Fiscal policy Coordination: Broad Guidelines, the Stability & Growth Pact, and Rationalism

The EU has created a complex system of fiscal policy coordination that was designed to ensure that all EU countries maintain fiscal discipline and balance their budgets over the medium term and avoid excessive deficits. The system covers all Member States but has special provisions governing the countries in the eurozone. Member States must report on their budgetary situations and provides for multi-lateral surveillance of budgetary performance. While the system seeks to forestall excessive deficits, it also includes provisions to deal with them if they occur. Thus it includes mechanisms, procedures, and specific rules concerning what constitutes an "excessive" budget deficit

[65] Kilpatrick, this volume.

and specifies processes to be followed if deficits become excessive. These mechanisms include monetary sanctions as a last resort.

Coordination of national fiscal policies is achieved using three basic tools: Broad Economic Policy Guidelines, multilateral surveillance, and the Excessive Deficit Procedure (EDP). Taken together, these are sometimes referred to as the Stability and Growth Pact (SGP) [66]. This system includes both soft and hard elements. It employs "soft" methods similar to the OMC: these include the BEPGs and multilateral surveillance. But, unlike the OMC, it also includes "hard" measures that create binding obligations and expose non-complying states to potential sanctions and litigation in the ECJ. These are set out in the EDP and SGP.

i. Broad Economic Policy Guidelines (BEPG)

Recognizing that national fiscal policy is a common concern, the treaty requires that eurozone states maintain the budget deficit limits set out in the criteria originally set for entry into the euro.[67] The BEPGs are designed to help. Founded on Art. 99,[68] these guidelines form the center of coordination efforts at the Community level.[69] They are designed to provide a broad orientation for economic policies. The Guidelines begin as a Commission draft, which then forms the basis of a report by ECOFIN to the European Council. The Council adopts a recommendation setting out the BEPGs for Member States and the Union.[70]

The BEPGs are soft law designed to encourage cognitive and, therefore, policy convergence around a set of fiscal policies that the EU-level actors deem helpful for remaining in compliance with the initial convergence criteria. Hodson and Maher argue

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[66] The term SGP is often used to refer to all of these tools and the process in which they are designed to play a part. This is technically incorrect. While this may seem insignificant, the tools have varying legal bases that will be important to the later discussion of forms of law. The SGP consists of two Council regulations and a Council Resolution designed to enhance the operation of other tools. The BEPGs, multilateral surveillance, and the EDP were created in the Maastricht Treaty

[67] Art. 99(1) (ex 103(1)).

[68] K Dyson, *The Politics of the Euro-Zone: Stability or Breakdown?* (Oxford, Oxford University Press, 2000): 36.

[69] J von Hagen and S Mundschenk. "The Functioning of the Economic Policy Coordination" in M Buti and André Sapir (eds.), *EMU and Economic Policy in Europe: The Challenge of the Early Years* (Northampton, MA: Edward Elgar, 2002): 90.

[70] Art. 99(2).

that the guidelines are broad and general because "the issue is one of coordination rather than compliance with an emphasis on orientation of policy rather than defined outcomes."[71] The BEPGs themselves have been the target of reform over the years, as they were first changed in 1997 to become more specific and to include country-specific recommendations[72], and then again recently in the name of "streamlining" so that they will now be produced tri-annually.[73] Perhaps their most important function comes in combination with the mechanism for multilateral surveillance where they form the basis for analysis and critique of national performance.

ii. Multilateral surveillance

Multilateral surveillance is the soft law half of a hybrid tool of coordination. Article 99 EC puts in place what is often known as the "Early Warning System". Multilateral surveillance gives the Council, on the recommendation of the Commission, the chance to make public or confidential assessments of the policies of the Member States and to give public or confidential recommendations as a result. This assessment is based on *Stability and Convergence Programmes*, which are updated annually by the Member States and submitted to the Commission and Council. The Council of Ministers then evaluates the programmes.[74] A primary goal is to ensure that the medium-term budgetary plans are conservative enough to avoid an excessive deficit. If the Council finds that this is not the case, it may make recommendations to the Member State to correct the problem.

Council Regulation 1466/97 of 7 July 1997 implements Article 99. It focuses on "the strengthening of surveillance of budgetary positions and the surveillance and co-ordination of economic policies" and is often portrayed as the preventative measure. António Cabral, former Director of DG Economic and Financial Affairs of the

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[71] D Hodson and I Maher, "European Monetary Union: Balancing Credibility and Legitimacy in an Asymmetric Policy Mix" (2002) 3 *Journal of European Public Policy* 9.
[72] Dyson (2000): 36.
[73] Slight modifications can be made annually. See I Begg, D Hodson, and I Maher, "Economic Policy Coordination in the European Union" (2003) *National Institute Economic Review* 183: 75.
[74] "Glossary" in A Brunila, M Bui and D Franco (eds.) *The Stability and Growth Pact: The Architecture of Fiscal Policy in EMU* (New York, Palgrave): 418.

Commission, notes six different elements to the "backbone" of 1466.[75] States must submit Programmes that focus on public finances and must include "medium-term objective of a budgetary position close to balance or in surplus and the adjustment path towards this objective."[76] The Council provides a non-binding assessment of that Programme, making recommendations for changes where it sees fit. The Council then monitors the implementation of fiscal policy to ensure that sufficient "wiggle room" is created so as to allow the automatic stabilizers to work when necessary without breaching the 3% deficit limit. Those outside the Euro-zone must include statements on the effects of their policy on exchange rate stability. Finally, while the system targets individual states, the Council also assesses each Programme based on whether its contents "facilitate the closer coordination of policies and whether the economic policies of the Member State concerned are consistent with the broad economic policy guidelines." Regulation 1466 is soft law designed to establish an "early warning system" to help Member States avoid an excessive deficit and the processes of Regulation 1467.

iii. Excessive Deficit Procedure (EDP)

The Excessive Deficit Procedure (EDP) is set forth in Article 104. Should an "excessive" deficit exist, the EDP details a procedure designed to escalate through a number of sanctions, primarily informal at the beginning (naming and shaming, peer pressure), but moving on to formal sanction in case of non-compliance. It is the hard law part of the system. The EDP is implemented through Council Regulation 1467/97 of 7 July 1997. Should the early warning system of 1466 fail to prevent a deficit beyond the 3% limit; Regulation 1467 on "speeding up and clarifying the implementation of the excessive deficit procedure" is designed to act as a corrective, or "dissuasive,"[77] measure.

Regulation 1467 entered into effect on 1 January 1999. From the beginning, however, there have been important ambiguities in its operation. To begin, Art. 104 sets out that a deficit above 3% is not excessive if "the excess over the excess over 3% is only

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[75] AJ Cabral, "Main Aspects of the Working of the SGP" in A Brunila, M Bui and D Franco (eds.), *The Stability and Growth Pact: The Architecture of Fiscal Policy in EMU* (New York, Palgrave, 2000): 140-1.
[76] Regulation 1466/97.
[77] *Ibid*: 141.

exceptional and temporary and the (government deficit) ratio remains close to the reference value."[78] There is considerable maneuverability within those limits. [79] Should a deficit qualify for this exceptional status, however, the Procedure is still initiated--the opinion of the Commission is sent to the Economic and Financial Committee for comment and returned afterwards to the Commission for final revision before being sent on to the Council. It simply requires that those facts be taken into consideration. The Member State in question may defend the deficit to the Council "as regards the abruptness of the downturn or the accumulated loss of output relative to past trends."[80] This is an option only if the annual fall of real GDP was less than 2%, which implies that anything above that limit would be automatically justified.[81] In the Council Resolution, however, the Member States have committed themselves to defend deficits only if the annual fall in real GDP is at least 0.75%.

Once this process has been triggered,[82] the process could in theory move quickly, imposing fines as early as ten months from the start date. It is highly unlikely, however, that the procedure could ever work so quickly due to the nature of the data required to make such decision. The clock on the process begins once an excessive deficit is "identified," not once an excessive deficit has occurred. Cabral notes that it could take three years from the beginning of the excessive deficit before sanctions are applied.[83]

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[78] Art. 104 EC.

[79] Regulation 1467 moves toward clarifying the multiple qualifiers in the original treaty. An excess over 3% can be considered exceptional if: a) it results from an unusual event outside the control of the Member State or b) it results from a severe economic downturn", where a severe economic downturn is defined as "an annual fall of real GDP of at least 2 per cent." The deficit is considered temporary if budgetary forecasts as provided by the Commission indicate that the deficit will fall below the reference value following the end of the unusual event or the severe economic downturn. The Regulation fails, however, to define the ambiguous term "close to the reference value" upon which the entire set of exceptions rests. Considering that such a qualification automatically stops the Procedure, it is imperative that such qualifiers be clear.

[80] *Ibid*, Art. 2.1.

[81] Council Regulation 1467/97, Art. 2(3).

[82] Where "triggered" is defined as the Commission having made the recommendation that an excessive deficit exists and once the supporting data having been having made public by either March 1 or September 1 of any year.

[83] Cabral (2001): 147. In an ambivalent judgment in 2004 case C-27/04, the ECJ effectively suspended the EDP and, in Maher's words, "fudged the legal significance of the deadlines that are meant to be followed under the procedure and thus allowed for the Council to put the procedure in de facto abeyance." For a detailed discussion, see I Maher, "Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion" (2004) 29 *European Law Review* 6.

Once the Procedure moves into sanctions, the progression is relatively straightforward. The first sanction is a non-interest bearing deposit, calculated so as to make the size of the deposit dependent upon the size of the excessive deficit.[84] The continued constitution of the deposit is subject to the following criteria:

- if, after two years since it was made the excessive deficit has not been corrected, the deposit is turned into a fine;
- if, before the 2 years have elapsed the Council considers that the excessive deficit has been corrected and abrogates its previous decision on the existence of an excessive deficit, then the deposit can be returned to the member state.

In the latter case, the cost of such a sanction is then only the interest lost on the money deposited. Once a deposit has been made, the Council assesses every year whether the excessive deficit has been resolved. For each year the excessive deficit is not resolved, the Council requires an additional non-interest bearing deposit which is turned into a fine two years after its constitution. The result is that there is always one fine that may be changed from a non-interest bearing deposit to a fine.[85] Should a second deposit be required, the amount of the deposit as a percentage of GDP increases.[86] No single deposit may be more than 0.5% of GDP.[87]

iv. A hybrid structure

The result of this complex set of legal provision is a two-track structure. Amtenbrink and de Haan summarize the structure as follows:

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[84] The amount of the first deposit is calculated using the following formula: *deposit in per cent of GDP = .2 +.1*(deficit - 3% of GDP)*.

[85] Cabral (2001): 149.

[86] Deposits beyond the first are calculated using the following formula: *deposit in % of GDP =.1*(deficit - 3% of GDP)*.

[87] Two final points bear noting regarding the sanctions system of the EDP. First, and oddly, monetary deposits and fines can only be calculated when non-compliance stems from an excessive deficit. No regulations exist laying out the system for calculating fines should a Member State be in violation with the limit on public debt. Should a case arise in which a Member State is in compliance with the limits on excessive deficits but is well beyond the limit of 60% on public debt as a percentage of GDP, no sanctions could be levied. Cabral notes that the likelihood is small, but possible.Finally, the money gathered from sanctions is dispersed among Member States who have adopted the euro and who do not have an excessive deficit. The money is handed out according to the qualifying Member States based on their percentage of total GDP.

> "The multilateral surveillance and excessive deficit procedure employ distinct modes of co-ordination. Whereas the latter can be described as a form of closed co-ordination, the former can be regarded as an application of the so-called open method of co-ordination. The open method relies on self-commitment by the Member States, peer review and benchmarking, placing emphasis on policy learning and consensus building, while the closed method tends to have top-down policy formulation and provides for binding rules and severe sanctions. Also in terms of the distinction between hard and soft law, where hard law lies at one end of a continuum and soft law at the other, the multilateral surveillance and the excessive deficit procedures are different, the latter being "harder".[88]

Similarly, Imelda Maher describes the SGP as "…a combination of soft law (multilateral surveillance) and hard law (the excessive deficit procedure) with the Pact having a preference for soft law measures."[89]

Because of the importance of the "soft" elements in the overall system of fiscal coordination, scholars have sought to account for the use of soft law in this area. Strikingly, unlike those who have studied the "soft law" of the OMC, these scholars have relied primarily on rationalist perspectives, often explicitly citing the work of Abbott and Snidal.[90] Using a rationalist approach, these authors suggest at least eight broad (and related) reasons why soft law is employed for fiscal coordination in the EU:

1) *Reduces negotiation costs.* Soft law reduces the levels of obligation, delegation, and/or precision, and therefore makes cooperative agreements possible. In the context of fiscal coordination, very name of the central instrument that protects against excessive deficits suggests that Member States had different ideas on what should take priority: stability or growth. They realized that once they signed the Treaty it would be hard to make changes, as that would require unanimity. So, to get agreement, they kept certain provision vague and/or non-binding. Hodson and Maher observe, "…by building in considerable discretion in the Pact, scope for reform without resort to formal legal changes is possible and more likely than if formal legal instruments—including the Treaty—had to be reformed."[91] And, Amtenbrink and de Haaan argue that by choosing a "rather vague and legally non-binding objective for the medium term" the Member States were able to reach an agreement that otherwise might not have been available.[92]

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[88] F Amtenbrink and J de Haan, "Economic Governance in the EU: Fiscal Policy Discipline versus Flexibility," (2001) 3 *Common Market Law Review* 40.
[89] I Maher, "Law and the OMC: Towards a New Flexibility in European Policy-Making?" (2004) 2 *Journal for Comparative Government and European Policy* 2.
[90] Most notably D Hodson and I Maher, "Soft Law and Sanctions: Economic Policy Coordination and Reform of the Stability and Growth Pact" (2004) 5 *Journal of European Public Policy* 11: 798-813.; Maher (2004); and Amtenbrink and de Haan (2003).
[91] Hodson and Maher (2004): 5
[92] Amtenbrink and de Haan (2003): 1085.

2) *Reduces sovereignty costs.* States can limit sovereignty costs through non-binding or imprecise arrangements that do not delegate extensive powers. With respect to the Pact, soft law "provides a ready means for member states to express concern for budgetary discipline, without actually ceding control over fiscal policy," as Member States were unwilling to delegate a significant amount of authority to the Community level.[93]

3) *Deals well with uncertainty.* Soft law is well equipped to cope with uncertainty by providing the flexibility necessary to allow for the possibility of renegotiation and/or reform that may be required as circumstances evolve over time. Building considerable discretion in the Pact makes reform possible without having to resort to formal legal changes. Soft law also is appropriate when it is impossible to specify a precise standard. This is the case for the medium term balance standard that involves complex and contestable econometric projections. Hodson and Maher contend that it was for this reason that it this standard was left in the realm of soft law.[94]

4) *Facilitates compromise.* Soft law can take divergent national circumstances into account through flexible implementation, which in turn helps states deal with the domestic political and economic consequences of an agreement. Because soft law commits states to specific forms of discourse and procedure, it makes it easier for them to understand one another and thus achieve compromise over time. For example, recent Commission proposals for reform were, to large extent, based on prior experience with the Pact.[95]

5) *Improves information flows and facilitates learning.* Soft legal instruments such as benchmarking, monitoring, and review develop a common discourse that helps states learn from one another. For example, the Pact's reporting mechanisms improve transparency and reduce information asymmetry between national economies.[96]

6) *Encourages consistency and disseminates information.* Soft law can improve transparency "by providing a code of practice for states when preparing their stability or convergence programmes for the Council and Commission and a timeline for medium term adjustment." These measures encourage consistency in bureaucratic decision-making and inform the wider public of official attitudes.[97]

7) *Deals well with imprecision of standards and goals.* Under the Pact, some of the agreed targets (e.g. medium term target of close to balance or in surplus or the general government debt level of below 60% of GDP or falling) are "unavoidably imprecise and cannot give rise to binding legal obligations or legally enforceable sanctions."[98]

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[93] Hodson and Maher (2004): 14; Amtenbrink and de Haan (2003): 1085.
[94] Hodson and Maher (2004): 6, 9
[95] Amtenbrink and de Haan (2003): 1085.
[96] Hodson and Maher (2004): 6.
[97] *Ibid*: 6.
[98] *Ibid*; see also Amtenbrink and de Haan (2003): 1088.

8) *Structures competition and cooperation.* Soft law may work by creating competition among Member States that ramps up reputation costs as they relate to poor performance. In addition, soft law might provide a cooperation incentive whereby poor performance by participating Member States weakens the performance and attractiveness of the eurozone as a whole vis-à-vis the rest of the world. In both of these cases, soft law can increase the peer pressure on member states to perform well. [99]

9) *Sets the stage for hard law.* Soft law may be seen as a precursor to hard law, developing shared ideas, building trust, and establishing non-binding standards that can eventually harden into biding rules once uncertainties are reduced and a higher degree of consensus ensues.[100]

We can see that scholars discussing the possible role of "soft law" in the SGP have drawn heavily on rationalist perspectives. They have framed the issues in terms of the self-interest of states and draw heavily on the work of Abbott and Snidal. Many are primarily interested in explaining why soft law exists and deploy soft law theory merely to account for the SPG's non-binding or soft track. Unlike those who have deployed "constructivist" approaches to put forward a theory of why soft law measures may be preferable to hard law in the social policy field, some analysts of the SGP may believe that the choice of soft law is a second best solution and that it would have been better to set up the system exclusively in the domain of hard law.[101]

v. The failure of the EDP and future of fiscal coordination

However, the whole issue of hard and soft law in the area of fiscal coordination has now been reopened as a result of recent experiences with the EDP and subsequent litigation in the ECJ. In recent years, the soft law system has failed to stop number of major countries from breaching the 3% budget deficit limit set out in the EDP. As a result, the Commission has tried to set in motion the hard law sanctioning system but these efforts have been blocked by several of the larger Member States that have broken the 3% ceiling. The result is that all parties are now calling for changes in the SGP,

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[99] Amtenbrink and de Haan (2003): 1086.
[100] Maher (2004).
[101] This seems to be the conclusion of Amtenbrink and de Haan (2003) who rely on Abbott and Snidal to explain why soft law was deployed in the Pact, but then argue that hard law is the preferable approach to ensuring that budget deficits do not occur.

although there is no agreement on what changes should be made.[102] However, several scholars have called for a recalibration of the relationship between the hard and soft elements of the system, thus bringing into direct view the elements of hybridity on which it was based.[103] This is likely to spur further inquiries into the operation of both the hard and soft elements, as well as the possibilities for interaction between them.

In the context of the SGP, some of these inquiries will focus on the inability of hard law (the EDP) to deter noncompliance and analyze why the governance structure proved incapable of effective implementation of its enforcement provisions. However, the problems faced by the SGP are not just endemic to fiscal coordination in Europe; many regulatory institutions have trouble effectively imposing sanctions, particularly in the face of violations by powerful actors. Given the difficulties of implementing hard legal sanctions, the analysis with the most fruitful application might lie within a more intensive examination of the role of soft legal instruments. Specifically, a better understanding of the soft law components of the SPG (the BEPG and multilateral surveillance), which may be cultivated by looking more closely at OMC processes and drawing more from a constructivist perspective—could produce findings that are better capable of achieving policy goals without ever having to activate of the EDP in the first place. Maher and Hodson seem to recognize this already, as their analysis is lined with indirect references to processes such as learning and diffusion that are stressed in constructivist analyses.[104]

IV. Toward a Theory of Hard and Soft Law: the Need for Synthesis and the Issue of Hybridity

The survey of the literature on employment policy and fiscal coordination reveals two major lacunae in our knowledge. The first is the failure to create an integrated approach to soft law. As we have seen, scholars attempting to explain two rather similar soft law systems (OMC and BEPG) draw on different traditions; stress different reasons for the adoption of these approaches, and suggest different functional roles for soft law. At the most general level, the rationalist account suggests that soft law is a way to allow

[102] Reforms to the SGP advanced by the Council were agreed to in March 2005, further vitiating the EDP by offering countries easier excuses for breaching the 3% limit.
[103] See for example the related symposium in the *Journal of Common Market Studies.* 4 *JCMS* 42 (2004)
[104] See discussion in Section III (iv) above.

Member States to avoid hard decisions and defer making choices that, it is alleged, hard law would require. On the other hand, the constructivist story indicates that use of soft law measures like the OMC may be a better way to bring about those very decisions and facilitate the hard choices rationalists that think are being deferred. Since reality probably reflects a mix of these two motives and effects, it seems clear that we need a synthetic approach to soft law that would integrate elements of these two perspectives.

There is, however, a second lacuna that becomes apparent as we explore these cases further. Note that in both cases we see the simultaneous presence of hard and soft legal processes. This is part of the explicit design of the fiscal coordination system, but it is also present in employment policy. In that area, although the three governance pillars operate independently, they increasingly refer to each other and are evolving towards a more integrated system. A synthetic approach to the use of soft law would help us understand better the use of soft measures in areas like fiscal coordination and employment policy. But it also would serve as the first step in the development of a theory of the relationship between hard and soft law, or what we have called *hybridity,* in cases like this.

a) A synthetic approach to soft law

The foregoing suggests that there are virtues to both constructivist and rationalist approaches to soft law. We have seen that rationalist approaches are very useful when we want to develop an understanding of how soft law regimes have emerged. But they seem less than adequate to offer an explanation of how these mechanisms may work to bring about change. For such an explanation, it seems necessary or at least desirable to draw on constructivist approaches such as those that have developed in the effort to explain the operation of the OMC.

This suggests that insights from these two separate approaches might best be merged in some form of synthesis. Thus, the analysis of the origins of the OMC might benefit from some of the rationalist insights that have helped scholars understand the emergence of the soft track in the SGP. At the same time, if constructivist approaches were employed more fully in the study of the operation of multilateral surveillance, we might

be able to frame more cogent arguments about the relative effectiveness of hard and soft law in the budgetary area. This could make it easier to see how and when soft law might be a desirable alternative rather than simply a second best solution or a way station towards hard law.

This points to the desirability of an approach that draws on both these strands of thought. Such a synthesis could build on developments within IR theory and the theory of European integration. Recently, a large number of prominent IR scholars have asserted that the so-called rationalist-constructivist divide has been overstated and that the two approaches are in fact more compatible than not.[105] Fearon and Wendt (2002) claim that there are substantial areas of agreement, and where genuine differences exist they are as often complementarities as contradictions.[106] At the same time, there have been calls to bring constructivism into studies of European integration to complement the primarily rationalist approaches used by the mainstream approaches of liberal intergovernmentalism, neofunctionalism, and multi-level governance.[107] Thus Risse argues that there are at least three ways in which constructivism enriches the understanding of the European Union:

> "First, accepting the mutual constitutiveness of agency and structure allows for a much deeper understanding of Europeanization including its impact on statehood in Europe. Second and related, emphasizing the constitutive effects of European law, rules, and policies enables us to study how European integration shapes social identities and interests of actors. Third, focusing on communicative practices permits us to examine more closely how Europe and the EU are constructed discursively and how actors try to come to grips with the meaning of European integration."

Jeff Checkel's study of "why agents comply with the norms embedded in regimes and international institutions" is an effort to develop a synthetic approach. Checkel's study shows the interrelationship of rationalist and constructivist accounts by demonstrating that certain institutional contexts are more likely to facilitate argumentative persuasion

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[105] See G Hellman, "Forum: Are Dialogue and Synthesis Possible in International Relations?" (2003) *International Studies Review* 5 and Risse (2002) for discussions of theoretical synthesis.
[106] J Fearon and A Wendt, "Rationalism v Constructivism: A Skeptical View" in W Carlsnaes, T Risse, and B Simmons (eds.) *Handbook of International Relations* (London, Sage Publications, 2002): 53.
[107] Risse (2004): 159-160; see also Christiansen et al. (1999).

and social learning. This, in turn, can lead to the reconstitution of interests thus changing rational calculations and fostering compliance.[108]

It seems clear that a similar effort at synthesis could be developed to provide a richer account of the role of soft law in the EU. Speaking in the context of the debate over the OMC, Kerstin Jacobsson highlights the need for such a synthesis:

> "A theory of the OMC and its role for domestic policy change would have to take into account both the roles of ideas, interests, and power relations in explaining policy change. It would also have to take into account the interplay of interests and ideas. Ideational change may affect how actors perceive their interests, that is, interests may change as a consequence of learning and socialization…A theory of the OMC would, moreover, have to be a multi-level and multi-actor, able to take into account the interplay of actors, and thus interests as well as power relations, at various levels of governance: supranationally, nationally, and sub-nationally."[109]

b) Dealing with hybridity

Hybridity is emerging as an important issue in EU law as more and more scholars discover the simultaneous presence of "hard" and "soft" measures in the same policy domains. This is certainly true in the two domains that we have explored. Hybridity, in this sense, may be the result of conscious design or it may come about because the same objective is being pursued through two routes, one of which leads to hard measures and the other to soft ones.

The fiscal coordination system is the classic example of conscious hybridity. The system relies primarily on the BEPGs and multilateral surveillance to reach its goals. But it also includes a set of binding rules that define excessive deficits in very specific terms, create a formal process that must be followed when an excessive deficit occurs, and includes sanctions for Member States that continue running such deficits. The BEPGs both respect national diversity and are designed to encourage reform while the excessive deficit procedure and its sanctions are supposed to deter states that might be tempted to

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[108] J Checkel, "Why Comply? Social Learning and European Identity Change," (2001) 3 *International Organization* 55. Risse (2002) also suggests that rationalist and constructivist approaches could usefully be integrated to build an understanding of international negotiations that incorporate both arguing and bargaining that could provide tools to break deadlock situations.

[109] Jacobsson (2004): 100.

free ride by running excessive deficits that might do hard to the common currency. The hybridity that Kilpatrick has shown to exist in employment policy may not have been part of an original design but the system is evolving towards a similar pattern in which hard and soft elements are deployed in the same arena and for similar objectives. .

These cases suggest that hybridity may emerge when the EU is faced with a set of difficult and potentially contradictory imperatives. Take for example the fiscal coordination system. In this case, the EU must deal with the budgets of 25 different countries. Each has its own way of doing business and each may seek a different path towards the common goal of fiscal sustainability. The coordination system must operate in a multi-level system where much of the competence affecting economic policy rests at the Member State level yet common interests and interdependencies mean that each state has an interest in the behavior of the others. It must at the same time encourage and promote reforms in fiscal practice while deterring purely self-interested behavior and free riding. Given these varied and possibly conflicting goals, it is no surprise that the Union has sought to draw on both hard and soft methods and processes and to marry them in a single system.

It is true that this system has failed to work as originally hoped. In the current economic conjuncture several states, including some of the larger ones, have breached the excessive deficit limits for some time. The soft law system could not prevent this development and the Union's inability to deploy the hard law sanctions has forced the EU to reconsider the original design. The result has been a vigorous debate about the respective roles of hard and soft law in a new system, as well as an effort to pay closer attention to ways that would make the soft law system more effective. Hopefully, this debate will contribute to the development of a clearer understanding of the respective roles of hard and soft law in this and other domains and contribute to a more robust theory of hard and soft law and hybridity.

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