

Explaining the transformations of law
The cases of economic governance, migration and cybersecurity

Sabine Saurugger
Sciences po Grenoble, Univ. Grenoble Alpes, PACTE

Fabien Terpan
Sciences po Grenoble, Univ. Grenoble Alpes, CESICE

EUSA Conference, Denver, May 2019

Draft

Abstract

European integration is associated with the idea of an 'Ever closer Union'. This approach, however, seemed to have lived: While directives and regulations are still the cornerstones of the European political system, soft norms are increasingly added. The EU's polycrisis has reinforced this diagnosis: the Schengen rules have been suspended, negotiations amongst member states in other areas seem to dawdle on. At the same time however, in other areas, such as EMU or cybersecurity, rules have been strengthened, and regulations reinforced. This paper seeks to explain when, how and why these norms have been transformed in different directions: economic governance, migration and cybersecurity have all been affected by crises, but while some have become softer, understood as delegalization, others have hardened (legalization).

Based on a law-and-politics approach, which combines policy approaches and legal analysis, the article develops a series of assumptions explaining legalization and delegalization. Three potential explanations are analysed: the impact of crises (is the occurrence of an –internal or external- crisis the main driving factor for normative changes?); the weak implementation of norms (are changes due to a malfunctioning of an existing norm? or, on the contrary, does it occur when norms are correctly implemented?); the heterogeneity of the entrepreneurship, on the hand of supranational institutions, on the other of member state governments.

1. Introduction

European integration is associated with the idea of an 'Ever closer Union', based on integration through law (Cappelletti et al. 1986). While directives and regulations are still the cornerstones of the European political system, softer norms have been increasingly added, and sometimes replaced, hard law. The European Union's polycrisis has reinforced this development: the Schengen rules have been suspended, negotiations amongst member states in other areas seem to dawdle on. At the same time however, in other areas, such as EMU or cybersecurity, rules have been strengthened, and regulations reinforced.

This paper seeks to explain when, how and why the law of the European Union has been transformed in three policy-areas: economic governance, migration and cybersecurity policies. More precisely, which are the factors triggering the transformation of soft law into hard law, and vice versa? Three types of explanations can be distinguished in the literature: crisis, entrepreneurs and regulatory impact. Hence, at a time where the European Union is said to be in a situation of crisis, a number of authors see this factor as a determinant variable of norm transformation (Fabbrini 2013; Schimmelfennig 2014; De la porte & Heins 2016; Jones et al 2016). Additionally, studies on regulatory policy and impact assessment have shown, that compliance and implementation problems of pre-existing policies can be the determinant factor for norm transformation (Jacobsson 2004; Breeman & Zwaan 2009; Hartlapp 2019). Finally, actor-centred policy approaches have identified additional aspects for norm change, insisting in particular on different types of member state and/or institutional entrepreneurship as a predominant reason (Galanti 2018; Jabko 2006; Saurugger 2013, Woll 2008).

The assumption on which this research is based is that EU norms can be placed on a law continuum made of soft and hard norms. Following the introduction of this special issue, the distinction between soft and hard law is determined by two elements: the binding nature of the norm and the enforcement mechanism that ensures compliance with the norm. Depending on the way these elements are combined, a norm, a legal act or an entire policy-area, can be placed at different points on the law continuum. When norms, acts and policy-areas are transformed, they may move on the law continuum.

This movement is called legalization when norms, acts and policy-areas become harder, and de-legalization when they become softer.

This article is structured as follows: In section two, we will present our conceptual framework from which our assumptions are drawn, aimed at identifying and explaining the transformation of law. In section three, we will apply it, to our three case studies.

2. Identifying and Explaining the Transformation of Law

The transformation of law, as one of the institutional building blocs of public policy, is a dynamic process at the heart of every political system. If we consider law as one of the institutions of public policy, explanations of its transformation can be found in the literature on institutional change. Schematically speaking three types of explanations can be distinguished, focusing first on the impact of crises understood as windows of opportunity or focusing events (Kingdon 1984; Birkland 1997; Zahariadis 2008, 2014), a second approach concentrating on implementation feedbacks, according to which the quality of policy implementation at the domestic level leads to feedback at the EU level law and policy-making; and finally an approach centred on actors, their entrepreneurship and their capacity to build coalitions (Mahoney and Thelen 2005 for a more institutionalist approach, Jabko 2006, Saurugger 2013 and Woll 2004 for a more actor-centred approach).

Crises, implementation and coalitions amongst policy entrepreneurs

Based on this literature, it is possible to develop three types of assumptions that will guide us through our three case studies.

The **first assumption** is based on the idea that legalization is mainly influenced by exogenous events. EU institutions are incited or forced to react to an external pressure that challenges the legal and political system. In particular, crisis situations open windows of opportunity that are used by political entrepreneurs to promote normative changes. In other words, **the stronger the crisis, the higher the probability of legalization.**

This assumption requires a clear definition of crisis. Our understanding of 'crisis' refers to a situation which: 1) threatens the high priority goals of the decision-making unit, 2) surprises the members of the decision-making unit by its occurrence, 3) creates a situation of urgency and restricts the amount of time available for response (Hermann 1969). To measure the severity of the crisis, we attribute a value (1 or 2) to each element of the crisis. Threat, surprise and urgency can be either weak (and get 1 point) or strong (and get 2 points) (Saurugger & Terpan 2016).

A threat is strong when the existence of a community is endangered and core values or life-sustaining systems of a community come under threat. An economic crisis of this type not only threatens job security and citizens' welfare benefits, but also undermines the trust in the economic system and destabilize the political system as well. A threat is weaker when it only affects the functioning of a specific policy-area without having such systemic consequences.

Surprise is stronger when it comes from an external unpredictable shock, such a monetary shock, a financial turmoil, or a military conflict, and weaker when it is caused by an internal policy problem. In both cases the crisis comes as a surprise, has not been anticipated, and therefore could not be prevented. But internal problems are less surprising than external shocks because they are frequent and inherent to the functioning of political systems, although not predictable.

Finally, a strong sense of urgency appears in case of an immediate problem that would worsen in case of non-action. The risk of worsening or escalation of the problem triggers a sense of urgency. When the problem is immediate but is not likely to dramatically worsen, then the urgency criteria is more weakly met. When the problem is serious but not immediate (climate change or pensions systems for example) (Boin et al. 2005, 3), there is no sense of urgency.

Based on the above, we can distinguish schematically between two extreme degrees of windows of opportunity. On the one hand a severe crisis, and hence a huge window of opportunity, whereby all three elements (threat of policy markers' high priority goals; surprise factor; time restrictions to react in order to prevent a worsening of the situation) are strongly present. On the other, a small window opening, whereby the three elements are much less present. According to this model, the larger window of opportunity would get 6 points while the smaller would only get 3. In between are

intermediary situations where the window is measured 4 or 5, meaning that some elements of the crisis are strong, others not.

A **second assumption** is based on the argument that normative changes are reactions or learning processes due to the failure of a pre-existing norm (Jacobsson 2004; Radaelli 2010; Dunlop & Radaelli 2016). With regard to the transformation of hard law and soft law, the explanation of these changes is to be found in the perceived efficacy of norms, be it soft or hard law. If soft law is perceived to have failed in a specific area of competence, then hard law will take the lead. In return, soft law can be chosen as a way to make norms more efficient. We might then argue that **the weaker the perceived (correct) implementation of a norm, the higher the probability of legalization.**

Finally, **the third assumption** is based on the idea that normative changes do result from the activism of actors. While we are convinced that non-state actors can have an important influence on decision-making processes, we concentrate here on two specific types of actors whose centrality in the decision-making process makes them crucial to analyse: Supranational institutions and member state governments. This is consistent with a broader argument in the literature focusing on policy entrepreneurs according to which bringing formal political institutions back into the policy entrepreneur debate better captures the agenda-setting as well as decision-making power of these types of actors (Zohlnhöfer et al. 2016).

Referring to *supranational institutions*, and close to Jabko's (2006) argument that supranational institutions are able to create a common understanding through the framing of a coherent argument, this article argues that the **stronger the entrepreneurship of EU supranational institutions (Commission, Parliament, European Central Bank, CJEU), the higher the probability of legalization.**

With regard to *member state governments*, the policy entrepreneur argument is based on the idea that, in the European Union, normative changes cannot be decided by a small number of member states, even powerful ones. This assumption is in contradiction with the idea that a few member states make decisions for the whole Union (Germany in the field of economics, the Franco-German tandem on institutional reforms, France in the field of security and defence). In this sense we would argue that

the stronger the entrepreneurship of the big Member States, the higher the probability of a legalization.

While these assumptions allow us to analyse the case studies systematically, a clear understating of the parameters of norm transformation is needed.

Identifying Norm Transformations

Normative changes can be situated on a *continuum* of EU norms. There is legalization when: 1) a non-legal norm becomes soft law (soft law creation); and 2) when soft law is hardened, which may take different forms: a non-legal norm becomes hard law; a soft norm slowly moves towards harder obligation or harder enforcement; soft law becomes hard law. Delegalization is defined as a process going in the opposite direction: hard law being soften because of either a weaker obligation or a weaker enforcement (hard law softening); a hard norm becoming soft law (hard law transformation into soft law); 3) soft law becoming even softer; a hard norm losing its legal nature (hard law disappearance); a soft norm losing its (quasi-)legal nature (soft law disappearance).

For the purpose of this special issue, we will focus on legalization processes only, and distinguish between two categories of legalization: the creation of soft law (see paragraph above, point 1); the hardening of soft law in its different forms (see paragraph above, point 2).

We will focus on legal and quasi-legal acts and treaty provisions, instead of looking at the levels of an entire policy or a specific norm.

Case selection

Methodologically, the research relies on the establishment of a comprehensive database on non-legal, soft law and hard law acts in specific policy areas, an in-depth analysis of secondary literature and press reviews on these policy areas. Three policy-areas will be studied more specifically: economic and financial governance (stability and growth pact and banking union), migration and cybersecurity. They have been chosen for three main reasons. First, they comprise different categories of norms (soft/hard),

which is a prerequisite for studying legalization. Second, in spite of some elements of continuity, they all have entered into some kind of policy change, although at different levels and to various degrees. We will check whether these changes have taken the form of creation of soft law or hardening of soft law. Third, they have been affected by different crises (migration crisis, cyber attacks, economic and financial crisis).

Economic and financial governance is a good case study due to recent evolutions (reform of the Stability and Growth Pact, creation of the banking union and the European Financial Stabilisation Mechanism), and the crisis context impacting the European Union, and the Eurozone more particularly.

In the field of migration law, several changes have been introduced first at treaty level, then at legislative level, although these changes never seriously questioned the prevalence of security concerns and economic interests over solidarity with migrants. The crisis, here, is due to the large number of migrants seeking to enter the territory of the member states since 2015 and challenging the existing rules of immigration and asylum law. In this field, we will look at general legislation on migration as well as EU rules on asylum and illegal immigration.

Our third case study –cybersecurity- has been mainly tackled through internal policies, although it may also concern CSDP in the specific case of cyberdefence. Again, there have been some evolutions in the area with a series of texts adopted and initiatives launched and developed. A crisis situation has resulted from cyberattacks against Estonia in 2007, which raised the awareness of the general public and member states' governments about the potential impact of such attacks. Since then, several attacks have targeted European countries.

3. Case studies: Legalization processes in economic governance, migration and cybersecurity

Economic governance

The EMU was established by the Treaty of Maastricht (1992) as a combination of hard and soft law (Dyson & Featherstone 1999). Whereas monetary policy was led by 'traditional' hard law, economic and financial governance was mostly based on softer norms. In more than two decades, however, many changes have affected this policy-area. Legalization processes may be identified in three main fields: budget monitoring; macro-economic strategies and surveillance; banking union.

The Stability and Growth Pact, adopted in 1997, deals with the **budget monitoring** (Graph 1) of the member states through measures that combine hard obligations with a soft enforcement (binding rules being placed outside the reach of the CJEU or any independent institution). Indeed, the SGP aims at keeping budget deficits below 3% of GDP and overall debt levels below 60% of GDP by threatening member states with a formal procedure of Commission 'blue letters' and, finally, severe financial penalties. Although the 3% and 60% limits are binding (hard obligation), the sanctions must be agreed on in the ECOFIN Council, and based on a qualified majority decision. As it is very unlikely that a large majority of the member states decide to sanction one of their own, and as the enforcement mechanism is weak, the rule itself contains an element of softness.

In 2002-03, France and Germany ran up 'excessive' deficits under the Pact definition. Although an early warning was recommended by the Commission, France and Germany managed to water down the SGP criteria to avoid further rebuke by the Commission (Dyson 2009). Instead of a reform aimed at strengthening the Pact and making it more coercive, this led to incremental adjustments to EMU at the EU level (Maher & Hodson 2001, Maher & Hodson 2004) and to the softening of different rules. As regards the corrective arm of the Pact, this concerns for example the definition of a 'severe economic downturn', which leads to exceptional and temporary breaches of the Pact, and therefore permits a more lenient assessment of these breaches within an excessive deficit procedure (Howarth 2007).

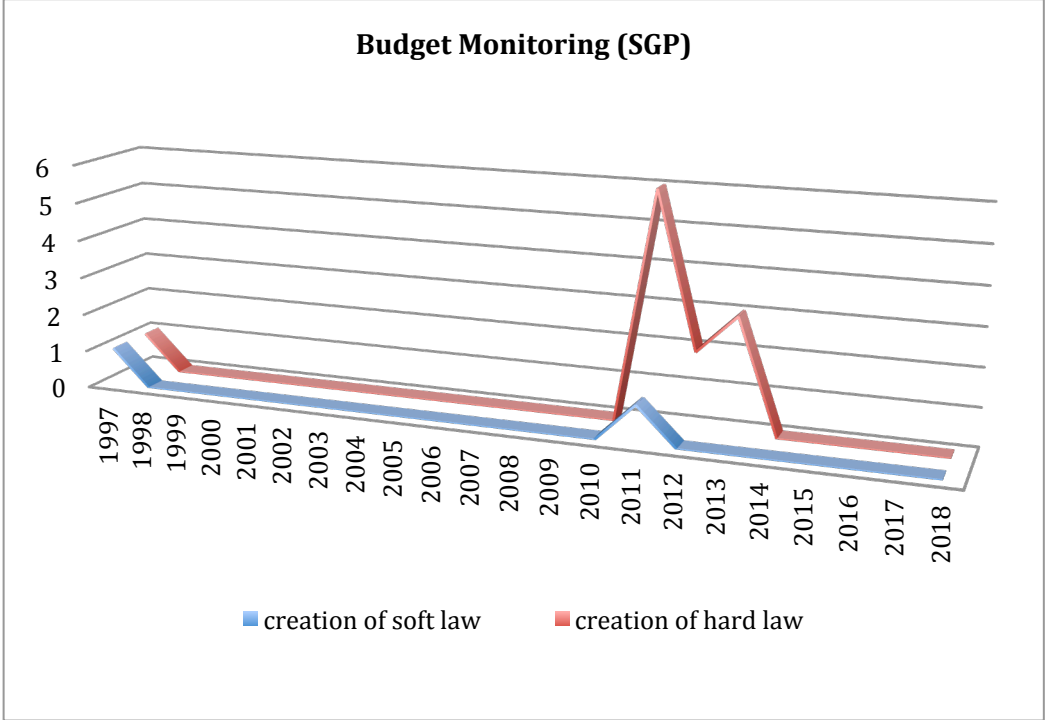
However, since 2010, in the context of the economic and financial crisis, there is a

clear evolution towards harder obligation and harder enforcement, as well as a profusion of legislative work. The EU member states' coordinated response took the form of a new set of rules enhancing EU economic governance: the European Semester in 2010, followed in 2011 by the so-called 'Six-Pack', five regulations and one directive reinforcing the Stability and Growth Pact even further. 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.

These reforms contain several rules that come very close to hard law or at least may be considered as a hardening of soft measures. For example, the TSCG/Fiscal compact aims at reinforcing the Stability and Growth Pact through 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 European Court of Justice supervises the enforcement of the new budget rules. Another example is the reversed majority voting in the Council. In case of a member state breaching the SGP, the Commission makes a recommendation to the Council, and the latter imposes the financial sanction unless a qualified majority of its members vote against it. This can be seen as a hardening of the enforcement mechanism.

These new hard enforcement mechanisms mean that budget surveillance has evolved towards hard law. However, a closer look shows that uncertainties and flexibilities remain regarding some elements like the definition of 'structural balance' and deficit, allowing for room of manoeuvre for member states. Moreover, the enforcement mechanism remains largely controlled by the member states (even under reversed majority voting), and thus cannot be seen as 'traditional' hard law (where an independent institution like the Court or the Commission exerts control) (Zeitlin 2016; Zeitlin and Vanhercke 2018).

Graph 1. Budget Monitoring (SGP) - A period of softness (1992-2009) followed by legalization since 2010



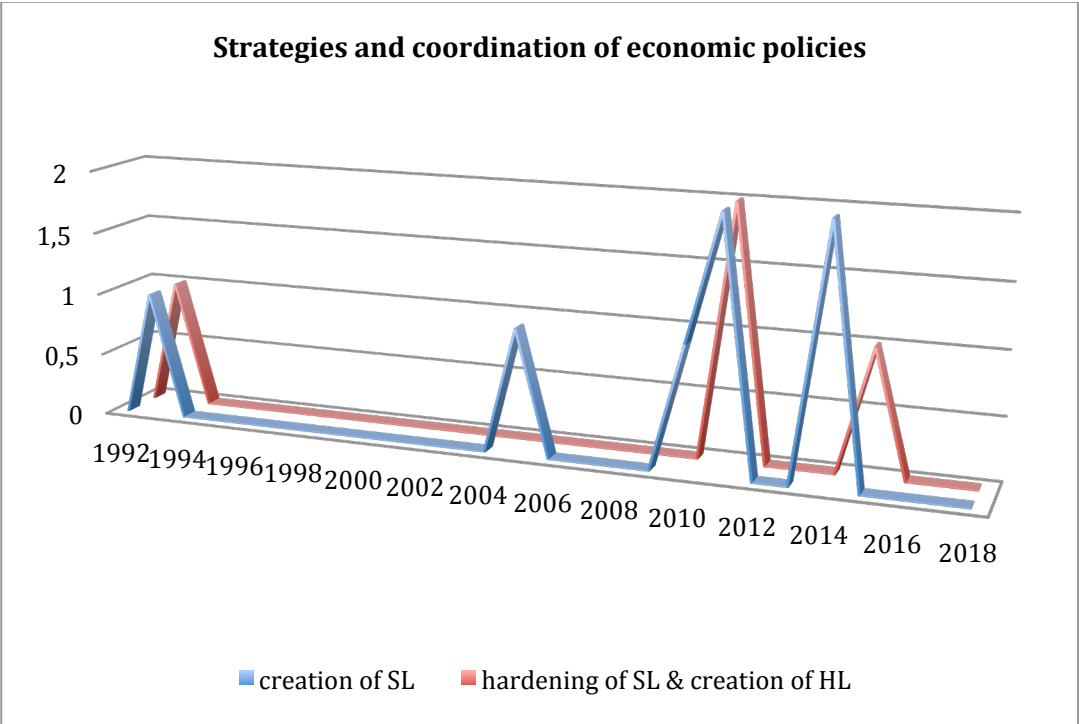
Macro-economic strategies and surveillance of macro-economic policies (graph 2) are a second domain of the economic governance. Macro-economic strategies, such as the Lisbon strategy or the strategy 2020, are soft law documents aimed at defining the objectives as well as the practical modalities to reach these objectives. Although some hard norms may be included in these documents, they can be considered as soft law as most of the targets that have been defined are not compulsory.

The coordination of macro-economic policies complements the strategies through informal mechanisms like programmes, codes of conduct, recommendations, guidelines, benchmarking or best practices. This type of mechanism matches the understanding of soft law as non-binding objectives combined with soft enforcement mechanisms (peer reviews and monitoring by the Commission or the Council).

A similar evolution towards hard law has occurred in this domain with the creation of macroeconomic imbalance procedure in December 2011. This procedure is a surveillance mechanism dealing with economic problems other than debt and deficits, and pertaining to major changes in international investment, exports, labour costs, private sector debt or housing costs. The Commission and the Council may intervene at

an early stage to prevent macroeconomic imbalances occurring and then setting requirements for correcting those imbalances. Just like in the SGP, when member states fail to correct these imbalances, it is now possible for the Commission to recommend financial sanctions that have to be adopted by the Council by reversed qualified majority. This mechanism is a harder form of enforcement, which, however, remains quite soft because the member states still have to decide in the end, rather than an independent institution.

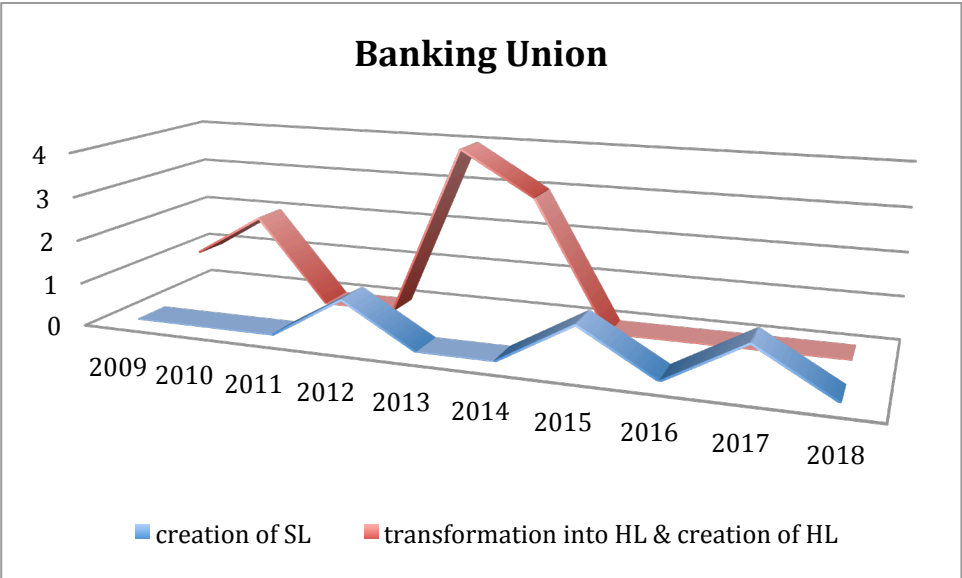
Graph 2. A period of softness (1992-2010) followed by legalization since 2010



Finally, the **Banking Union** (graph 3) has undergone a clear profusion of legalization, an evolution that has not been closed yet (Howarth and Quaglia 2016; Epstein & Rhodes 2016 & 2016a). Not less than six hard law instruments -four directives and six regulations- have been adopted in the field of Banking Union since 2009, combined with three softer ones –in the form of Commission’s communications. In particular, a new Deposit Guarantee Scheme was established, as well as a single supervisory mechanism (SSM) and a single resolution mechanism (SRM) for banks. A proposal on a common system for deposit protection is still pending and further measures could follow to tackle the remaining risks of the banking sector (such as those

related to non-performing loans). The Capital Market Union, linked to Juncker’s Investment Plan, also have banking aspects and remains one of the legislative priorities. In this field like in others, non-legal norms in form of Commission and Council communications could lead to hard law if they were transformed into proper legal acts. So far, there is a clear trend towards hard legalization since 2009, with a peak in 2013-14.

Graph 3. Banking Union: Legalization since 2009



Migration policy

From 1997 until 2014, both hard and soft law acts have been adopted in the field of migration (Trauner and Ripoll Servent 2014; Trauner 2016; Scipioni 2017). During this period, soft norms give a framework to the overall policy of the European Union in the field of migration (Trauner and Ripoll Servent 2016). They include: large programmes on migration like the ones adopted in Tampere (1999), The Hague (2004) and Stockholm (2009); communications of the Commission, in particular the communication on “establishing a framework programme on Solidarity and the Management of Migration Flows for the period 2007-2013” (COM/2005/0123 final) and the one on “enhanced intra-EU solidarity in the field of asylum” (november 2011); documents of

the Council such as the European Pact on immigration and asylum (October 2008). When it comes to the more specific topics of asylum and illegal immigration, hard instruments are widely used (Acosta Arcarazo & Geddes 2013; Cortinovis 2015). Rules regarding the protection of asylum are included in regulations and directives adopted in 2004-05 and 2013. In total, we found more hard law than soft law during this period of time, as graph 4 shows.

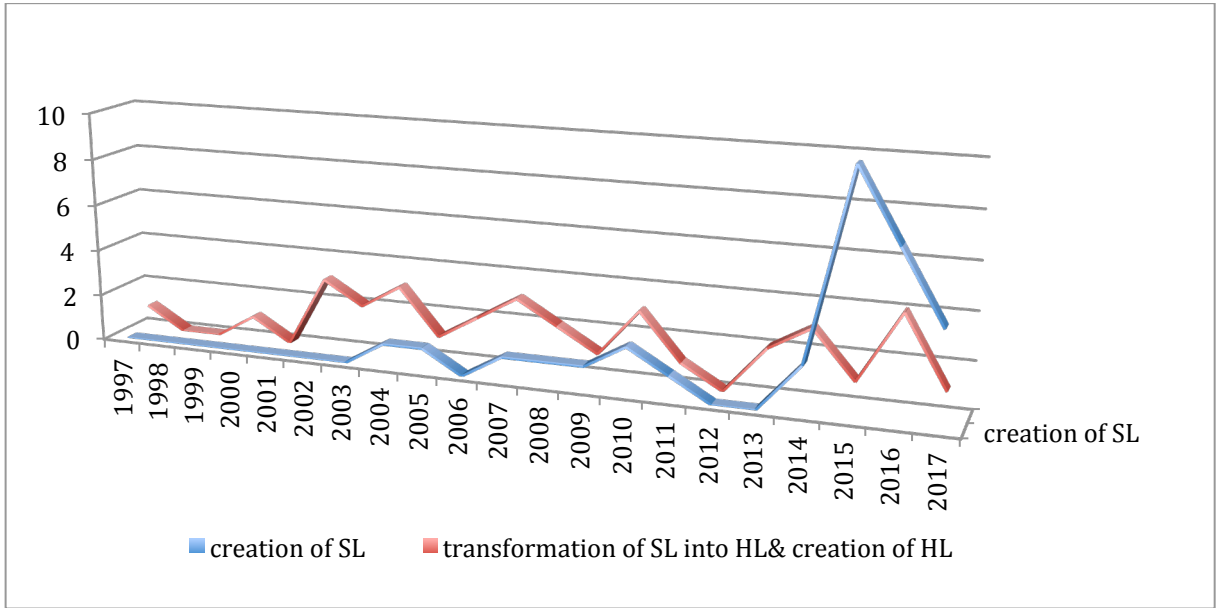
This trend is reversed in 2015-2017 when the number of soft law acts for the first time exceeds the number of hard law acts. Guidelines, orientations, recommendations on migration in general are issued not only by the Commission but more and more by the European Council, the JHA Council and the Parliament. What is even newer is the use of recommendations in the field of asylum, where hard law used to be dominant. While the Schengen and Dublin rules have temporarily been suspended, we observe at the same time a profusion of new soft law policy instruments. In 2015, the Commission publishes a ten-point programme where we find elements such as the reinforcement of rescue and control operations in the Mediterranean, in particular Triton and Poseidon, through increasing the financial and personnel resources of FRONTEX. The three agencies Europol, Frontex and Eurojust are requested to cooperate more strongly in order to exchange information and reinforce cooperation with regard to transborder human traffickers. More generally, delegation to agencies is used as a practical response to the crisis (Ripoll Servent 2018).

Overall, hard law in the field of migration seems weaker than in other fields as it is creating tools to act at the European level but leaving a lot of leeway for member states to implement them. And it focuses on one specific aspect of the migration policies - return policies - much more than on the others. We observe first the establishment of voluntary return and readmission agreements with third countries, before witnessing the establishment of forced return and common standards, followed by the proposal and then the creation of a European financial instrument to handle forced return policies, and the organisation of joint return operations.

Even in this field of the return policy, where hard rules are present, we see that soft law is sometimes adopted instead of hard law. On March 18th 2016, Turkey and the European Union have signed a global plan to reduce the arrival of refugees in Europe. This soft "political" agreement led to the re-conduction of migrants in illegal situation from Greece to Turkey starting from April 4th, and to the provision of some 2.300

European experts to assist the Greek administration. More generally, the (still hard) domain of return policy is also filled with follow-up (soft law) communications that complement hard rules in order to facilitate their implementation and enforcement.

Graph 4. Migration policy – A period of legalization (1997-2014) followed by a period of greater softness (2015-...)



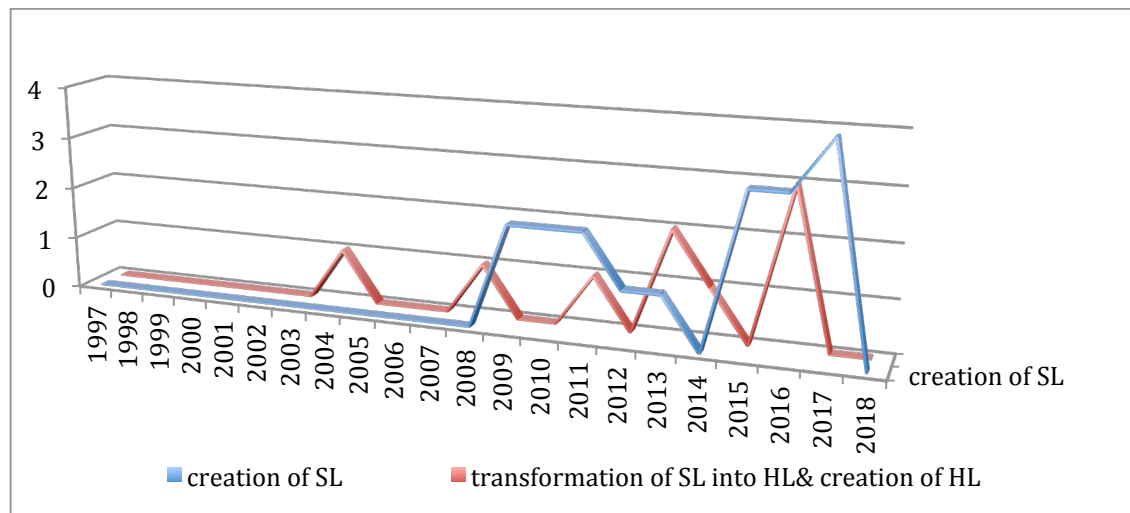
Cybersecurity

Cyber attacks have increased over the last twenty years. Their influence on election processes such as on the US elections of 2016, on public administration or, more generally on companies, have been a subject of concern for governments and the market (Cavelty 2013; Christou 2016). As political systems as well as economies have become increasingly dependent on digital technologies, these cybersecurity incidents are diversifying both in terms of who is responsible and what they seek to achieve: cyber threats come from both non-state and state actors: they are often criminal, motivated by

profit, but they can also be political and strategic. The EU has underlined this in a series of communications and frameworks since 2000.

While soft law prevailed in a first period up to 2013 (Procedda 2014), since then hard rules have entered more clearly the field of cybersecurity, with two main directives in 2013 and 2016 (see Graph 5). The only case of hard law before 2013 is limited to the Council regulation creating an agency dealing with cybersecurity (ENISA) and its revisions in 2008 and 2011. All EU acts adopted by the Commission and the Council before 2013 can be considered soft law. Among the most important documents, the Commission has issued a number of communications aimed to protect “Europe from large-scale cyber-attacks and disruptions” (2009), to set up a “Digital Agenda” for Europe including security concerns (2010), to protect “Critical Information Infrastructure” (2011), while the Council supported the Commission’s communications and adopted a resolution

Graph 5. Cybersecurity: A period of softness (2000-2013) followed by a period of combined soft and hard legalization (2013-...)



4. Factors explaining legalization processes, and lack thereof

We have seen that in all three policy sectors, hard law and soft law coexist but have been introduced at different times based on different arguments. In this section, we aim at analysing why these transformations occurred. We look for an in-depth analysis of the dynamics of norm change, based on the three assumptions previously developed: -the size of the crisis; the weak implementation of norms; the entrepreneurship of actors, both of supranational institutions and the consensus the amongst member states.

Economic governance

The impact of crises

As we have seen in the previous section, two crises have affected the economic and financial governance of the European Union since the Maastricht treaty, in 2002-05 and then in 2009-13. Why did the crisis that began in 2009 lead to a hardening of soft law (hardening of the SGP and macro-economic surveillance, banking union) while the crisis starting in 2002 did not? Our first hypothesis reads as follow: the stronger the crisis, the higher the probability of a normative change. For this hypothesis to be validated, the second 'crisis' should be more severe than the first one.

During the first crisis (2002-05), a number of EU member states (including France and Germany) failed to stay within the confines of the SGP criteria, ran annual deficits higher than 3% of GDP and lifted their overall debt well beyond the 60% of GDP limit. In 2002-03, the Council of Ministers (ECOFIN) failed to apply sanctions against the non-complying states. While the crisis initially concerned 'only' two member states in 2003, other countries were finally affected in 2004 and 2005¹. The breaches of the Pact, as well as the ECOFIN's decision not to sanction France and Germany, threatened the SGP's economic and financial goals. But neither the EU nor the Eurozone were endangered by the crisis, which reduced the intensity of the crisis. Compared to the situation in 2009 in which almost every country was affected, the crisis concerned two member states in

¹ Cyprus, Czech Republic, Greece, Hungary, Italy, Malta, the Netherlands, Poland, Portugal, Slovakia.

2003, and then a group of ten in 2004 and 2005. On the one hand, the crisis was seen as a compliance problem and a challenge to EU law caused by the attitude of two large founding member states. On the other hand, the Pact in itself was criticized in particular during the election campaign of French President Jacques Chirac by him and his economic advisors on the grounds that the rigorous application of the SGP criteria had a negative economic impact on the member states.

Based on a typology of crisis severity, while an element of surprise did indeed exist, we perceive neither an existential threat from policy-makers' high priority goals or from the system as a whole, nor a sense that non-action would dramatically worsen the economic situation. Hence while a crisis actually occurred, it was less severe than the one we observe in the late 2000s. Each element of the crisis is of weak intensity (and gets only 1 point). On our scale of crisis intensity, we consider this crisis as low (3 points when you put the different criteria together) (Graph 6).



The economic and financial crisis starting in 2009 revealed an even greater number of weaknesses in the governance of EMU. In a first period, several banks in the Eurozone faced liquidity and debt problems. Then, during a second period, a large group of countries submitted to excessive deficit procedures and a smaller one finding it difficult to repay or refinance their government debt without the assistance of third parties. Finally, economic growth slowed down and recession even affected some of the Eurozone members.

The crisis featured all three elements defining a severe crisis (Graph 7). First, policy-makers' high priority goals such as high employment and a sound economy were threatened. The impact of the crisis was severe as it threatened not only the credibility of the Pact (which was breached by almost every member states at that time) but the economic wealth of some member states as well as the composition of the Eurozone (could Greece abandon the single currency?) and its mere existence. Some member

states were greatly affected by the budget crisis (Greece and Ireland, but also Portugal and Spain) and had to carry out sound reforms and apply austerity plans in order to benefit from financial assistance. In addition, economic growth slowed down while recession affected most of the Eurozone members. What was feared at the time was that the crisis would spread to more and more member states, placing the entire Eurozone in jeopardy. The media coverage regularly pointed to the ‘weakness’ and the ‘inefficacy’ of the European Union in dealing with the crisis. Furthermore, the public debate shifted from the advantages and pitfalls of the SGP to the continuation of the integration process (does the crisis mean the end of Europe?). The Euro as a symbol of European integration was weakened and it became a matter of credibility to save it. The existence of the Eurozone was challenged as well as the EU itself, with the possibility of a ‘Grexit’ (Greece withdrawing from either the Eurozone area or the EU), opening the door for other possible withdrawals.

Second, the surprise factor was strong, and took the form of an external shock (the crisis was first and foremost an external economic and financial crisis) that finally affected the Eurozone more than any other area in the world. Even though several economists had repeatedly stated that the EMU suffered from an imbalance between a strong integrated monetary policy and a weak intergovernmental economic policy, the economic and financial crisis came as a surprise. While in 2007-08 the EMU seemed to protect the Eurozone from the subprimes crisis, one year later it was no longer a shelter but the direct cause of a crisis specific to the Eurozone.

Third, the time available for response was restricted – the higher the threat, the more urgent the need to respond the crisis – and the EU was constantly criticized for reacting too slowly. Non-action was certainly perceived to lead to the worsening of the crisis and a possible escalation of the crisis and dilution of the Eurozone / European Union. Thus, all three criteria defining the crisis were strong during this period so the crisis can be attributed a maximum score of 6 points (2 points for each criterion).

Graph 7. Severity of the crisis in 2009-13:			
2009-13 crisis			
6	5	4	3

In the case of the economic and financial governance, our first hypothesis seems to be validated. The weak crisis only led to some minor adjustments in the SGP. On the contrary, the more severe crisis starting in 2009 has triggered major normative transformations including a sound reform of the SGP, a tighter macro-economic surveillance and the Banking Union.

Weak implementation of the norms

Our second hypothesis reads as follows: the weaker the (correct) implementation of a norm, the higher the probability of a normative change. During both periods (2002-05 and 2009-...), the implementation of the norms is rather weak.

In 2002-05, France and Germany, although great supporters of the Pact, were the first member states who failed to comply with its requirements. In France, while the main requirements of EMU remained endorsed by the French government at the EU level, the then French President Chirac insisted, after the 2002 Presidential elections, on fulfilling one of his electoral promises for tax cuts, taking the risk of isolating France in the Eurogroup over the Stability and Growth Pact (Dyson 2002; Howarth 2007; Leuffen, Degner & Radtke 2012). In Germany, the re-unification process had created macro-economic imbalances and the effects of the economic reforms aimed at reducing the public deficits and debts were still to come.

During the crisis starting in 2009, compliance with the Pact was even lower. Excessive Deficit Procedures were opened against every member state in 2008, 2009 and 2010, including Germany, with the exception of Estonia and Sweden. Half of these EDP were closed in 2013 and 2014 (after the reform of the Pact)², but some remained open.³

In both periods European norms were poorly implemented. Non-compliance was widespread. The number of countries subject to an Excessive Deficit Procedure was higher in 2009 than in 2002, which entails a strong probability of our hypothesis. However, as both cases show a low level of compliance with the Pact, we conclude, more

² Austria, Belgium, Bulgaria, Czech Republic, Denmark, Germany, Hungary, Italy, Finland, Latvia, Lithuania, Luxembourg, the Netherlands, Romania, Slovakia.

³ Cyprus, France, Greece, Ireland, Poland, Portugal, Slovenia, Spain, the United Kingdom. In addition, new EDPs were opened in 2013 for Malta and 2014 for Croatia.

cautiously, that the weak implementation hypothesis might have a limited explanatory power with regards economic and financial governance.

Heterogeneity and coherence amongst member states and institutions

In 2003, two groups of actors clashed on how the SGP should be applied. A first group, composed of supranational institutions (Commission, Parliament, ECB) and a few small and medium-sized states, was in favour of a strict application of the Pact, against the views of non-complying states (France and Germany). This large group supporting the Pact was particularly active at the early stage of the crisis. Unofficial reports indicate that Austria, Belgium, Finland and the Netherlands wanted to issue a warning against Germany and Portugal in February 2002 (Staunton 2002). The same member states, together with Denmark, Greece, Spain and Sweden, voted in favour of the Commission's recommendation to sanction France and Germany on 26 November 2003. For reasons of economic interest and prestige, and in the case of Germany because a vulnerable government wanted to escape sanctions in the year of a general election and hence sided with France against its own Central Bank's and the Council of economic advisors' positions⁴, the French and German governments resisted the sanctions. The coalition asking for a strict application of the Pact was not able to reach the size required for qualified majority voting (QMV).

When it came to the reform of the Pact, the coalition defending the SGP criteria seemed even less coherent and influential. The decision to modify the Pact lay with the member states and did not require a Commission proposal, although the latter could play a role based on its expertise in economic coordination. Taken by the European Council in March 2005, this decision aligned with the Franco-German position (Bohn and de Jong 2011), which at the time provided the only coherent interpretation of problems and possible solutions. National representatives that had argued in favor of a strict application of the Pact (Austria, Belgium, Denmark, Finland, Greece, the Netherlands, Spain and Sweden) during the debate on possible sanctions for France and Germany, did not succeed in proposing a coherent position that could help build a coalition. Two of them (Greece and the Netherlands) were furthermore being submitted

⁴ However, the German ordoliberalists arguing in favour of stricter rules in 2005, are not a entirely coherent group of policy entrepreneurs. Wade Jacoby (2014, 2015) argues that ordoliberalism is a big enough tent that key German actors draw powerfully different policy implications from its general tenets.

to an Excessive Deficit Procedure, within a group of 12 non-complying member states. Conversely, France and Germany defended such a position and managed to mobilize other agents in support of it. The Commission, in particular, stood behind France and Germany. It was this group that finally influenced the reform of the Pact through making soft rules even softer (Hodson & Maher 2004). France, Germany and the Commission were joined by other member states which were initially strong advocates of the Pact's corrective dimension. This illustrates that the building of a coherent *coalition* of actors is necessary in order to promote like-minded core ideas. The question of "cost" is equally relevant here: while in 2002-2005, cost was not an issue for countries respecting the Pact, it was entirely different in 2009-2013. In sum, in 2005, it did not cost much to soften the Pact and negotiators did not seem to anticipate the future consequences of rising public debt

Contrary to the 2002-2005 crisis, in 2009-2013, supranational institutions (Commission, Parliament, ECB) were in a stronger position. The Parliament, in particular, made more than 2000 amendments to the Six-Pack in order to impose sanctions at an early stage of the EDP (Van Nisten, 2011, Chiti and Teixeira 2013). Not only did supranational agents continue to defend the idea of more constraining rules but their position was echoed by a new actor, the president of the European Council, whose position had been created by the Lisbon treaty (2009) (Hodson 2013). Though not strictly speaking supranational, the president's role as an honest broker, and his mandate as the Chair of the Task Force created in March 2010 to propose solutions for the economic and financial crisis, allowed him to be influential in promoting ideas in favour of strengthened budgetary rules. On 25-26 March 2010, the Van Rompuy Task Force on Economic Governance⁵ was established by the European Council and commissioned to generate the measures needed to reach the objective of an improved crisis resolution framework and better budgetary discipline. The European Council on October 28-29, 2010 endorsed the Task Force report and heads of State and Governments decided upon five main modifications to the economic governance: A reinforcement of fiscal discipline; A broadening of economic surveillance to cover macro imbalances and competitiveness; A deepening and broadening of policy coordination

⁵ Chaired by the President of the European Council, Herman van Rompuy, and composed of representatives [primarily the Minister of Finance] of all member states. In addition, Jean Claude Juncker, chairman of the Eurogroup and Olli Rehn, Commissioner for Economic and Monetary Affairs and Jean-Claude Trichet, president of the ECB, participated in the work of the task force.

through the European Semester; A robust framework for crisis management; And, finally, the strengthening of institutions for more effective economic governance.

The composition of the ECB also changed in 2011, influencing its policy. Following the Frenchman Jean-Claude Trichet, the Italian Mario Draghi (Italy) was appointed president of the ECB in November 2011. And, for the first time since its creation the position of chief economist was not attributed to a German but to the Belgian Peter Praet. Mario Draghi made his reputation in Italy as a defender of both responsible management and strict monetary policies, and opened the possibility for negotiation of both stricter rules and political opening, reflected in the reform of the Stability and Growth Pact (Fontan, 2012).

Later, the creation of the Banking Union will show that a strong consensus had indeed emerged among EU institutions (Epstein & Rhodes 2016 & 2016a). The publication of the Five President's Report in 2015 (European Commission 2015) has increased the salience of the five institutions (European Commission, European Parliament, European Council, Eurogroup, European Central Bank) objective to harden the framework of fiscal policy and in particular of the European Banking Union.

Most of all, supranational agents were no longer isolated in their attempt to harden the rules of economic governance, thanks to the positions defended by national governments, especially Germany and France (but also smaller states such as Finland and the Netherlands), as well as national public and private actors. Finland and the Netherlands, in particular, which had argued in favor of sanctioning Germany in 2002-05, worked hand in hand with this country to strengthen the SGP with automatic sanctions and a role for the ECJ (Van Nispen 2011, Hodson 2013, Schwarzer 2012, Howarth & Quaglia 2016).

Sound reforms have transformed Germany, whose economy has recovered from the re-unification period. Although not complying with the SGP requirements in 2009, like almost all member states at the time, Germany defended a 'governance by rules' approach and clearly promoting the hardening of soft law (Jacoby 2015; Dyson 2014). The preference of the German government for harder rules also stemmed from the pressure of other German actors, such as the Bundesbank and the Constitutional Court, as well as the political context. In a context of electoral defeats in regional elections (Nord Rhine-Westphalia, Baden-Württemberg and Bremen) Angela Merkel tried to

convince her electorate that the Eurozone countries, Greece included, would make the efforts that were deemed necessary and become more and more like Germany (Crespy & Schmidt 2014:1089, 1092).

France cannot be considered an opponent to the hardening of soft law. On the contrary, the French government contributed to making the German arguments stronger. While the French President Nicolas Sarkozy suggested in 2012 his country should resist the rules he agreed to tighten a year later; his economic advisors, and in particular Olivier Blanchard, future chief economist of the IMF reminded him of the crucial necessity to stick to the rules (Leparmentier 2013). It is true that the French and German governments, in the first place, responded differently to the financial and economic crisis, France insisting on financial solidarity and the necessity of establishing an ‘economic government’,⁶ and the German government putting forward the idea that only austerity mechanisms and hard rules would allow the Eurozone crisis to be solved (Bulmer 2014). Yet the coordination mechanisms, based on the regular councilor meetings they set up to find a coherent position between the two heads of state and government, enabled subsequent compromises to be found. Hence, the French position became closer to German preferences during the negotiations about the reform of economic governance. An informal meeting between Angela Merkel and Nicolas Sarkozy in Deauville on October 18, 2010,⁷ ended up with a package deal including: first, a revision of the decision-making aimed at facilitating the adoption of sanctions in the correcting phase of the EDP (reversed QMV) – but no automatic sanctions; second, financial solidarity through the conversion of the temporary European Financial Stability Facility into a permanent European Stability Mechanism – but no bailouts for the weakest countries. Similarly, France accepted the German proposal to introduce the ‘golden rule’ into national law during the negotiation of the Fiscal Compact, in 2012.

Our conclusion when comparing the two periods (2002 and 2009-...) is that our assumption about the consensus among EU supranational policy entrepreneurs during the first period is not enough to trigger a major normative change. During the second

⁶ French officials have pushed forward the idea of an “economic government” since a declaration made by Pierre Bérégovoy in the early 1990s, in which he argued in favour of broad orientations of the ECOFIN in both monetary and economic policy (Howarth 2007: 1067). Nicolas Sarkozy reiterated this position in a statement made at the European Parliament on October 21, 2008 (Jabko and Massoc, 2012; Clift and Ryner 2014).

⁷ Forelle et al., Charles, As Ireland Fails, Europe Lurches Across the Rubicon, *The Wall Street Journal*, December 27, 2010.

period, not only the Commission and the Central Bank but also the European Council and its president push towards legalization, which explains the importance of the reform. In addition, we see that only a large consensus among the member states makes a strong legalization possible, which was the case in period 2 but not in period 1.

Migration policy

The impact of crises

The migration crisis can be considered as a rather strong crisis (Graph 8). According to Eurostat⁸ the 28 member states of the EU registered 662.960 asylum seekers in 2014, compared to 1.322.845 in 2015, 1.260.910 in 2016 and 712.235 in 2017. This increase came as a surprise (2): even if it was possible to deduce from the situation in Libya and Syria, in particular, the increase in the number of migrants willing to join Europe, it was not possible to predict that the flow would be so important. The perceived threat to the system was important (2) for three main reasons: the number of people dying in the Mediterranean sea, the inapplicability of the Dublin III regulation, and the political impact of the crisis (dispute between member states, rise of populism). There is an urgency (2) to solve the crisis for human reasons (inaction means more migrants people dying) and because of the salience of the topic (media coverage of the crisis and its consequences).

The migration crisis, started in 2015, has led to a series of individual statements from heads of state and governments. Matteo Renzi, Angela Merkel and Alexis Tsipras collectively called for a stronger coordination of the European Asylum Policy, based on the Dublin regulation and a stronger solidarity amongst member states to accept refugees on their territory. However, while migration and asylum have regularly been put on the agenda of both the Council and the European Council, these institutions have often failed to decide on issues that were, yet, presented as crucial (Trauner 2016; Niemann & Zaun 2018). Thus, a relatively strong form of crisis has not triggered a large

⁸ http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=migr_asyappctza&lang=en accessed 14.10.2018

process of legalization, but rather a development of soft law in the form of Commission’s recommendations or even soft agreements (like the EU-Turkey common statement).

Graph 8: Severity of the migration crisis in 2015-...



Weak implementation of the norms

A weak implementation of existing rules does not systematically trigger law hardening in the case of migration policy. On the contrary, we found several examples of soft law created to compensate for a weak implementation of hard norms, which questions the idea of a shadow of law that has been presented in other cases (Schmidt and Kelemen 2012). The implementation difficulties of the 2008 Directive on common standards and procedures in the member states for returning illegally staying third-country nationals (2008/115/EC) have been highlighted by an evaluation report of the Commission, on 23 October 2013. At that time, all the member states had breached the Return Directive, at least once, with the Cyprus, Greece and Portugal showing the worst performance. These numerous violations have not led to a hardening of the rules, but has rather reinforced the continued development of soft instruments, like communications of the Commission and the political “agreement” between the EU and Turkey.

The failure to comply with the Dublin system of rules has led to the adoption of soft recommendations instead of a hard law reform (Bauböck 2018, Niemann & Speyer 2018). An evaluation report issued by the Commission (DG Migration and Home Affairs) on 18 March 2016 has shown that 17 member states had breached the Dublin regulation at least once, with Greece, Malta and Hungary having the worst performance. The most frequent violations were: the lack of information provided to the applicants, the fact that a specialized Dublin unit was not established, the disruption of family unity, the lack of an interpretation service provided to applicants... During the period between 2015-17, the Commission has issued a series of recommendation to compensate for the non application of Dublin. In July 2018, the member states agreed to greater solidarity in the

way they treat demands coming from asylum seekers and economic migrants. The deal has only been possible because it was not binding but based on the political will of the member states.

Heterogeneity and coherence amongst member states and institutions

The field of migration policy confirms that a strong entrepreneurship of both supranational institutions and big member states is not sufficient to trigger the adoption of hard law. Soft norms have mushroomed in the context of the migration crisis because the Member States, defending highly diverging positions, could not agree on binding commitments.

The Commission has clearly played the role of a policy entrepreneur, suggesting solutions to the crisis since 2015, in order to resettle large numbers of persons in clear need of international protection and establish the criteria and mechanisms for greater solidarity between the Member States. The Commission proposed a regulation of the Parliament and the Council reforming Dublin III, on 4th May 2016. It would have established a corrective allocation mechanism based on the determination of a reference key per member states according to GDP and population and the triggering of a fairness mechanism when the number of asylum application in a country is above 150% of its reference key. A solidarity contribution of 250,000€ per applicant should have been paid by the member states who refused to reallocate migrants. This proposal, like many other initiatives of the Commission, failed to create a consensus. A report of the Parliament issued on 6th November 2017 supported the idea of greater solidarity among the Member States, even arguing that the Commission's proposal should go further in the reform of the Dublin Regulation. According to the authors of this Report, the Commission's mechanism would only be triggered in case of crisis, while the EP wanted the Member States to share the burden permanently and automatically, with coercive measures for member states not complying.

The pro-solidarity position of both the Commission and the Parliament have been constant on the whole period. France and Germany have also supported the idea of

greater solidarity since 2015. During a meeting of the JHA Council on 20 July 2015,⁹ France and Germany, together with the Netherlands, expressed their support to Greece and Italy, and their willingness to participate in these mechanisms for persons in need of international protection. They emphasised the necessity to link responsibility with solidarity and stressed the following conditions: (1) every member state should take part in the relocation schemes in order to balance member states' effort towards migration ; (2) identification of the hot spots, namely the points of migrants' arrivals, in order to reinforce assistance to these hot spots ; (3) avoidance of secondary movements ; (4) distinction between asylum seekers and illegal migration and (5) the relocation programme should be rolled over a period of two years. While being quite supportive of the Commission's initiatives, France and Germany have never succeeded in creating a larger consensus among the Member States, and have, on the contrary, faced a strong opposition from the Visegrad countries in particular. The UK has supported the idea of resettlements but on a purely national basis.

Clearly the entrepreneurship of supranational institutions and big member states has not been enough to create a large coalition in favour of hard law mechanisms. Huge divisions between the Member States have prevented the EU migration policy from evolving towards legalization (Bauböck 2018 ; Slominski & Trauner 2018 ; Thielemann 2018 ; Zaun 2018). The Commission have compensated for this blockage through the adoption of several soft law instruments.

Cybersecurity

The impact of crises

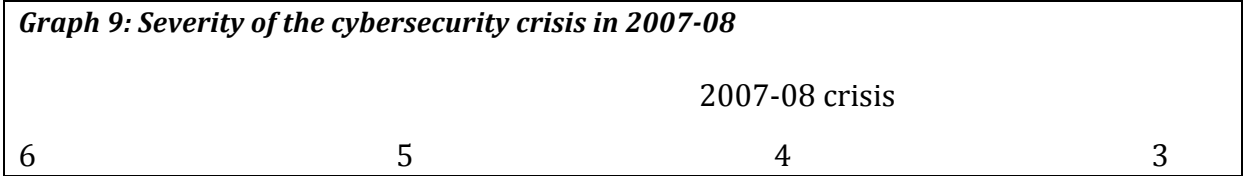
Cyberattacks can be considered as a crisis if they meet the criteria of a large threat, an urgency to respond to this threat and an element of surprise. We argue that Europe has been touched by major cyberattacks in 2007-08, which explain the launching of a legalization process. In April 2007, the cyberattack in Estonia was the first cyberattack

⁹ Source: Monthly summary of Council Acts - July and August 2015. 15081/15. Brussels, 8 December 2015. Council of the European Union.

against an EU member state. Due to a dispute with Russia on the relocation of war graves, a series of cyberattacks targeted the websites of Estonian organisations (Parliament, banks, newspapers etc.). This attack was not meant to be a paralysing offensive, even though financial transactions were interrupted, and the Estonian authorities were able to restore the service during the following hours/days. But the entire Estonian IT system was targeted. And several other attacks have impacts member states in the following months. In August 2007, cyberintrusion were reported in the government networks of the British Security Service, the French Prime Minister's Office and the Office of German Chancellor. In September 2007, British authorities reported that hackers, believed to have come from China's People's Liberation Army, penetrated the network of the Foreign Office and other key departments. The same exact month, the French defence ministry's public website was hacked by Chinese cyber saboteurs. And in August 2008 it was an important EU partner, Georgia, who was attacked several, presumably by Russia, and on the same model as the attacks in Estonia.

Cyberattacks in 2007-08 can be considered as a medium-sized crisis (Graph 9), when applying our criteria. The potential threat of a large scale cyberattack or of a cyberattack endangering the EU and its member states, or European societies in general, is large (Andreasson 2012; Fahey 2014); yet, the actual threat in Estonia is smaller (1). There is a situation of urgency for Estonia, but less for the EU as a whole. The element of surprise is a little stronger (2), as it was the first time a cyberattack of such an amplitude occurred. The medium-sized crisis (4) has triggered the adoption of soft law and preparatory acts in the following years. The Commission relied to these attacks in March 2009 with the Communication "Protecting Europe from large scale cyber-attacks and disruptions: enhancing preparedness, security and resilience" (COM(2009)149), very soon endorsed by a Council resolution on a "collaborative European approach to Network and Information Security" (2009/C 321/01). Clearly it can be argued that the 2007 cyber attack on Estonia has been the starting point of the EU's involvement in cybersecurity. Several Member States have reacted to these attacks at national level. For example, the French government awareness followed the attacks against several French official websites in 2007. Estonia is another good example of such a reaction to cyberattacks. In a way, the Russian cyberthreat in 2007 forced this country to become a heavyweight in cybersecurity.

However, according to the International Centre for Defense and Security (Estonia), the trigger for Europe as a whole was the WannaCry virus because it evidenced the gap in the EU’s cybersecurity and the fact that the EU is late.¹⁰ It took time for the European Union to go one step further and use hard instruments of cyberpolicy. While the Commission issued a Communication on ‘Protecting Europe against large scale wyberattacks and disruptions’ in March 2009, the directive on attacks against information systems was proposed in September 2010, and finally adopted in 2013, opening a period of greater legalization culminating with the adoption in 2016 of a directive “concerning measures to ensure a high common level of network and information security across the Union” (NIS Directive). These developments may not be solely explained by the occurrence of a crisis but they occurred in a context where cyberattacks increased substantially and happen to pose a continuous threat to the member states of the EU.



Weak implementation of the norms

It seems that EU recommendations made in the aftermath of the 2007-08 attacks have not fully convinced the member states to develop national public policies on cybersecurity. In 2008-09, when the fist EU soft law documents on cybersecurity were issued, most of the member states had a CSIRT (computer security incident response team), for example, but only a few of them had a national cybersecurity strategy, as requested now by the Directive on Network and Information Society. The dashboard of cybersecurity policies established by “BSA software alliance” in 2015 (BSA 2015) shows that, on many aspects contained in the Commission communications and the Council resolutions, the member states have poorly performed. Similarly, ten Member States have abstained from transposing the relatively soft Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (Belgium,

¹⁰ <https://icds.ee/how-to-advance-european-cybersecurity/>

Czech Republic, Denmark, Germany, Ireland, Greece, Italy, Slovenia, Sweden and the UK).¹¹ This can explain why the topic –attacks against information systems- was tackled in a harder instrument, the 2013/40 Directive.

The perception that implementation at member states was weak has most certainly contributed to the decision to transform recommendations into proper commitments. To say it differently, a shift towards hard law has certainly been seen as a good way to make the member states reinforce their cybersecurity policies (Maarsden 2011; Bendiek & Porter 2013).

Heterogeneity and coherence amongst member states and institutions

The Commission has been acknowledged as a strong ‘policy entrepreneur’ during the period of greater legalization, ‘regarding cybersecurity management, publishing policy frameworks, socializing the member states and pushing the institutionalization process forward in several ways’ (Backman 2016 :40 ; Bendiek & Porter 2013 ; Wessel 2015). Cybersecurity exercises were conducted since 2010. And in 2013, the Commission created the NIS-platform to support the implementation of the EU cyber security strategy objectives, as well as an annual cyber security month.

In many countries, in particular Estonia who had been specifically targeted, but also in France, the awareness of the cyberthreat followed the attacks of 2007 and 2008 (Guitton 2013). The French “Livre Blanc” in 2008 takes the cyberthreat into account and considers cyberattacks as a major risk for the country. In 2009, the ANSSI (Agence nationale pour la sécurité des systèmes d’information) is created as the national authority of defense regarding the information system. Two years later, the first national cybersecurity strategy is published. Germany has also reacted to the cyberthreat, but a little later, with the creation in 2011 of the National Defense Centre.

By and large, the building of a consensus has been triggered by France, acting as a policy entrepreneur, as well as the Commission. Member states have followed the lead of these two actors, agreeing that cybersecurity is a borderless problem, and that measures have to be adopted at the European level. However, legalization was not so consensual

¹¹ <https://eur-lex.europa.eu/legal-content/EN/NIM/?uri=CELEX:32005F0222>

amongst them. Germany, in particular, has been reluctant towards an evolution that would transfer excessively cybersecurity policies to EU institutions (Barrinha and Carrapico 2017 ; Teffer 2017). The Germans were amongst the Member States who had not transposed the Council 2005 Framework Decision on Attacks against Information Systems before it was transformed into a Directive. Today, Germany is still reluctant towards the Commission's proposal to reinforce ENISA's role and enables the Agency to better support the Member States in implementing the NIS Directive and to counter particular threats more actively by becoming a centre of expertise on cybersecurity certification.

From this we conclude that: first, there was strong supranational entrepreneurship coming from the Commission, on the whole period. But the role of France as a policy entrepreneur capable of building a coalition has proved to make a difference. Other Member States have brought a valuable contribution, like Estonia who has been a precursor in the field of cybersecurity at national, European as well as international level. A strong consensus amongst big member states was not essential. Germany has tried to slow down the initiatives coming from France and the Commission but did not oppose the evolution towards legalization of EU cybersecurity policy.

5. Conclusion

Based on a dynamic and longitudinal approach, this article has shown that all three approaches explaining institutional, and in other words, norm change (crisis-centred, feedback-centred and actor centred explanations) explain parts of why soft law transforms into hard law. The legalization of the SGP, macro-economic surveillance and the banking union, that occurred since 2009, can be explained by a combination of four factors (Table 2): the severity of the crisis, the weak implementation of the norm, the entrepreneurship of EU supranational institutions and big member states. However, two of these factors were absent in 2002-2005 (severe crisis and entrepreneurship of big Member States), which can explain why no legalization was achieved at that time. The

entrepreneurship of EU supranational institutions and a weak implementation of the norms were clearly not sufficient to trigger legalization during the 2002-05 crisis. On the contrary, the four variables were present since 2009. Three main remarks derive from this: First, the four variables may play a role, as shown in the most recent period. Second, when the crisis is not perceived as severe, the incentive to legalization is lower. And third, the fact that big member states do not advocate legalization prevent this evolution to occur.

When adding the cases of cybersecurity and migration a few more conclusions can be drawn. First, a weak implementation of existing norms sometimes correlates with legalization (economic governance in the 2010s, cybersecurity), and sometimes not (economic governance before 2009, migration). For legalization to happen, it is not enough that a policy is perceived as not to function efficiently (in terms of norms application): there must be other factors coming into play.

Secondly, the impact of crisis on legalization varies extensively. As seen above, the severe of the crisis has had a clear impact in the case of economic governance. In the case of cybersecurity, there might be have been an impact of the crisis, but its influence is less obvious. Indeed, the 2007-08 cyberattacks have triggered reactions at Member States level first, and then the launching of several initiatives at EU level. But it took time for these initiatives to become proper hard law. If the period of greater legalization, with the adoption of the 2013 and 2016 directives, is a consequence of the 2007-08 attacks, it is in an indirect manner. More clearly, the case of migration shows that legalization may occur outside a context of crisis. Indeed, hard law is more present before the 2015 migration crisis than it is during the crisis. Crisis situations are factors of legalization (like in the case of economic governance), but are not a necessary condition for legalization to happen.

Finally, a combination of different entrepreneurships is needed. Supranational entrepreneurship is a constant in all three cases. The Commission has taken several initiatives towards more legalization in economic governance, migration and cybersecurity, and was often supported by the Parliament. This was, of course, not always sufficient. When two big member states opposed its proposals (France and Germany against legalization of the SGP in 2002-05), the legalization process was rejected. When it was supported by big Member States (France and Germany in favour

of reforming economic governance in the 2010s), legalization became possible. This does not mean at all that legalization is mainly triggered by the Franco-German tandem. The case of cybersecurity, on the opposite, shows that legalization is still possible when the two partners defend different views. And with the case of migration, we know that, even when France and Germany support the Commission, this might not be enough to make the EU go in the direction of legalization. In the end, there must be a large consensus between the Member States. The likelihood of such a consensus increases when our four variables combine; but even a combination of the four variables does not guarantee the realisation of legalization processes.

Table 2. Comparative analysis of factors explaining legalization, or lack thereof

	Economic governance in 2002-05	Economic governance since 2010	Migration policy before 2015	Migration policy since 2015	Cyber-security before 2013	Cyber-security Since 2013
Severe crisis	+	+++	irrelevant	+++	++	++
Impact of the weak implementation of norms	+++	+++	++	+++	irrelevant	++
Entrepreneurship of big Member States	+	+++	++	++	++	++
Entrepreneurship of EU supranational institutions	+++	+++	+++	+++	+++	+++
	softness	Legalization	Legalization	softness	Soft legalization	Legalization

References

- Abbott, K. W. and Snidal, D. (2000). 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 54(3): 421-456
- Abbott, K. W., Keohane R. W., Moravscik A., Slaughter A.-M., and Snidal D. (2000). 'The Concept of Legalization', *International Organization*, 54:3:401–20.
- Ackrill, R., Kay, A., & Zahariadis, N. (2013). Ambiguity, multiple streams, and EU policy. *Journal of European Public Policy*, 20(6), 871-887.
- Acosta Arcarazo D. & A Geddes, (2013). The Development, Application and Implications of an EU Rule of Law in the Area of Migration Policy. *Journal of Common Market Studies*, 51(2), 179-193
- Andreasson, Kim J. (2012). *Cybersecurity : Public Sector threats and Responses*, CRC Press.
- Backman, S. (2016). *The institutionalization of cybersecurity management at the EU-Level: 2013-2016*, Swedish Defence University.
- Bauböck, R. (2018). Refugee Protection and Burden-Sharing in the European Union. *Journal of Common Market Studies*, 56(1), 141-156.
- Barrinha, A., Carrapico, A. (2017). The EU as a Coherent (cyber)Security Actor ?, *Journal of Common market*, vol. 55 n°6, p. 1254-1272.
- Bendiek, A., & Porter, A. L. (2013). European Cyber Security Policy within a Global Multistakeholder Structure. *European Foreign Affairs Review*, 18(2), 155–180
- Birkland, T. A. (1997). *After disaster: Agenda setting, public policy, and focusing events*. Georgetown University Press.
- Blichner, Lars C., and Anders Molander (2008). 'Mapping Juridification', *European Law*
- Bohn, F., de Jong E. (2011) The 2010 euro crisis stand-off between France and Germany: leadership styles and political culture. *International Economics and Economic Policy* 8(1), 7-14
- Boin, A. (Ed.). (2005). *The politics of crisis management: Public leadership under pressure*. Cambridge: Cambridge University Press.
- Breeman, G., & Zwaan, P. (2009). Domestic change and EU compliance in the Netherlands: Policy feedback during enforcement. *European Integration*, 31(3), 349-367.
- BSA (2015), <https://www.google.com/search?q=tableau+de+la+maturit%C3%A9+des+politiques+de+s%C3%A9curit%C3%A9+dans+l%27UE&ie=utf-8&oe=utf-8&client=firefox-b-ab>
- Bulmer, S. (2014). Germany and the Eurozone Crisis: Between Hegemony and Domestic Politics. *West European Politics*, 37(6), 1244-1263.

- Cappelletti, M., Secombe, M., & Weiler, J. H. (Eds.). (1986). *Integration through law: Europe and the American federal experience* (Vol. 1). Walter de Gruyter.
- Cavelty, M. D. (2013), " From Cyber-Bombs to Political Fallout: Threat Representations with an Impact in the Cyber-Security Discourse", *International Studies Review*, Volume 15(1), p. 105–122
- Chiti, E., Teixeira, P.G. (2013) The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis. *Common Market Law Review* 50(3), 683-708
- Christou, G. (2016). *Cybersecurity in the European Union: Resilience and Adaptability in Governance Policy*, Basingstoke, Palgrave MacMillan
- Cortinovic, R. (2015). The Evolution of Frontex Governance: Shifting from Soft to Hard Law?. *Journal of Contemporary European Research*, August, 11(3), 16.
- Crespy, A. & Schmidt, V. (2014). The clash of Titans: France, Germany and the discursive double game of EMU reform, *Journal of European Public Policy*, 21:8, 1085-1101.
- De la Porte, C., & Heins, E. (2016). A new era of European integration? Governance of labour market and social policy since the sovereign debt crisis. In *The sovereign debt crisis, the EU and welfare state reform* (pp. 15-41). Palgrave Macmillan, London.
- Deubner, C. (2006). A Dynamic Perspective for the Reform of the Stability and Growth Pact, March, n°6, March, CEPIL.
- Dunlop, C. A., & Radaelli, C. M. (Eds.). (2016). *Handbook of regulatory impact assessment*. Edward Elgar Publishing.
- Duttler, T., Holzinger, K., Malang, T., Schäubli, T., Schimmelfennig, F., & Winzen, T. (2017). Opting out from European Union legislation: the differentiation of secondary law. *Journal of European Public Policy*, 24(3), 406-428
- Dyson, K. (Ed.). (2002). *European states and the Euro: Europeanization, variation, and convergence*. Oxford: Oxford University Press.
- Dyson, K. (2009). The evolving timescapes of European economic governance: contesting and using time. *Journal of European Public Policy*, 16(2), 286-306.
- Dyson, K. (2014)
- Dyson, K., & Featherstone, K. (1999). *The road to Maastricht: negotiating economic and monetary union*. Oxford University Press
- Epstein, R. A., & Rhodes, M. (2016). The political dynamics behind Europe's new banking union. *West European Politics*, 39(3), 415-437.
- Epstein, R. A., & Rhodes, M. (2016a). States ceding control: Explaining the shift to centralized bank supervision in the Eurozone. *Journal of Banking Regulation*, 17(1-2), 90-103.
- Fabbrini, S. (2013). Intergovernmentalism and its limits: Assessing the European Union's answer to the Euro crisis. *Comparative political studies*, 46(9), 1003-1029.
- Fahey, E. (2014). The EU's Cybercrime and Cyber-Security Rulemaking : Mapping the Internal and External Dimensions of EU Security. *European Journal of Risk Regulation*, 5(1), 46-60
- Fontan, C. (2012)
- Galanti, M. T. (2018). Enablers and Time: How Context Shapes Entrepreneurship in Institutional and Policy Change. In *Institutional Entrepreneurship and Policy Change* (pp. 41-61). Palgrave Macmillan, Cham.
- Guinard, D. (2013). 'A propos du soft law en droit de l'Union européenne : analyses théorique et pratique', *Revue de l'Union européenne*, 12:573, 609–17.
- Guittou, C. (2013) 'Cyber Insecurity as a National Threat: Overreaction from Germany, France and the UK?' *European Security*, Vol. 22, No. 1, pp. 21–35

- Guzman, Andrew T., and Timothy L. Meyer (2010). 'International Soft Law', *Journal of Legal Analysis*, 2:1, 171-225.
- Hallerberg, M. (2010). The Role of the European Parliament in the European Semester. Increasing the Accountability of the Commission and Council. Brussels: European Parliament [IP/A/ECON/NT/2010-09].
- Hartlapp, M. (2019). Soft Law Implementation in the EU Multilevel System: Legitimacy and Governance Efficiency Revisited. In *Configurations, Dynamics and Mechanisms of Multilevel Governance* (pp. 193-210). Palgrave Macmillan, Cham.
- Hermann, C.F. (1969). Some Consequences of Crisis which limit the Viability of Organizations. *Administrative Science Quarterly*, 8, 61-64
- Hillgenberg, H. (1999). 'A fresh look at soft law', *European Journal of International Law*, 10:3, 499-515.
- Hodson, D. (2013) The little engine that would't: supranational entrepreneurship and the Barroso Commission. *Journal of European Integration* 35(3), 301-314
- Hodson, D., & Maher, I. (2001). The open method as a new mode of governance: the case of soft economic policy co-ordination. *Journal of Common Market Studies*, 39(4), 719-746.
- Hodson, D., & Maher, I. (2004). Soft law and sanctions: economic policy co-ordination and reform of the Stability and Growth Pact. *Journal of European Public Policy*, 11(5), 798-813.
- Howarth, D. J. (2007). Making and breaking the rules: French policy on EU 'gouvernement économique'. *Journal of European Public Policy*, 14(7), 1061-1078.
- Howarth, D., & Quaglia, L. (2016). *The political economy of European banking union*. Oxford University Press.
- Jabko, N. (2006) *Playing the Market: A Political Strategy for Uniting Europe, 1985-2005*, Ithaca, NY: Cornell University Press
- Jabko, N., Massoc, E. (2012) French capitalism under stress: How Nicolas Sarkozy rescued the banks. *Review of International Political Economy* 19(4), 562-585
- Jacobsson, Kerstin (2004). 'Soft regulation and the subtle transformation of states. the case of EU employment policy', *Journal of European Social Policy*, 14:4, 355-70.
- Jacobsson, K. (2004). Soft regulation and the subtle transformation of states: the case of EU employment policy. *Journal of European Social Policy*, 14(4), 355-370.
- Jacoby, W. (2014). The politics of the Eurozone crisis: Two puzzles behind the German consensus. *German Politics and Society*, 32(2), 70-85.
- Jacoby, W. (2015), 'Europe's New German Problem: The Timing of Politics and the Politics of Timing', in M. Matthijs and M. Blyth (eds), *The Future of the Euro* (Oxford: Oxford University Press), pp. 187-209. Jones et al (2016).
- Keeler, J. T. (1993). Opening the Window for Reform Mandates, Crises, and Extraordinary Policy-Making. *Comparative Political Studies*, 25(4), 433-486.
- Kingdon, J. W. (1984). *Agendas, Alternatives and Public Policies*. Boston, MA: Little, Brown.
- Kollman, Kelly (2009). 'European institutions, transnational networks and national same-sex unions policy: when soft law hits harder', *Contemporary Politics*, 15:1, 37-53.
- Lavergne, Benjamin (2013). 'Recherche sur la soft law en droit public français, LGDJ', Institut Fédératif de Recherche "Mutation des normes juridiques", Toulouse.
- Lenschow, Andrea (2002). 'New Regulatory Approaches in 'Greening' EU Policies', *European Law Journal*, 8:1, 19-37.
- Leparmentier (2013)

- Leuffen, D., Degner H., Radtke, K. (2012) Which mechanics drive the 'Franco-German Engine'? An Analysis of How and Why France and Germany Have Managed to Shape Much of Today's EU. *L'Europe en formation* 53(4), 47-83
- Mahoney, W., Thelen, (2005)
- Marsden, Christopher T. (2011). *Internet co-regulation: European law, regulatory governance and legitimacy in cyberspace*: Cambridge University Press
- Niemann, A., & Speyer, J. (2018). A Neofunctionalist Perspective on the 'European Refugee Crisis': The Case of the European Border and Coast Guard. *Journal of Common Market Studies*, 56(1), 23-43.
- Niemann, A., & Zaun, N. (2018). EU refugee policies and politics in times of crisis: theoretical and empirical perspectives. *Journal of Common Market Studies*, 56(1), 3-22.
- Procedda, M. (2014). Public-Private Partnerships: A soft approach to cybersecurity? Views from the European Union. In G. Giacomello (Ed.), *Security in Cyberspace: Targeting Nations, Infrastructures, Individual*. New York, London: Bloomsbury Academic.
- Quaglia, L. (2010). Completing the single market in financial services: the politics of competing advocacy coalitions. *Journal of European Public Policy*, 17(7), 1007-1023.
- Radaelli, C. M. (2010). Regulating rule-making via impact assessment. *Governance*, 23(1), 89-108.
- Ripoll Servent, A. (2018). A new form of delegation in EU asylum: Agencies as proxies of strong regulators. *Journal of Common Market Studies*, 56(1), 83-100.
- Sand, Peter H. (1991). 'Lessons Learned in Global Environmental Governance', *Boston College Environmental Affairs Law Review*, 18:2, 213-77.
- Saurugger, S. (2013) 'Constructivism and public policy approaches in the EU: from ideas to power games', *Journal of European Public Policy* 20(6): 888-906.
- Saurugger, S., & Terpan, F. (2016). Resisting 'new modes of governance': An agency-centred approach. *Comparative European Politics*, 14(1), 53-70.
- Schelke, W. (2006). EU fiscal governance: hard law in the shadow of soft law. *Columbia Journal of European Law*, 13, 705.
- Schelke, W. (2012). Good governance in crisis or a good crisis for governance? A comparison of the EU and the US. *Review of International Political Economy*, 19(1), 34-58.
- Schimmelfennig, F. (2014). European integration in the euro crisis: The limits of postfunctionalism. *Journal of European Integration*, 36(3), 321-337.
- Schimmelfennig, F., & Winzen, T. (2014). Instrumental and constitutional differentiation in the European Union. *JCMS: Journal of Common Market Studies*, 52(2), 354-370.
- Schmidt and Kelemen 2012
- Schwarzer, D. (2012) The Euro Area Crises, Shifting Power Relations and Institutional Change in the European Union. *Global Policy* 3(S1), 28-41
- Scipioni, M (2017), Failing forward in EU migration policy? EU integration after the 2015 asylum and migration crisis. *Journal of European Public Policy*, pp.1-19
- Senden, Linda A. J. (2004). *Soft Law in European Community Law*. Oxford/ Portland: Hart Publishing.
- Senden, Linda A. J. (2005). 'Soft law and its implications for institutional balance in the EC', *Utrecht Law Review*, 1:2, 79-99.
- Shaffer, Gregory C., and Mark A. Pollack (2010). 'Hard v. Soft Law: Alternatives, Complements, and Antagonists in International Governance', *University of Minnesota Law Review*, 94:3.

- Slominski, P., & Trauner, F. (2018). How do member states return unwanted migrants? The strategic (non-) use of 'Europe' during the migration crisis. *Journal of Common Market Studies*, 56(1), 101-118.
- Snyder, Francis (1994). 'Soft Law and Institutional Practice in the European Community', in: Stephen Martin (ed.), *The Construction of Europe: Essays in honour of Emile Noël*. Dordrecht: Kluwer Academic Publishers, 197-225.
- Staunton, D. (2002). Germany, Portugal escape censure over running high budget deficits, Irish Times, 13 February.
- Teffer, P. (2017). 'Germany tells EU to slow down on new cyber rules', *EU Observer*, 11/10/2017, <https://euobserver.com/digital/139373>
- Terpan F. (2015). Soft Law in the European Union - The Changing Nature of EU Law, *European Law Journal*, 21(1), 68-96
- Thielemann, E. (2018). Why refugee burden-sharing initiatives fail: Public goods, free-riding and symbolic solidarity in the EU. *JCMS: Journal of Common Market Studies*, 56(1), 63-82.
- Trauner, F. (2016). Asylum policy: the EU's 'crises' and the looming policy regime failure. *Journal of European Integration*, 38(3), 311-325.
- Trauner, F. and Ripoll Servent, A. (2014) *Policy change in the area of freedom, security and justice: how EU institutions matter*. London: Routledge
- Trauner, F., & Ripoll Servent, A. (2016). The communitarization of the Area of Freedom, Security and Justice: Why institutional change does not translate into policy change. *JCMS: Journal of Common Market Studies*, 54(6), 1417-1432.
- Van Nispen, F. (2011). The Budgetary Coordination of the Eurozone, The Reform of the Stability and Growth Pact, Paper delivered at the panel on Policy Instruments, 6th ECPR General Conference, Reykjavik August 25-27, 2011.
- Wessel, R.A. (2015) 'Towards EU Cybersecurity Law: Regulating a New Policy Field'. In Tsagourias, N. and Buchan, R. (eds) *Research Handbook on International Law and Cyber Space* (Cheltenham: Edward Elgar Publishing), 403-425
- Woll, C. (2008). *Firm Interests: How Governments Shape Business Lobbying on Global Trade*, Ithaca, NY: Cornell University Press..
- Zahariadis, N. (2008). Ambiguity and choice in European public policy. *Journal of European Public Policy*, 15(4), 514-530.
- Zahariadis, N. (2014). Ambiguity and Multiple Streams. In Sabatier, Paul, & Christopher M. Weible eds. *Theories of the Policy Process* (pp. 25-58). Boulder, CO: Westview Press.
- Zaun, N. (2018). States as Gatekeepers in EU Asylum Politics: Explaining the Non-adoption of a Refugee Quota System. *JCMS: Journal of Common Market Studies*, 56(1), 44-62.
- Zeitlin, J. (2016). EU experimentalist governance in times of crisis. *West European Politics*, 39(5), 1073-1094.
- Zeitlin, J., & Vanhercke, B. (2018). Socializing the European Semester: EU social and economic policy co-ordination in crisis and beyond. *Journal of European Public Policy*, 25(2), 149-174.
- Zohlnhöfer, R., Herweg, N., & Huß, C. (2016). Bringing formal political institutions into the multiple streams framework: An analytical proposal for comparative policy analysis. *Journal of Comparative Policy Analysis: Research and Practice*, 18(3), 243-256.

