ARTICLES

NEW OPTIONS FOR DIFFERENTIATED INTEGRATION IN THE EUROPEAN UNION

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DOES SOFT LAW TRIGGER DIFFERENTIATION AND DISINTEGRATION?

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ABSTRACT: The purpose of this *Article* is to provide a framework that helps to analyse the relationship between soft law, differentiation, and the prospects of integration/disintegration. More specifically we aim at developing a typology of scenarios in order to show how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union, in a context of crises. Section II presents and discusses three main assumptions: the EU is facing a context of political and economic turbulences; territorial differentiation has increased since the 1990s; EU policies more and more rely on soft law. Against this backdrop, we seek to capture, in section III, the dynamics between soft law, differentiation and integration/disintegration, by using three main scenarios (soft law leads to more territorial differentiation; soft law leads to differentiation but then results in more integration; soft law triggers integration). Section IV is dedicated to the factors making these three scenarios more or less likely to occur. Two types of factors are distinguished: those which are inherent in the soft law instruments and those related to the EU system of governance. In the end, we argue that further investigation is needed in order to verify whether the legal and political EU system is strong enough to prevent normative and territorial differentiation from escalating, and preserve the integration-through-law narrative.

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I. INTRODUCTION

Soft law and differentiation are widely used concepts to better understand the transformation of European Union law, the evolution of European integration and the possibility of disintegration. However, the academic literature has not yet paid much attention to the interaction between these notions. The purpose of this *Article* is to provide a framework that helps to analyse the relationship between soft law, differentiation, and the prospects of integration/disintegration.

To do so first requires a conceptual clarification. The definition of soft law is not crystal clear and far from being consensual, whether it is soft law at domestic, EU or international level.[1] It is not easy to situate soft law with regard to the sources of European Union law[2] and part of the scholarship would use the notion of 'informal law' rather than soft law.[3] In the context of this presentation, I will stick to the notion of soft law and the widely cited definition by Linda Senden, who sees soft law as "rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects".[4]

This definition is not precise enough to clearly delineate non-law, soft law and hard law. There are grey areas where soft law does not seem to be so soft, and hard law is not as hard as it looks. For example, hard law is sometimes softened by the absence of a proper enforcement mechanism, which is typical of those EU instruments that are not placed under the jurisdiction of the CJEU and whose non-compliance with does not give rise to sanctions. For the purpose of this *Article*, we will keep in mind this softness of certain hard acts while focusing on proper non-binding soft law.

Differentiation, the second crucial term in this analysis refers to the variation in the integration of policies (competences to the Union, *i.e*. vertical differentiation) and to the application of rules to some Member States and non-Member States, but not to all (horizontal differentiation).

[1] F Terpan, 'Soft Law in the European Union: The Changing Nature of EU Law' (2015) ELJ 68.

[2] B De Witte and B Smulders, 'Sources of European Union Law' in P J Kuijper and others (eds), *The Law of the European Union* (Kluwer Law International 2018) 193; O Stefan, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) The Modern Law Review 879.

[3] J Pauwelyn, R Wessel and J Wouters (eds), *Informal International Lawmaking* (Oxford University Press 2012).

[4] L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 3; See also the classical definition by F Snyder, 'Soft Law and Institutional Practice in the European Community' in S Martin and F Snyder (eds), *The Construction of Europe: Essays in Honour of Emile Noël* (Kluwer Law International 1994) 197.

Soft law can contribute in different ways to differentiation processes in the European Union. It can be seen as participating in normative or "vertical" differentiation,[5] defined as a form of differentiation in the way the EU takes normative action, with modes of governance and rulemaking departing from the traditional narrative of Integration through (hard) law.[6] But, of course, differentiation is also (and mainly) considered in its territorial dimension ("horizontal differentiation").[7] When EU decision-makers purposively choose that rules do not apply evenly in the territory of the Union, in order to make integration possible, and when this choice is enshrined either in primary law or in secondary law, differentiation then takes the specific form of differentiated integration. Differentiation can thus be presented either as a way to further integration or as a factor leading to disintegration.[8]

The main aim of this *Article* is to develop a typology of scenarios showing how soft law contributes to our understanding of differentiation and to the overall discussion about integration/disintegration in the European Union. More precisely, this *Article* will try to uncover the dynamics of soft law, differentiation, integration and disintegration in a context of multiple crises, which can be seen as a disruptive phenomenon.

To do so, section II will provide basic assumptions about, the crises, soft law and differentiation in the European Union respectively. Based on these assumptions, section III will present three scenarios aimed at catching the dynamics of soft law and differentiation with a view to better understanding their contribution to integration or disintegration processes. Section IV will discuss the factors that make these scenarios more or less likely.

II. Basic assumptions regarding crises, soft law and differentiation

This section presents three main assumptions regarding crises and integration/disintegration, differentiation and soft law.

First, the EU is facing a context of political and economic turbulences. Are there more crises than before? Are these crises more intense than prior crises? This is not so easy to say, and historical studies often remind us of the severity of certain past crises.[9] It is

[5] D Leuffen, B Rittberger and F Schimmelfennig, *Differentiated Integration: Explaining Variation in the European Union* (Palgrave Macmillan 2012).

[6] M Cappelletti, M Seccombe and J Weiler (eds), *Integration Through Law: Europe and the American Federal Experience* (de Gruyter 1985).

[7] D Leuffen, B Rittberger and F Schimmelfennig, *Differentiated Integration* cit.

[8] H Vollaard, *European Disintegration: A Search for Explanations* (Springer 2018); B Rosamond, 'Theorising the EU in Crisis: De-Europeanisation as Disintegration' (2019) Global Discourse: An Interdisciplinary Journal of Current Affairs 31.

[9] D Dinan, 'Crises in European History' in D Dinan, N Nugent and W Patterson (eds), *The European Union in Crisis* (Palgrave Mcmillan 2017).

however correct to say that the current context is undoubtedly a difficult one, with multiple layers of crises that occurred successively and sometimes simultaneously.[10]

Since the early 1990s, the permissive consensus[11] whereby citizens supported EU integration without putting much interest in it, and left it to the governments to advance EU integration in their own way, has come to an end, and has been replaced by a constraining dissensus (governments being constrained by different forms of citizens' opposition to policies and a general resistance to European integration).[12]

This general context has developed into different crises such as the rejection of revision treaties and of the Constitutional treaty more particularly, the economic and financial crisis, the migration crisis, the rule of law crisis, Brexit, the Covid-19 pandemic, the war in Ukraine and its consequences at EU level. The rise of populism, Euroscepticism and assertions of national sovereignty have made disintegration possible.[13] The EU and its Member States are placed in a situation where the need arises to choose between, on the one hand, avoiding exits at all costs and, on the other, accepting exits for the sake of the Union and with potential benefits in terms of integration. Against this background, soft law is sometimes presented as a valid option to convince reluctant Member States to stay on board. It allows, on the one hand, for implementation to the extent and the pace Member States wish, and on the other to retain the argument of sovereignty as non-compliance is not linked to sanction but can be presented to the voters as a learning process if soft law is indeed followed.

The second assumption is based on the idea that territorial differentiation has increased since the 1990s in at last two different directions. On the one hand, differentiated integration has been used in several areas such as Economic and Monetary Union, the Schengen area, CFSP-CSDP, based on the -contested- idea that it is a good way to further integration in a context of crisis. On the other hand, differentiation has aroused from the attitude of Member States resisting and contesting EU law. One example of this is the United Kingdom deciding to move towards Brexit.[14] Another example is given by Poland and Hungary, which challenge the rule of law through reforms threatening the

[10] M Riddervold, J Trondal and A Newsome (eds), *The Palgrave Handbook of EU Crises* (Palgrave Macmillan 2021); M Matthijs, 'Lessons and Learnings from a Decade of EU Crises' (2020) Journal of European Public Policy 1127.

[11] LN Lindberg and SA Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Prentice Hall 1991).

[12] L Hooghe and G Marks, 'A Postfunctionalist Theory of European Integration: From Permissive Consensus to Constraining Dissensus' (2009) British Journal of Political Science 1.

[13] H Vollaard, *European Disintegration* cit.; B Rosamond, 'Theorising the EU in Crisis' cit. 31.

[14] F Schimmelfennig, 'Brexit: Differentiated Disintegration in the European Union' (2018) Journal of European Public Policy 1154; B Rosamond, 'Brexit and the Problem of European Disintegration' (2016) Journal of Contemporary European Research 864; B Leruth, S Gänzle and J Trondal, 'Exploring Differentiated Disintegration in a Post-Brexit European Union' (2019) JComMarSt 1013; B Leruth, S Gänzle and J Trondal, *Differentiated Integration and Disintegration in a Post-Brexit Era* (Routledge/UACES 2019).

independence of justice and the media.[15] These different forms of resistance and contestation can be considered as a direct threat to European values and norms enshrined in the Treaties.

The third assumption refers to the idea that soft law is said to be increasingly used since the early 1990s, in particular – but not only – in areas of competences posterior to the Treaty of Maastricht.[16] The EU would more and more rely on informal means, instead of formal ones. Soft instruments such as conclusions, communications, resolutions, strategies, programmes, codes of conduct, guidelines, arrangements, memoranda of understanding, would have mushroomed from the post-Maastricht period onwards. This trend would affect both internal and external policies.[17]

The growing use of soft law is not so easy to prove, as it requires comprehensive and systematic analyses.[18] The use of soft law at EU level may vary across policies and be sensitive to crisis situations, which makes generalization difficult. While we can measure the increase of soft law rules in the EU by counting their number, measuring their use by different actors is empirically and methodologically more complex. Datasets of soft and hard law, such as the one developed in the EfSoLaw project,[19] are indeed needed to fill this gap in the literature. Yet, there is sufficient evidence to say that, at critical moments and in a number of important policy areas, informal means are chosen over formal ones.

The increase of soft law in the EU is connected to two complementary evolutions: first, the desire of the European Union to coordinate policy areas outside the classical Community Method. These coordination methods are not based on hard law but try to create homogeneity through collective learning instruments such as the open method of coordination, or new modes of governance more generally, which are mostly based on

[15] L Pech and K Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) CYELS 3; RD Kelemen, 'Is Differentiation Possible in Rule of Law?' (2019) Comparative European Politics 246; S Saurugger and F Terpan, 'Differentiation and the European Court of Justice' in B Leruth, S Gänzle and J Trondal, *Differentiated Integration and Disintegration in a Post-Brexit Era* cit. 231.

[16] F Terpan, 'Soft Law in the European Union' cit.

[17] B Van Vooren, 'A Case-Study of "Soft Law" in EU External Relations: The Neighbourhood Policy' (2009) ELR 704; RA Wessel, 'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements' (2021) West European Politics 72.

[18] Arguing in favour of a growing use of soft law: A Zhelyazkova and others, 'Beyond Uniform Integration? Researching the Effects of Enlargement on the EU's Legal System' (MAXCAP Working Paper Series 8/2015).

[19] The EfSoLaw project analyses the "Effects of Soft Law in EU Multilevel Governance" based on a large dataset of soft and hard instruments. See the EfSoLaw website at www.efsolaw.eu, and for a presentation of the dataset: B Cappellina, 'EfSoLaw: A New Data set on the Evolution of Soft Law in the European Union' (August 2020) ECPR Virtual General Conference 2020; B Cappellina and others, 'Ever More Soft Law? A Dataset to Compare Binding and Non-binding EU Law across Policy Areas and over Time (2004-2019)' (15 July 2022) European Union Politics 741.

soft law.[20] Second, when hard law is used to regulate "old" policy fields decided under the Community Method, it is often combined with soft law.

Among the different reasons potentially explaining the use of EU soft law,[21] protecting Member States' sovereignty seems to be most convincing. In a context of crisis, and maybe even more in a post Brexit era, EU institutions and Member States are searching for effectiveness while avoiding sovereignty losses.[22] It is no surprise that soft instruments are particularly used in times of crisis. When decisions are difficult to make, informal law-making has the double advantage of being easier to adopt and of avoiding binding commitments. More generally, in a period of tensions over sovereignty, as is the one opened by the end of the permissive consensus, it makes sense to see the EU using informal means quite extensively. Soft law, as part of the so-called new modes of governance, was presented by the Commission in its White Paper of 2000 as a means of European integration.[23] It was supposed to convince the Member States to converge on common objectives without constraining them.

However, when focusing on the consequences of a more systematic use of soft law, we observe that it can be a source of normative differentiation and a challenge to integration through law. Integration through law, according to the seminal work of Cappelletti, Seccombe and Weiler in the mid-1980s,[24] is one of the central explanations of the EU integration process. The Court of Justice of the European Union (CJEU) would be instrumental in fostering EU integration through judicial activism.[25] Legal integration triggered by the Court would compensate for the lack of political will of the Member States and the blockades of decision-making in the Council of Ministers. The Community Method and hard law in the form of regulation, directives, external agreements as well

[20] J Scott and DM Trubek, 'Mind the Gap: Law and New Approaches to Governance in the European Union' (2002) ELJ 1; DM Trubek and LG Trubek, 'The Open Method of Coordination and the Debate over "Hard" and "Soft" Law' in J Zeitlin, P Pochet and L Magnusson (eds), *The Open Method of Co-ordination in Action: The European Employment and Social Inclusion Strategies* (Peter Lang 2005) 83.

[21] Many reasons are usually advanced to explain why actors make use of soft law although formal instruments are available. It would bring greater smoothness in the negotiation and the conclusion of the instruments. It would help decreasing transaction costs during the negotiations. The States could not agree on a formal arrangement. It is meant to be efficient while remaining flexible. It is more respectful of Member States sovereignty as the Court of Justice is not supposed to exert judicial control and the Parliament is not so much involved.

[22] C Bickerton, D Hodson and U Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford University Press 2015).

[23] European Commission COM(2001) 428 final of 12 October 2001 European Governance: A White Paper eur-lex.europa.eu.

[24] M Cappelletti, M Seccombe and J Weiler (eds), *Integration Through Law* cit.

[25] S Saurugger and F Terpan, *The Court of Justice of the European Union and the Politics of Law* (Palgrave Macmillan 2017); H Rasmussen, 'Between Self-restraint and Activism: A Judicial Policy for the European Court' (1988) ELR 28; B de Witte, M Dawson and E Muir (eds), *Judicial Activism at the European Court of Justice: Causes, Responses and Solutions* (Edward Elgar 2013); A Grimmel, 'Judicial Interpretation or Judicial Activism? The Legacy of Rationalism in the Studies of the European Court of Justice' (2012) ELJ 518.

as Court rulings, would prevail over soft law. In line with the integration through law narrative, the EU has been described as an organization based on the rule of law,[26] with EU law being increasingly constitutionalised.[27] However, since the early 1990s, the integration through law narrative has been revisited or even contested at different levels.[28] Hence, the CJEU would exert self-restraint instead of activism,[29] the Community Method would be challenged by new modes of governance, or soft law would figure prominently among the factors that are said to be challenging integration through law. The growing use of soft law in the European Union is indeed a departure from the classical forms of legal integration, with possible effects in terms of differentiation and disintegration.

III. The dynamics of soft law, differentiation, integration/disintegration: three scenarios

Indeed, what are the effects of soft law on the EU integration process? Is soft law an effective tool to bring integration forward or to make Member States coordinate their policies? Does it contribute to weld the Member States together? Is integration through soft law a valid alternative to integration through law? These questions are complex. The literature dealing with soft law and new modes of governance is divided on the issue, a first group claiming that soft law and new modes of governance have an impact[30] while another one argues in the opposite direction.[31] The gap between the two groups may not

[26] K Lenaerts, 'New Horizons for the Rule of Law within the EU' (2020) German Law Journal 29.

[27] J Gerkrath, *L'émergence d'un droit constitutionnel pour l'Europe: Modes de formation de la constitution des communautés et de l'union européenne* (Editions de l'Université de Bruxelles 1997); N Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (Cambridge University Press 2010); F Terpan, 'Le constitutionnalisme européen: penser la Constitution au-delà de l'Etat' in *Mélanges en l'honneur du Professeur Henri Oberdorff* (Lextenso 2015) 181.

[28] D Augenstein (ed.), *Integration through Law' Revisited: The Making of the European Polity* (Routledge 2016).

[29] K Alter, 'The European Court's Political Power' (1996) West European Politics 458; R Dehousse, *The European Court of Justice: The Politics of Judicial Integration* (Palgrave Macmillan 1998) 148; D Keeling, 'In Praise of Judicial Activism, but What Does It Mean? And Has the European Court of Justice ever Practiced It?' in C Gialdino (ed.), *Scritti in onore di Giuseppe Federico Mancini* (Giuffrè 1998).

[30] I Bruno, S Jacquot and L Mandin, 'Europeanization Through its Instrumentation: Benchmarking, Mainstreaming and the Open Method of Co-ordination... Toolbox or Pandora's Box?' (2006) Journal of European Public Policy 519; K Jacobsson, 'Soft Regulation and the Subtle Transformation of States: The Case of EU Employment Policy' (2004) Journal of European Social Policy 355; S Jacquot, 'The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain' (2010) West European Politics 118; CF Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press 2010).

[31] V Hatzopoulos, 'Why the Open Method of Coordination is Bad for You: A Letter to the EU' (2007) ELJ 309; E Radulova, 'Variations on Soft EU Governance: The Open Method(s) of Coordination' in D De Bièvre and C Neuhold (eds), *Dynamics and Obstacles of European Governance* (Elgar 2007) 3; DM Trubek and LG Trubek, 'Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination' (2005) ELJ 343.

be so large, in reality, and could be partially explained by the way scholars see the glass, either half-full or half-empty. To get a clearer picture, more studies dealing with the use or the implementation of soft law at Member States' level are needed, in line with the work done within the SoLar[32] and the EfSoLaw[33] projects. In the context of this *Article*, three main scenarios are proposed to capture the dynamics between soft law, differentiation and integration/disintegration.

III.1. Soft law, territorial differentiation, disintegration

In this first scenario, soft law leads to more territorial differentiation because the implementation of soft law creates variations across Member States. The idea that soft law would help harmonizing domestic rules by convincing national governments instead of constraining them[34] is highly debatable. Resistance to soft law takes the same forms than resistance to hard law.[35]

Focusing on implementation at national level, Oana Stefan explains that "Member States chose between various options, which seem to reflect the continuum of 'legalisation' ranging from full engagement with soft law in the text of national hard law to brief website references and no engagement at all".[36] In the same vein Trubek and others argue that soft law gives consideration to divergent national circumstances "through flexible implementation", which offers Member States leeway to adapt European norms to national economic and social contexts.[37] This can lead to an anarchical situation regarding soft law implementation by the Member States, or at least to a clear-cut distinction between groups of state, with one group fully implementing soft rules while another one would not. In both cases, the result is further differentiation among the Member States.

Based on the observation that soft law favours differentiation, it remains to be seen whether the flexibility of soft law implementation contributes to disintegration or integration.

At first sight, the difference between soft and hard law does not seem significant in its overall impact on the dynamics of integration. Directives are transposed in various

[32] NoLesLaw, *European Network on Soft Law Research* noleslaw.net; see also, founded on empirical work undertaken by the European Network of Soft Law Research (SoLaR), across ten EU Member States, in competition policy, financial regulation, environmental protection and social policy: M Eliantonio, E Korkea-aho and S Oana Stefan (eds), *EU Soft Law in Member States: Theoretical Findings and Empirical Evidence* (Bloomsbury 2021).

[33] See also B Cappellina and others, 'Ever More Soft Law?' cit. 741.

[34] European Commission COM(2001) 428 final cit.

[35] S Saurugger and F Terpan, 'Resisting New Modes of Governance: An Agency-Centred Approach' (2016) Comparative European Politics 53; S Saurugger and F Terpan, 'Studying Resistance to EU Norms in Foreign and Security Policy' (2015) European Foreign Affairs Review 1.

[36] O Stefan, 'The Future of EU Soft Law: A Research and Policy Agenda for the Aftermath of COVID-19' (2020) Journal of International and Comparative Law 329.

[37] DM Trubek, MP Cottrell and M Nance, "'Soft Law", "Hard Law", and EU Integration: Toward a Theory of Hybridity' in J Scott and G de Búrca (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 88.

forms at national level and non-compliance with EU law exists, despite the possible opening of an infringement procedure. Member States benefit from different types of opt outs from primary and secondary law, even in policy areas at the core of European integration.[38] On this basis, soft law should not lead to disintegration, at least no more than hard law does. However, it can be argued that the flexible implementation of soft law results in more diversity than the transposition of directives, as no real legal constraints are provided for in soft law acts. Thus, if soft law is increasingly used in EU policymaking, and if it is used in areas where hard instruments could have been adopted, then we can conclude that soft law would not only lead to differentiation but also to disintegration.

The EU's migration policy offers a good example of such an evolution, with many soft rules adopted since 2015 in a policy field where hard instruments could have been widely used.[39] Trauner and Slominski have shown that, in the wake of the 2015/2016 migration crisis, EU policy-makers have urged returning more irregular migrants based on a series of non-binding documents for European administrations (such as the EU Return Handbook) and informal agreements signed with third countries.[40] Ramses Wessel confirms the rise of "soft" international agreements in establishing relations with non-EU States.[41] The softening of the EU's migration policy can be seen as a factor of disintegration at policy level. Should the same evolution occur in other areas, then the softening of EU law would be a factor of disintegration at EU level more generally.

In addition to this, it should be noted that soft law is criticized for undermining the legitimacy of the European Union. The choice of soft law over hard law circumvents the Parliament and creates a problem in terms of accountability. In addition to this, the use of soft law has an impact on justiciability and judicial review. By using informal means, the EU Member States escape the jurisdiction of the Court and challenge the rule of law. Although the Court of Justice in a few cases[42] has opted for an extensive interpretation of its own competence, in order to get a grip on some aspects of CFSP, and in the end, to protect the powers of the Parliament, it is not supposed to review the legality of a soft instrument, and in this case, there is no possible protection of the Parliament by the Court when soft instruments are chosen over hard ones.

[38] G de Búrca, 'Differentiation within the "Core"? The Case of the Internal Market' in G de Búrca and J Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000) 133.

[39] F Terpan and S Saurugger, 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity' (2021) West European Politics 21.

[40] P Slominski and F Trauner, 'Reforming Me Softly: How Soft Law has Changed EU Return Policy since the Migration Crisis' (2021) West European Politics 93.

[41] RA Wessel, 'Normative Transformations in EU External Relations' cit.72.

[42] Case C-658/11 *Mauritius* ECLI:EU:C:2014:2025; case C-263/14 *Tanzania* ECLI:EU:C:2016:435; case C-72/15 *Rosneft* ECLI:EU:C:2017:236.

III.2. Soft law, territorial differentiation, integration

In this second scenario, a large use of soft law may at first produce differentiation but, contrary to the first scenario, would result in more integration. The evolution of macroeconomic and fiscal governance provides a good example of this causal sequence.

Depending on their budgetary situation, the Member States are submitted to different Country Specific Recommendations, which are policy recommendations made by the European Commission and endorsed by the Council after evaluation of the National Reforms Programmes submitted by EU Member States as part of the European Semester. As Bruno de Witte argues, "[i]n some policy areas, country-specific measures are ubiquitous and outnumber the acts with general territorial application. This is the case in macro-economic and fiscal governance, where the EU institutions adopt a myriad of decisions and recommendations addressed to individual countries, sometimes with major implications for their domestic policies. Such frequent renunciation to the uniform application of common norms is rare in unitary states and even in federal states".[43] In sum, Member States are placed in different situations regarding soft law, which seems to lead to territorial differentiation. However, it can be argued that the Country Specific Recommendations are turned towards the same objectives, which favours convergence between Member States' economies and strengthens integration. And on a broader level, macroeconomic and fiscal governance has finally been hardened, thanks to a series of reforms made in-between 2010 and 2013, confirming that soft law has not been part of a disintegration process. This period saw the creation of the European Semester in 2010,[44] followed in 2011 by the so-called "Six-Pack", five regulations and one directive, reinforcing the Stability and Growth Pack. In February 2012, the Eurozone member states adopted a permanent European Stability Mechanism (ESM), allowing for the issuing of emergency aid to Euro area countries. In March 2012, the intergovernmental "Fiscal Compact" (Treaty on Stability, Coordination and Governance in EMU (TSCG)) was signed by 25 of 27 EU Member States, with the exception of the United Kingdom and the Czech Republic. The TSCG/Fiscal Compact aims at reinforcing the Stability and Growth Pact though the introduction of new control mechanisms. It requires national budgets to be balanced or show a surplus: this so-called "golden rule" has to be incorporated into national law within one year of the entry into force of the treaty. With the entry into force of the TSCG, the CJEU supervises the enforcement of the new budget rules.

[43] B De Witte, 'Variable Geometry and Differentiation as Structural Features of EU Legal Order' in B De Witte, A Ott and E Vos (eds), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law* (Edward Elgar 2017) 19-20.

[44] Communication COM(2010) 250 final from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions of 12 May 2010 about reinforcing economic policy coordination.

III.3. Soft law, uniformly applied, integration

Finally, in the third scenario, soft law rules are adopted at EU level and implemented in a uniform manner at Member States' level. Therefore, they do not trigger territorial differentiation but on the contrary, they contribute to further integration.

An example of this can be found in social policy. The 2003 Directive on Working Time,[45] for instance, has been a controversial issue, before and after its adoption, with the CJEU delivering a number of highly discussed rulings on the definition of working time and rest periods.[46] In 2017, the Commission has adopted an Interpretative Communication on this Directive, a soft law act addressing problems with the implementation of the Directive. As argued in a collective publication of the SoLar project, "administrative actors in the Member States have happily used the clarifications", which led to uniform implementation and reinforced integration.[47]

IV. Factors making these scenarios more or less likely

What factors make these three scenarios more or less likely to occur? The argument here is that the causal chain between soft law, differentiation and integration/disintegration depends on factors inherent in the soft law instrument as well as factors to be found in the legal/political system of the European Union.

IV.1. Factors inherent in the soft law instrument

Far from being a uniform category, soft law is made of very different instruments and norms. Two main differences are worth studying in the context of this *Article*: first, the relation between the soft instrument and hard law, and second, the existence, or absence, of an enforcement measure within the instrument. Schematically, soft instruments can be divided in two main categories: steering soft law is adopted as an alternative to hard law (para law) while interpretative soft law is adopted to complement an existing hard instrument (post law). Intuitively, it seems more likely that interpretative soft law leads to uniform application and thus integration as hard law already regulates the policy field and soft law in this field is only used to provide supplementary guidelines. On the contrary, steering soft law would rather lead to differentiation and be a factor of disintegration, unless it proves to be effective in the long run.

The existing literature does not provide irrefutable evidence in this regard. Since their preferences are heterogenous, the Member States might have difficulties to agree on

[45] Directive 2003/88/EC of the Council and the European Parliament of 4 November 2003 concerning certain aspects of the organisation of working time.

[46] Case C-303/98 *SIMAP* ECLI:EU:C:2000:528 or recently case C-55/18 *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE* ECLI:EU:C:2019:402.

[47] M Hartlapp and others, *Studying EU Soft Law Effects in Social Policy* (King's College London Law School Research Paper Forthcoming 2020) SSRN papers.ssrn.com 22.

binding measures in particular policy fields and opt for soft measures as an alternative to soft law (soft steering measures). Instances of these decisions can be found in macroeconomic governance and in some areas of social policy. Based on the assumption made above, the effectiveness of para law (steering soft law) should be low. However, as seen in the previous section, empirical evidence shows variation.

Similarly, it has not been clearly proven that post law (interpretative soft law) is more effective. We have seen that the Commission Communication on the Working Time Directive, an example of post law, has led to uniform implementation.[48] Yet, there are counterexamples showing that post law may also trigger differentiation. The Commission has decentralized state aid control to national authorities, through soft rules, within the so-called SAM package (State Aid Modernization), in order for the Commission to focus its own enforcement on cases having the largest impact on the internal market. This has been presented as resulting in more differentiation, with state aid control varying a lot across Member States.[49] More systematic empirical evidence is therefore required, beyond these examples, to see whether the type of soft law is a pertinent factor.

The second factor intrinsic to the soft law instrument is related to enforcement. Soft law would more likely result in uniform application and integration if it is backed up with some kind of soft enforcement mechanism, such as monitoring by the Commission, for instance. It is often assumed that the lack of judicial control makes soft law ineffective or that it explains a very flexible implementation of soft law, but we do not really know whether the existence of a soft enforcement mechanism makes a difference compared to no enforcement at all.[50]

In some cases, soft law is not supposed to be controlled by a Court, nor is it framed by legal sanctions, but it may finally be subject to different forms of control and sanctions. A first possibility is that the CJEU finally decides to give legal effect to a soft act.[51] Another possibility is related to non-legal forms of constraints. For instance, during the economic and financial crisis the Greek government had to decide on a number of reforms under a Memorandum of Understanding (MoU) signed with the Commission and the International Monetary Fund. The MoU was clearly soft law, and as such not placed under the jurisdiction of the CJEU, but there were other types of possible sanctions in case Greece refused to "comply", starting with the withdrawal of financial support.[52]

[48] Directive 2003/88/EC cit.

[49] CM Colombo, 'State Aid Control in the Modernisation Era: Moving Towards a Differentiated Administrative Integration?' (2019) ELJ 292.

[50] A Ausfelder and others, 'EU Soft-Law: Non-binding but Enforceable' (29 June 2022) Paper presented at the 28th International Conference of the Europeanists, Council for European Studies, Lisbon (on file with the author).

[51] E Korkea-aho, *Adjudicating New Governance: Deliberative Democracy in the European Union* (Routledge 2015).

[52] S Saurugger and F Terpan, 'Do Crisis Lead to the Policy Change? The Multiple-Streams Framework and the EU's Economic Governance Instruments' (2016) Policy Sciences 35.

IV.2. Factors related to the system of the EU

Three other factors are to be found in the overall system of the European Union.

First, soft law and the integration/disintegration perspectives might be linked to the context of a political or economic crisis. It can be argued that the severity of the crisis increases the likeliness for soft law to be transformed into hard law, and thus would further integration in the end.[53] But we already know that it is not necessarily the case. In recent years, we have witnessed integration processes in economic and financial governance, but not in migration policy.[54] For crises to have integrative effects, there must be specific conditions in the legal and political system.

The second systemic factor refers to the stringency of the EU's legal system. Against the idea of soft law triggering an evolution towards disintegration, a number of legal safeguards within EU law seem to prevent excessive differentiation and disintegration. The use of informal law-making should respect the principle of conferral (art. 5 TEU) and other principles such as institutional balance (art. 13 TEU),[55] sincere cooperation, coherence, and solidarity. It should also be respectful of fundamental rights as enshrined in the European Charter of Fundamental Rights. Generally speaking, and as seen before, the Court is protective of the EU legal order and can even decide that an informal instrument is in reality a binding commitment, because it was the intention of the parties to make it legally binding.

Finally, the third factor is to be found in the European system of actors. Here, the causal chain would include a small group of Member States and institutions, acting as policy entrepreneurs, and creating a large coalition in favour of integrative solutions.[56] Under these conditions, soft law would finally be transformed into hard law, and further integration. In an integrated organization such as the European Union, the governance system sometimes triggers hardening processes. This was the case for Justice and Home Affairs (JHA), the first pillar of the Maastricht Treaty, which is more and more embedded in hard law since the Amsterdam Treaty (partial communautarisation of JHA) and the Lisbon Treaty (end of the pillar structure). CFSP has also been partially "legalized", with for instance the possibility to conclude external agreements recognized by the Amsterdam Treaty, while only memoranda of understanding and informal agreements used to be concluded. The European Charter gives another example of a soft law act being transformed into hard law, thanks to the Lisbon Treaty. These examples show that the use of soft law at EU level may be a pathway leading to more classical formal integration.

[53] *Ibid*.

[54] F Terpan and S Saurugger, 'Soft and Hard Law in Times of Crisis' cit.

[55] For example: case C-233/02 *France v Commission* ECLI:EU/C/2004/173; see also P García Andrade, 'The Distribution of Powers Between EU Institutions for Conducting External Affairs through Non-Binding Instruments' (2016) European Papers www.europeanpapers.eu 115.

[56] S Saurugger and F Terpan, 'Do Crisis Lead to the Policy Change?' cit.

V. Conclusion

Is soft law challenging the idea of integration through law by increasing differentiation in the European Union? Or is it a viable solution to further integration in the post-Brexit era? This *Article* has shown that it is difficult to come up with a clear-cut answer to this question.

On the one hand, soft law acts indeed as a solution, at least a temporary one, to help continue the integration process in a context of crisis. It triggers a temporary process of differentiation, which in turn leads to Member States' convergence and integration through the hardening of soft law. But, on the other hand, it also contributes to the "problem" in a period where EU law is already facing many difficulties such as challenges to the rule of law in some Member States, contestation of the primacy principle, contestation of the CJEU and its monopoly over the interpretation of EU law. In this context, the increasing use of soft law for reasons related to the protection of sovereignty could also be seen as a threat if it systematically and continuously results in more differentiation. Soft law would then trigger a process of "normalization" of the European Union, which would more and more resemble a classical international organization, due to a larger use of informal law-making. In the end, the use of informal means in the EU would contribute to decrease the EU's distinctiveness as an integrated regional organization based on integration through law and a relatively high degree of legitimacy.

Henceforth we will have to further investigate: first, whether the characteristics of soft law (steering or interpretative; backed up or not backed up with some enforcement mechanism) determine the outcome in terms of differentiation and integration, and second, whether the legal and political EU system is strong enough to prevent normative and territorial differentiation from escalating, and preserve the integration through law narrative.