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EfSoLaw

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EfSoLaw: a new data set on the evolution of soft law in the European Union

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Abstract:

This paper is part of a research interested in the way in which EU norms vary concerning their binding nature and the enforcement mechanisms that ensure compliance with them under the continuum that goes from hard to soft law. EU policy combines hard and soft law instruments and their proportion varies among policy areas and over time. What is the proportion of soft law in different policy sectors and what does that imply for EU law on a multilevel policy framework?

This paper addresses these questions through the presentation of a new data set: EfSoLaw. Complementary to previous databases created on EU hard law (e.g. EUDIFF, EvoEU) and to qualitative comparisons of EU soft law across policy fields (e.g. SoLaR), this data set reunites for the first time scattered data on legal acts from various sources (EUR-Lex, DGs and EU agencies archives) proposing an organised and refined coding of the evolution of EU soft law acts (e.g. recommendations, resolutions, guidelines, notices...) in seven different policy sectors over a fifteen years span (2004-2019). The policy sectors cover different patterns in the relationship between EU policy-making and the nature of interests generated by the policy problems. The data set is composed of more than 16000 acts of hard and soft law in the policy sectors of state aid policy, pharmaceutical regulation, food security regulation, common foreign and security policy, financial regulation, sustainable agriculture policy, and police and judicial cooperation.

The paper presents the main tendencies in the data set concerning the ratio of hard to soft law, the actors involved in soft law elaboration, the function of soft law (steering, procedural or explanatory) and its relationship to hard law. All these variables will be compared over time and for each policy sector, giving a valuable base to study further aspects of EU multilevel policy activity. Legislative, judicial and policy scholars can use this data set in the study of European and national policy processes involving the adoption, implementation and enforcement of EU Law.

Keywords: EU Law, Soft Law, European Union, quantitative, database.

Introduction

The European Union legal system is often identified as one of the most complex and diversified in the world. Analysing European policies imply to look at a vast array of instruments that compose its legal and political framework. Various theoretical conceptions on the nature of these instruments have been elaborated over time (see Hartlapp, Saurugger, Terpan 2020 for a review), most notably elaborating a taxonomy on the continuum going from hard to soft law (Terpan 2015). While defining the first is relatively simple, as the European legislative acts having binding nature, such as the international and supranational treaties, regulations, directives and decisions, as well as court rulings, the latter is still the object of a variety of classifications and definitions that are the result of the various international settings in which soft law is used (Hillgenberg 1999; Abbott and Snidal 2000; Senden 2004; Shaffer and Pollack 2009; Guzman and Meyer 2010; Stefan *et al.* 2019). Although the distinction between hard and soft law has been debated widely among scholars and practitioners, there has so far been no systematic longitudinal data to provide empirical evidence about their respective extent and variation across policies, EU bodies responsible for their drafting, and over time. Moreover, the role of soft law in European policy has been less widely discussed, besides for the lively debate on the new forms of governance (Trubek and Trubek 2005; Tholoniati 2010; Van Waeyenberge 2015), for some national studies of domestic soft law, mainly by legal scholars (Knauff 2010; Lavergne 2013), and for some researches that reflected on the effects of European soft law on its supposed addressees (van Rijsbergen 2013; Tulmets 2014; Bérut and Saurugger 2018; Láncoš 2018).

The EfSoLaw project aims to fill this gap in the specialised literature focusing on the study of the effects of soft law on the European multilevel policy system. This paper follows the theoretical introduction to the EfSoLaw research project (Hartlapp, Saurugger, Terpan 2020). It presents for the first time a new dataset of European law including both hard and soft law from seven different policy sectors. The EfSoLaw database includes more than 16 000 policy documents (called as well legal instruments or acts) produced by the European Union and its various bodies (including agencies) that have been in force during the 15 years span between 2004 and 2019. The database has been built with the purpose to answer a fundamental and for the time being unexplored question in the EU Law and policy literature: what is the proportion of EU soft law in different policy areas and how has this developed over time?

This paper is a preliminary presentation of the database that will only scratch the surface of the possibilities that it offers, as its analysis is still under way by the EfSoLaw research team. However, we show that this database represents an unprecedented step for researchers interested in addressing questions on the differences between hard and soft law policy-making, as well as questions on the effects of implementation or lack of it on the EU policy processes in various policy sectors over time.

Previous EU Law Datasets and their limitations for the study of soft law

Multiple previous researches have tested theories on EU law and EU law-making using quantitative data collections, sometimes overlapping and generally uncoordinated (Fjelstul 2019). These previous data collections focus almost exclusively on hard law, exploring the policy-making phase (König, Luetgert and Dannwolf 2006) or compliance with it (Toshkov 2010; Börzel and Knoll 2012; Leuffen, Rittberger and Schimmelfennig 2013), as well as reconstructing the links existing among EU hard law legislative documents and the EU Court decisions (Fjelstul 2019). These previous datasets can also be divided in two types. On one side are those that rely at least partially on the human-mediated coding of a certain amount of cases, a sample of various hard law documents or one or more policy-sector based datasets that reunite various existing databases or that integrate them (Häge 2007; Toshkov 2010). On the other are automated data collection exploiting computer-based coding to derive information from various sources related to EU law and law-making, such as Eur-Lex, Pre-Lex, or through data aspiration in other institutional sites (König, Luetgert and Dannwolf 2006; Häge 2011; Hübner 2015; Fjelstul 2019). Advantages of automated data collection derive from the big amount of data that can be processed in a relatively limited time for the researchers. The use of computer technology to generate datasets by extracting information from online databases can provide a gap-less documentation of the research process. In contrast to data collected and coded by humans, the automated extraction process allows for any repetition of the process in the future reproducing the same dataset. On the contrary, this type of data collection limits the type of variables that can be included, excluding interpretative variables and information that is not repetitive in form. In our case, the vast array of shapes and forms that can be taken by EU soft law documents made particularly complicated to think and elaborate computer scripts that could automatically code data in an efficient and systematic way. Secondly, the coding of some variables relevant for implementation research purposes (e.g. function of the soft law document, and its ways of enforcement) seemed difficult to task to a computer script, given the variety of elements to interpret in a soft law document in order to correctly code them.

Moreover, automated data collection is open to reproducing the biases existing in the initial data source. “Just as there are plenty of ways in which the formulation and structure of a questionnaire can bias measurement in survey research, there are plenty of ways in which errors in the way that online information is extracted by a computer script can result in systematic distortions of the extracted information” (Häge 2011, 458). Other researchers have already observed the lack of reliability of Eur-Lex data for a complete and valid data collection (Hartlapp and Falkner 2009; Steunenbergh and Toshkov 2009). Using the Eur-Lex database as a non-human mediated source for soft law acts would have exposed our results to the same risks, notably given the different types of documents to be included and their erratic categorisation on the Eur-Lex database. An initial test on a limited number of Eur-Lex soft law documents showed an incoherent automatic coding used by the Eur-Lex database for some documents of various nature, often coded as notices or

communications, while actually being guidelines or recommendations. Also, Eur-Lex coding was incoherent concerning actors involved in the elaboration process (e.g. indicating only one country as involved in the procedure when there were multiple countries at the origin of it). For this reason, a human-mediated coding was preferred as it allowed for more control on the data collection and a consequent higher reliability of the data at the price of a larger time investment by the research team¹.

Conceptualization and operationalization of the EfSoLaw database

To be of general use to the research community, a dataset should contain all available information and it has to be clear how that information was collected (Häge 2011). The following paragraphs clarify the details for the generation of the EfSoLaw database. This allows other researchers to use the data knowing what are the conceptualization and operationalization processes that lead to their structure. Also, these explanations ease the comprehension of the following sections of the paper where a first analysis of the dataset is exposed.

The database is composed of all hard and soft law acts produced by the European Union and all its bodies and agencies in seven policy sectors selected by the members of the team. The policy sectors represent a diversity of competences of the Union as well as different levels of technicality and different styles of decision-making, with some that are more characterised by intergovernmental processes of decision-making and others that are characterised by supranational ones. Secondly, to make the human-mediated coding feasible, we chose sub-sectors of main policy fields of competence of the Union: State Aid from the Competition policy; Pharmaceutical regulation from Health policy; Food safety at the crossroads between Consumers and Health policy; Financial regulations from the Finance policy sector; Sustainable agriculture from Common Agricultural policy; Police and judicial cooperation for the Area of Freedom, Security and Justice policies; or policy fields of limited cooperation at the Union level such as Common Foreign and Security Policy. This makes for seven policy sectors that can be comparable on a same analytical level, as well as in size. Each of these sub-sectors is sufficiently representative of the type of policy acts that characterize the global policy fields to which they belong (e.g. State Aid is characterised by a set of regulations and many technical individual decisions on cases as in other Competition policies, vice versa Police and judicial cooperation has a more limited number of acts, but with a predominance of political rather than technical acts as expected in a domain of intergovernmental policy).

These policy sectors guided the collection of our sample of acts from the existing EU official databases (Eur-Lex, the registry of State Aid decisions). Our sample in Eur-Lex was built through the selection of legal acts, international agreements, and preparatory documents, that were in force in the time period between 2004 and 2019, for all the EuroVoc thesaurus entries and directory codes that were relevant for the policy sectors

¹ The coding process used a proxy survey for data entry and has been conducted by myself and the junior members of the team (A. Eick, A. Ausfelder, R. Mespoulet) from 1st April to 31st July 2020.

defined above. Finally, we integrated these data entries through DGs' and EU Agencies' online archives to complete our sample with soft law instruments that were excluded from the Eur-Lex database, such as Agency guidelines or reports on policy initiatives destined to Member states to coordinate European responses in that field. The database is constituted of a total of 16475 acts. For the purpose of making the database exploitable for our research purposes, the categorization of European rules on the soft law / hard law continuum is applied at the level of instruments. We can therefore distinguish between Regulations, Directives, Decisions, Implementing and delegated acts, and International agreements as hard law. On the soft law side of the spectrum, we include a vast array of instruments such as: recommendations, opinions, guidelines, communications, declarations, green/white papers, reports, resolutions, notices, conclusions, impact assessments, and agency regulations or guidelines.

A large number of European hard law instruments are either delegated, implementing legislation adopted solely by the Commission, or routine and often trivial (amending) acts adopted by the Council such as decisions (Steunenbergh and Toshkov 2009). Decisions (both *sui generis* and the *Entscheidung* type) bear little relevance for what concerns the establishment of obligations on the multilevel policy system as they represent either quasi-administrative acts precisising obligations addressed to a single Member state or to a private actor (decisions of the *Entscheidung* type) or they establish obligations for the European bodies involved in it (e.g. nominating a director for an agency, deciding upon the participation of the EU in a international peace-keeping mission) (von Bogdandy, Arndt and Bast 2004). The Lisbon treaty has not changed the core of this distinction. The policy sectors of competition law and secondarily of the common foreign and security policy (CFSP) are characterised by an extremely high number of decisions produced by the Commission or the Council. For this reason, we distinguished both types of acts (decisions and delegated/implementing instruments) in our coding. In this way, we can give a general overview of the overall distribution of European acts and a more salient one, considering only acts that have a more clearly identifiable political nature.

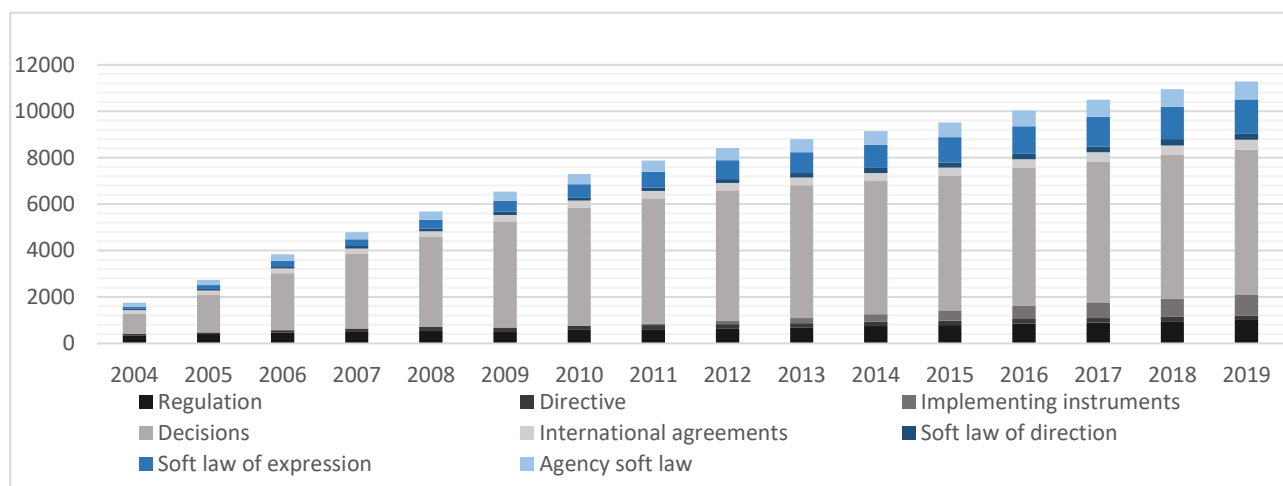
Moreover, if raw data on the type of acts has been collected, for reasons of data presentation, we are going to represent the multiple soft law type of acts in clumped-up categories based on their function. As Senden distinguished between preparatory and informative instruments, interpretative and decisions instruments and steering instruments (2004), we propose here a regrouping of soft law acts in three categories. Soft law of expression reunites preparatory and informative documents such as opinions, communications, notices, reports, declarations, resolutions and conclusions. Soft law of direction reunites interpretative and steering documents such as recommendations, guidelines, green/white papers and impact assessments. Finally, a separated third category reunites agency soft law. While this distinction can be discussed on its theoretical

validity, it has the only function of making the data easier to present in this preliminary phase of the database exploitation².

The EfSoLaw database

The dataset contains information on a total of 16475 acts that have been in force at least at one point between the 1st January 2004 and the 31st December 2019. The data shows a constant inflation of the number of acts that were in force in each of the year covered by the study. The number of in force acts went from 1758 in 2004 to 11288 in 2019. Figure 1 (below) shows that they are overwhelmingly constituted by Decisions, a category that reunites pre-Lisbon binding legal instruments (decision *sui-generis*, decisions in the JHA/PJC sector, joint actions, joint positions, framework decisions), as well as the post-Lisbon Decision category that reunites all of the above after the changes introduced in the treaties in 2009.

Figure 1. Type of acts per year



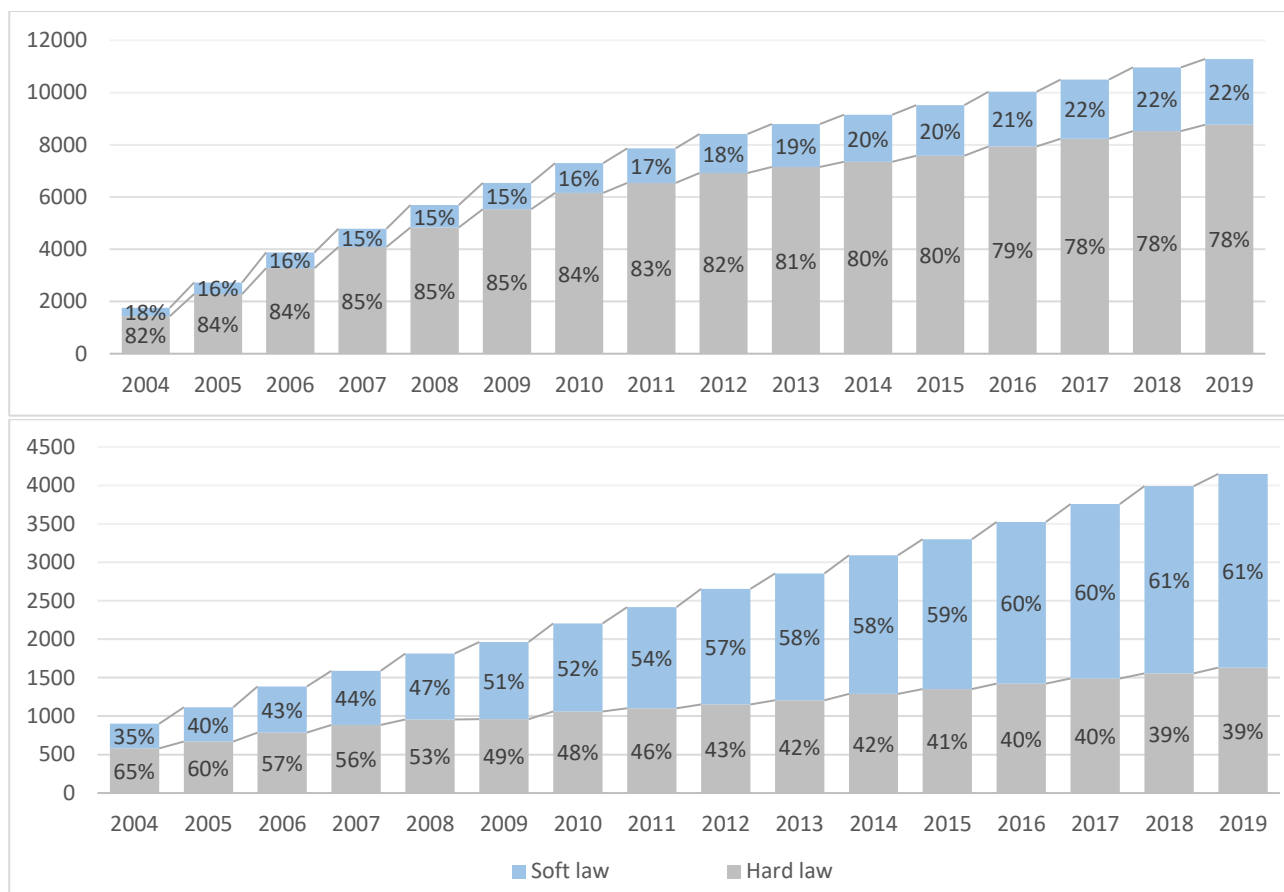
A methodological note is needed here to better understand this data. Hard law acts (in scale of grey in figure 1) have a date of entry in force and an “in force” status or a date of expiry clearly indicated in Eur-Lex data, which eased the process of definition of their precise time of validity. On the contrary, soft law acts (in scale of blue) only have a date of production and do not have a clearly identifiable date of expiry. Therefore, besides the rare cases in which it was possible to deduce a date of expiry of these soft law acts, for the others an “in force” status has been assumed for all the period of interest after their date of production. This has to be kept in mind for the correct interpretation of the data and figures presented in the remaining of the paper.

Given this methodological note, it is now possible to advance our analysis guided by the research question on the relative amount of soft law acts in EU law. Depending on the way in which we explore the data, we can get to different conclusions concerning this central question. For this reason, we are going to present our data in two forms. Figure 2a (top) shows the relative distribution of acts of hard and soft law between 2004

² A more thorough examination of the dataset will allow for a refined recoding of soft law acts in categories distinguished on the basis of multiple criteria, from their function, to their relationship to hard law, and their addressees.

and 2019 including all the acts of the database (n=16745). Figure 2b (bottom) shows the relative distribution of acts excluding decisions and implementing/delegated instruments (n=4915).

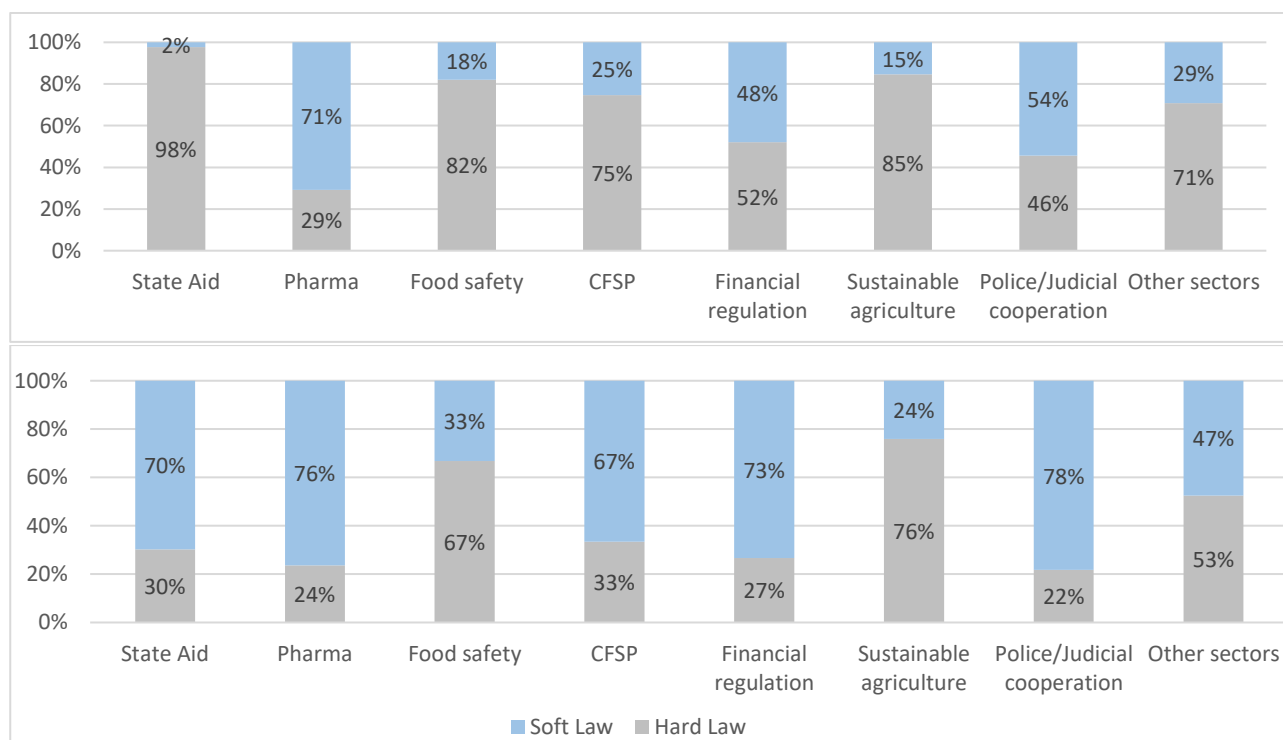
Figure 2. Type of acts per year on the Hard law-Soft law divide including (a, top) and excluding decisions, implementing and delegated instruments (b, bottom)



The hard law to soft law ratio varies decisively if we include or exclude repetitive acts with lesser political relevance. Notwithstanding the relative share of hard and soft law, some tendencies can be observed in the evolution of the rate of hard to soft law over time. Both contribute to the inflation of acts. However, while hard law seems to be the main contributor to this increase, it is actually soft law that experienced a bigger one in the period. In figure 2a, while hard law being in force per year increased by 6 times between 2004 and 2019, soft law did so by almost 8 times (n=319 in 2004; n=2519 in 2019). The difference is even more staggering using figure 2b data, where hard law inflates only by 189% in the same period. Although some part of the growth in soft law is to be associated with the bias in data collection relative to the lack of an ending of validity for soft law acts, data suggest that the general increase in the use of soft law in the seven policy sectors examined has been at least similar to that of hard law if not superior. This is in line with what literature has predicted since the Lisbon strategy (2000), with a wider number of policy sectors that have known a rise in the amount of soft law acts that are associated to hard law acts in new modes of governance framework such as the Open Method of Coordination (OMC) (Tholoniati 2010; Terpan 2015).

This can be seen looking at the distribution of hard law and soft law acts in the seven policy sectors that are included in the sample (see figure 3 a and b below). At least three of our policy sectors, pharmaceutical regulation, financial regulation and police and judicial cooperation are characterised by a high amount of soft law acts. The differential between figure 3a and 3b shows that a high number of decisions is common to some sectors of policy, State Aid and CFSP being the ones where the distribution between hard and soft law is radically changed including or excluding them (as well as implementing and delegated instruments).

Figure 3. Type of acts per year on the Hard law-Soft law divide by primary policy sector including (a, top) and excluding decisions, implementing and delegated instruments (b, bottom)



The structure of the data in raw numbers (cf. table 1) shows that the State aid sector is completely skewed in its distribution because most of its legal acts concern individual decisions made by the Commission. The same is true for Food safety and CFSP, where implementing and delegated instruments and decisions constitute the majority of acts adopted in the respective sectors. International agreements are mostly constituted of acts extending the application of EU law acts to external partners of the European Economic Area or of the EU Neighbourhood and Enlargement policy. As these acts may impose obligations on EU Member States as well as on non-EU ones (e.g. a visa exchange programme between the countries), we prefer keeping these acts among hard law acts with political relevance in our analysis.

Table 1. Type of acts by primary policy sector

Policy Sector	Type of act						Total
	Decision	Implementing instruments	Regulation	Directive	International agreement	Soft law	
State Aid	8782	6	81	2	6	205	9082
Pharma	37	45	153	25	66	789	1115
Food safety	352	507	539	37	98	336	1869
CFSP	670	3	73	9	56	275	1086
Financial regulation	78	299	103	35	53	524	1092
Sustainable Agriculture	204	25	87	122	101	98	637
Police/Judicial cooperation	160	33	46	19	31	345	634
Other	263	105	214	13	83	280	958
Total	10546	1023	1296	262	494	2852	16473

Concerning the authors of these legal acts, it is the European Commission and its DGs that have the main share of acts produced, from a minimum of 61,60% in 2004 to a peak of 74,42% in 2009 (see figure 4a). Even excluding lesser political acts, the Commission remains the main producer of legal acts in the Union, being responsible for the publication of more than a third of the overall acts produced by the Union and its bodies.

Figure 4. Main author of the acts per year, including (a, top) or excluding (b, bottom) decisions, implementing and delegated instruments

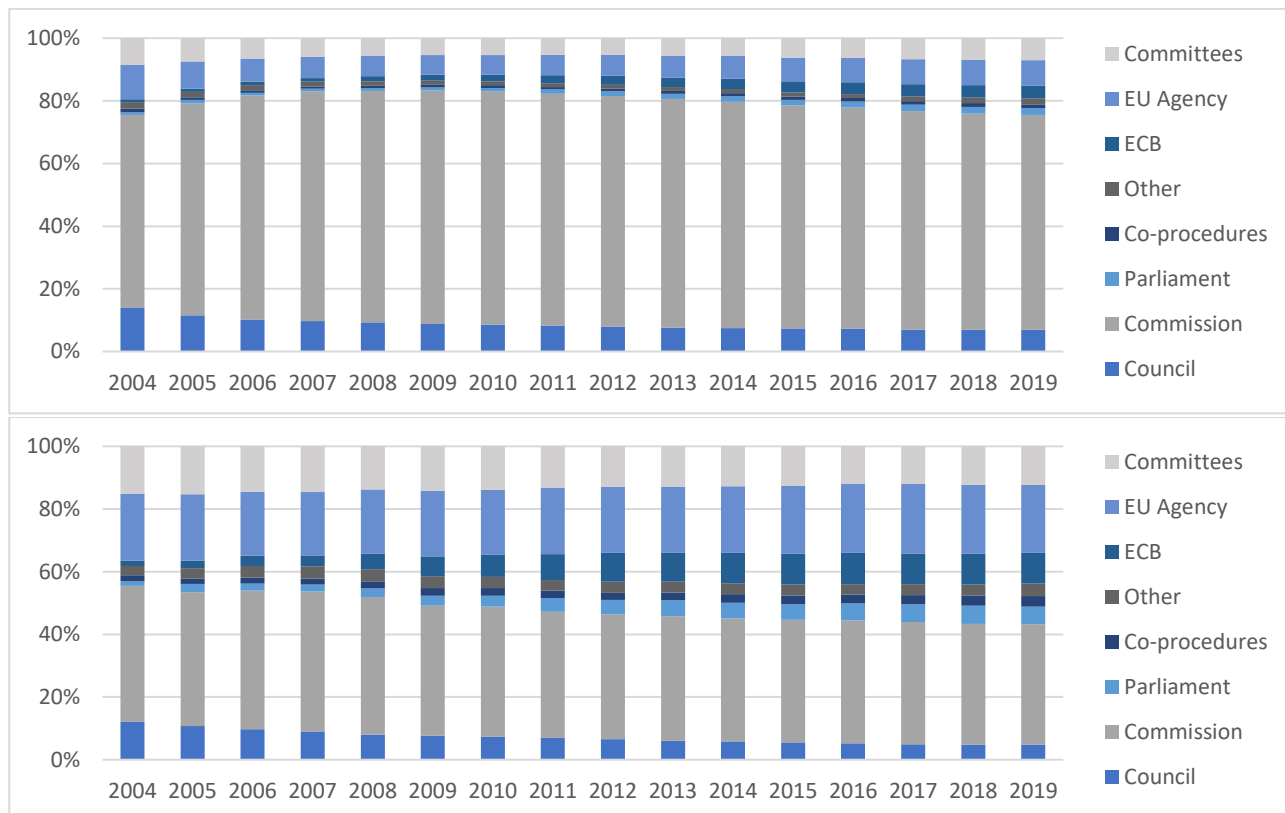
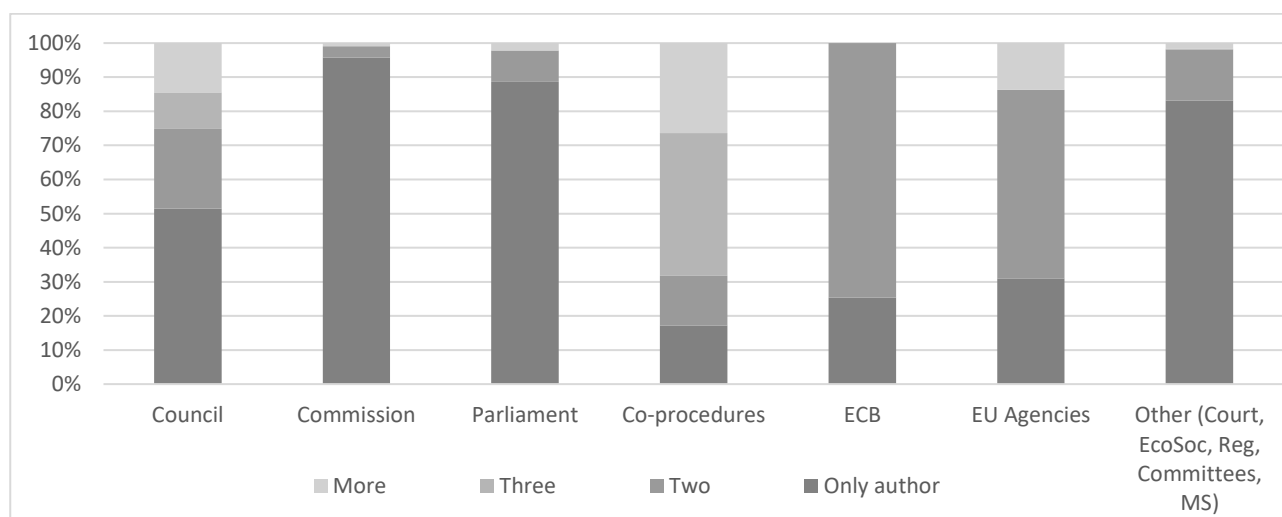


Figure 4a and b show one of the main contributions of this database to the advancement of knowledge on the structure of European law, and soft law especially. Disregarded by all previous EU Law databases, the EU

agencies are, in the seven policy sectors included in the EfSoLaw database, one of the main contributors to the production of policies in the Union, mainly through guidelines and reports. Although the numbers suggest a similar contribution to that of the Council, it is not possible to compare the two given the cumulative effect of the soft law acts and the very different relevance and nature of the acts produced by the two. On the contrary, these data suggest that the contribution of Agencies could be compared to that of Committees (including the Committee of the Regions and the European Economic and Social Committee). The EfSoLaw database confirms the conclusion that EU-level agencies became relevant building blocks in the multilevel Union policies and administration (Egeberg and Trondal 2011), and it should induce new scholarly attention on the precise role of Agencies in driving policy change in the Union and the Member states.

Besides their main authors, these acts can be produced through the collaboration of multiple bodies of the Union, and the more so since the Lisbon treaty established co-decision as the new ordinary legislative procedure for EU legislation. To represent this type of procedures, the author variable included all dyads between the Council, the Commission and the Parliament, as well as a modality including the three of them, all of which have been resumed in the modality “Co-procedures”. Besides this, the EfSoLaw database includes data on the other actors involved in the elaboration of an act beside its main author. This data gives us a glance at what are the most common styles of decision-making for the EU main organs. Figure 5 shows the number of involved actors in the elaboration of an act by main author.

Figure 5. Actors involved in the elaboration of an EU legal act by main author

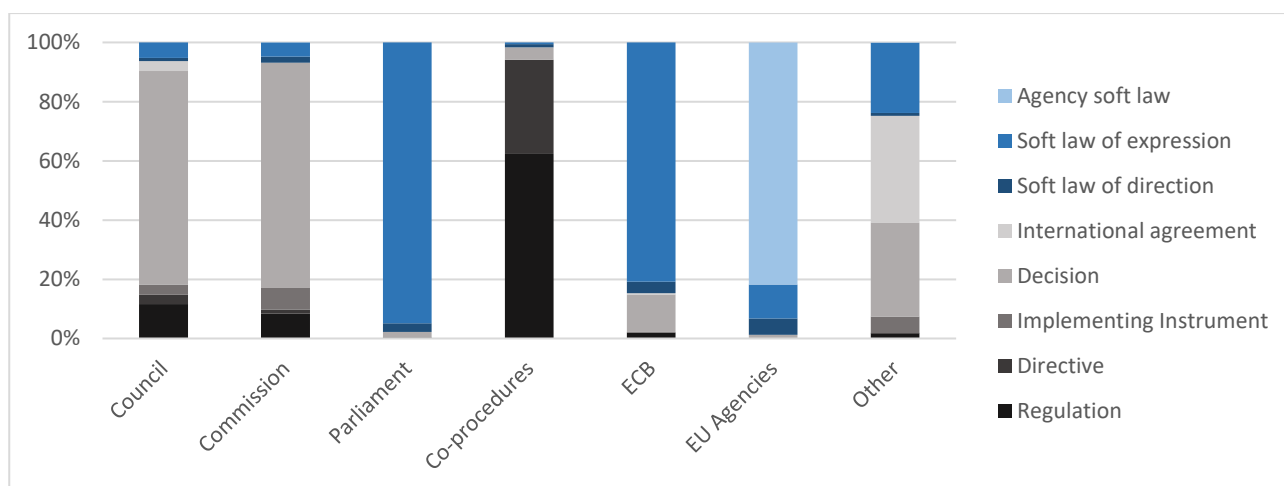


Coherently with its executive role in the Union, the Commission is by far producing most of its acts by its own. If this has certainly to do with the high rate of individual decisions and implementing and delegated instruments that the Commission produces, the data expunged of these acts confirms the same trend. The Commission is the only author in the acts in which it is the main author in 96% of the cases (81% without decisions and implementing instruments). The EU Parliament also has a relevant share of acts in which it is the only author. However, the extremely high rate of mono-authorship of the acts by the two bodies can be

explained through the co-procedures dyadic variables that include most of the acts in which these two bodies cooperated over the elaboration of a legal act. Moreover, the vast majority of acts in which the Parliament is the main and only author are soft law acts, such as Opinions, Declarations and Resolutions (cf. Figure 6), which for their purpose are drafted by only one institutional author.

Figure 5 shows as well that the Council drafts a relevant part of its acts in partnership with other actors, despite a part of these procedures being represented in the co-procedures modality. This reflects those acts for which a preparatory work has been done by the Commission, the Committees or other bodies, while not being formally under a co-procedure framework (notably for acts drafted before 2009). Co-procedures involves other actors than the main three legislative bodies in the Union, showing the relevance of comitology and of contributions coming from other EU bodies in the ordinary legislative procedure. Finally, the EU Agencies draft their instruments with another body more than two times out of three, mostly with other Agencies or other civil society institutions relevant in that field of policy.

Figure 6. Type of acts by main author of the act



As expected, Figure 6 shows that the Council, the Commission and co-procedures are mostly authors of hard law acts such as Regulations, Directives and Decisions. On the contrary, EU Agencies produce only soft law acts. Meanwhile, the European Central Bank is responsible for mostly Opinions addressed to the other bodies of the Union or to Member States in matters related to Financial regulation or State aid, as well as for a limited amount of hard law acts (only 76 on a total of 496 acts drafted as main author). Finally, an explanation is needed for the high amount of hard law acts categorised as drafted by “Other” authors. The majority of these acts are decisions and international agreements drafted by the EEA joint committee (n=750), while the soft law associated to this category is composed mostly of Opinions drafted by the European Economic and Social Committee (n=175), the Committee of the Regions (n=49), the Court of Auditors (n=32) or the Court of Justice of the EU (n=5).

Many other aspects of the database may find their place in this paper and are still to be analysed fully by the research team. Relevant conclusions have been inferred, confirming general previous knowledge on the functioning of the EU and on the relative composition and variety of its policy-making depending on the policy sector analysed. We know consider more in depth how the EfSoLaw database can contribute to the advancement of empirical and theoretical knowledge on European soft law and its policy effects.

EU soft law and its characteristics in the EfSoLaw database

European soft law developed in various institutional contexts and often without regulated mechanisms for adoption in the member states (Senden 2004). As a result, this type of instruments vary greatly in their function, form and application. The EU does not provide a legal categorization of soft law, but it formally recognizes recommendations and opinions in Art. 288 TFEU as non-binding legal acts. On this basis it is possible to distinguish these "official" instruments from "unofficial" forms of soft law which are not mentioned in the treaties (Knauff 2010). While intuitive and possibly in accordance with the legislators' intent, this taxonomic approach does not reflect relevant variation within the concept of soft law itself. Recommendations are similar to "unofficial" instruments like codes of conduct or practice and resolutions in their form and function (Senden 2004). A broad definition of "official" soft law as having a legal basis in Community law would apply to an even more diverse set of instruments, including OMC soft law (Knauff 2010) or agency-issued soft law, such as agency co-regulation or agency self-regulation (van Rijsbergen 2014). A distinction between official and unofficial soft law would then be conceptually and operationally unhelpful for a research that questions the way in which these acts influence policy change in the EU multilevel policy system.

Below the level of instrument types, specific attributes can be discussed as characteristics of soft law. These attributes relate to some important dimensions, which however do not allow to separate soft law from other law and fail to clearly distinguish between different subtypes if considered one by one. This is the case for the categories of adoption mechanism (agreement vs. unilaterally issued) (Knauff 2010), the object of its rules (procedural vs. substantive) (Cini 2001) its addressee (external vs. internal orientation) and its main institutional author. Although our data allows to measure all of these characteristics, each of them lacks the necessary conceptual and descriptive validity to construct a typology of soft law that accounts for its most valuable attributes in policy terms, its capacity of inducing policy change either at the European level (influencing successive hard law or soft law), or at the national level (inducing compliance in the Member states). Although not yet informed by a recoding based on these multiple variables, but only by a distinction based on qualities ascribed to the various type of acts, the proposed distinction between soft law of direction, soft law of expression and agency soft law was an attempt at labelling its variations in a more valuable sense for the purposes of our research.

Against these challenges, in this section, we propose a parsimonious typology of soft law instruments and we introduce the main variables that we are planning to use to better guide our future research on the effects of soft law on the multilevel system. A typology can serve as a pre-requisite to understand the heterogeneity of soft law and to identify empirical regularities (Kluge 2000). The previous discussion points to three challenges of constructing a typology. First, its dimensions should characterize relevant phenomena of soft law. Second, dimensions should be able to capture systematic variation among soft law instruments. Third, the emerging types should vary in additional attributes, which move in tandem with the main dimensions (Collier, LaPorte and Seawright 2012). Against this array of overlapping categories a more promising approach seems to be a categorization of soft law along two dimensions: the primary function of soft law and the relationship to corresponding hard law (Cini 2001; Knauff 2010; Senden 2004).

The primary function of soft law relates to its objective or intended effect. Along this dimension, we can distinguish three categories. First, steering soft law establishes a new governance idea, either in form of a substantive position or a direction of a policy that is independent of existing European Union law (Senden 2004, 118) or by establishing a process that did not exist before. A resolution of the Parliament that asks the Council and the Commission to change the leading policy objectives of a certain policy programme of the EU would be a fitting example. Second, an explanatory function of soft law provides additional information and criteria to prepare or explain the meaning and implications of existing or prospective EU policies. In its pure form, this function of soft law does not produce anything new but merely interprets what is already there, and suggests the continuity or limited modification of the position or direction of policy on a certain subject. An example of such an act is a report by the ECB where the impact of recent financial regulation policy initiatives is examined in detail and a suggestion for the renewal of the assessment exercise in some years time is made. Third, a procedural function of soft law can be identified in acts that merely provide initial or additional processes related to EU policy, without contributing to its renewal nor in direction, nor in content. For example, an opinion of the Parliament that gives assent to a Commission proposal without any argument or discussion for this support.

Table 2 shows the distribution of the soft law acts included in our sample in the three possible functions. Abiding to what we might expect from their names, the steering function is predominant in acts that presuppose the formulation of a political position, such as resolutions and conclusions. Similarly, around one in four recommendations and communications, one every three green/white papers, and one in five impact assessments and opinions have this steering function. The active role taken by agencies in building EU policies is confirmed as well by this data. One in four of their guidelines and regulations have a steering function. Notices, reports and guidelines are among those with a most recurrent procedural nature, notably for their repetitive nature in the context of policy evaluation or technical rule setting by the Commission or the Agencies. Last but not least, 61% of all acts have been identified as explanatory acts by the coders.

Table 2. Function of soft law acts by type of act

Type of act	Function of the act				Total
	Steering	Explanatory	Procedural	None of these	
Recommendation	22	53	4	1	80
Opinion	101	495	35	5	636
Guideline	13	115	52	3	183
Communication	52	130	34	2	218
Green/White paper	7	9	2		18
Report	18	205	86	2	311
Resolution	216	30	9	1	256
Notice	9	40	36		85
Conclusion	15	3	1		19
Agency guideline	198	494	61	37	790
Impact assessment	16	66			82
Other	55	95	23		173
Total	722	1735	343	51	2851

In line with expectations about their function, reports, guidelines (by agencies or not) and impact assessments fall in this category at least two times out of three. A bit surprisingly, recommendations and opinions contribute substantially to this function. This can be explained through the high share of technical opinions and recommendations produced by the European Central Bank (n=375), the Committees (n=102), the Agencies (n=508) or the Court of Auditors (n=20), and often addressed to the main legislative bodies of the Union to help them choose appropriately the policy directions to take through thorough data and technical advice.

Table 4. Function of soft law acts by policy sector

Policy sector	Function of the act				Total
	Steering	Explanatory	Procedural	None of these	
State Aid	12%	72%	16%	0%	100%
Pharma	29%	57%	9%	5%	100%
Food safety	29%	57%	13%	1%	100%
CFSP	67%	13%	20%	0%	100%
Financial regulation	7%	87%	6%	0%	100%
Sustainable Agriculture	16%	80%	4%	0%	100%
Police/Judicial cooperation	21%	64%	15%	0%	100%
Other	23%	56%	19%	2%	100%
Total	25%	61%	12%	2%	100%

Analysing the function of soft law acts by their policy sector shows that the more technical a field of policy, the higher the share of explanatory acts. More than two out of three soft law acts in State aid, financial regulation and sustainable agriculture are explanatory. The field of police and judicial cooperation has a similar share of explanatory acts, which can be explained by reports and recommendations from agencies (n=56) and committees (n=35), as well as impact assessments (n=30) and reports (n=85) by the DG Justice. In line with what one might expect from one of the most intergovernmental policy sectors of the Union, the

Common Foreign and Security Policy is the only one among the sectors analysed to have a majority of steering soft law acts, most of them resolutions (n=116) by the European Parliament.

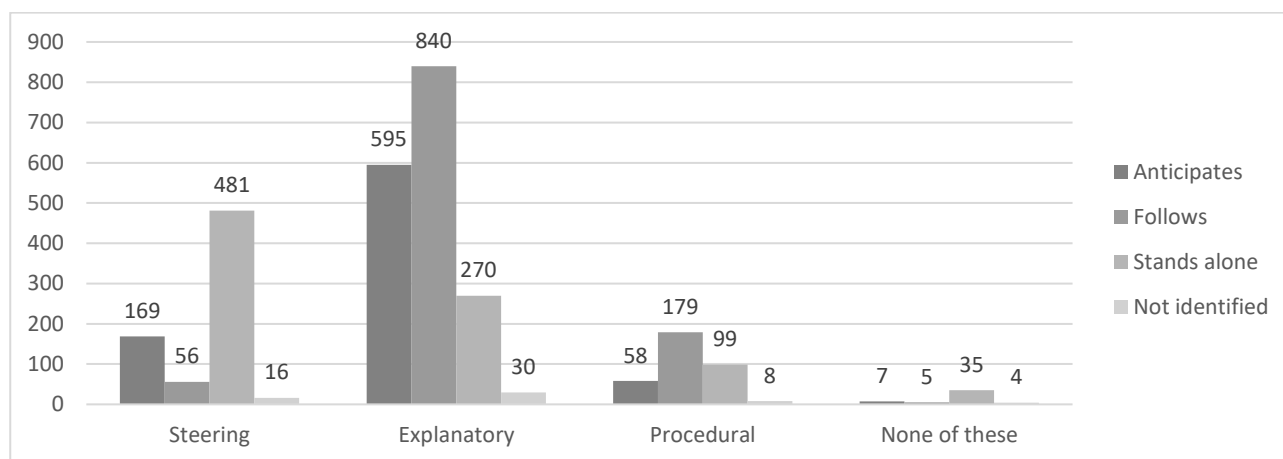
The second dimension through which build a proper categorization of soft law for our research purposes concerns the relationship of soft law to corresponding hard law. We distinguish instruments that supplement hard law from instruments that are issued in policy areas where no related EU hard law exists. The first category comprises soft law that coexists and interacts with specific hard law instruments. The second category comprises instruments that outline programs and set targets without a reference to articles, standards or concepts mentioned in corresponding hard law instruments. Among the first category, we further distinguish between soft law acts that anticipate or prepare future hard law, from acts that follow it. Table 5 presents this relationship to hard law for the sample of soft law acts by their type (n=2859). The type of act is in general a good predictor of its relationship in time towards hard law.

Table 5. Time relationship of soft law acts towards hard law by type of act

Type of act	Time to Hard law				Total
	Anticipates	Follows	Stands alone	Not identified	
Recommendation	20%	56%	23%	1%	100%
Opinion	87%	5%	8%	0%	100%
Guideline	10%	72%	15%	3%	100%
Communication	28%	40%	27%	5%	100%
Green/White paper	6%	17%	78%	0%	100%
Report	4%	54%	40%	3%	100%
Resolution	18%	16%	65%	1%	100%
Notice	0%	89%	8%	2%	100%
Conclusion	16%	11%	63%	11%	100%
Agency guideline	0%	57%	40%	3%	100%
Impact assessment	89%	2%	6%	2%	100%
Other	25%	22%	51%	1%	100%
Total	29%	38%	31%	2%	100%

Opinions and impact assessments as preparatory documents produced in the elaboration of hard law policy programmes anticipate hard law in most cases, while notices, communications, guidelines (and agencies' ones), reports, and recommendations tend to follow the hard law that they precise in content or evaluate in action. Finally, among the acts that do not have direct connections to hard law acts, we find resolutions, conclusions and green/white papers. An important share of reports and agencies' acts are also not directly linked to hard law, which suggests an informative and procedural function, or for most of the agency guidelines and regulatory instruments, acts adopted in the general context of their mandate and not associated with a particular one established through a hard law act by the main bodies of the Union.

The crosstabulation of the two main dimensions of soft law that we consider relevant to distinguish the acts with potential effects on the EU multilevel policy system is presented in figure 7. Given their function of steering, explanatory or procedural, how do these soft law acts relate to hard law?

Figure 7. Time relationship of soft law acts towards hard law by their function

Most of soft law acts with a steering function, such as EU Parliament resolutions, are not followed by an hardening of their content. However almost one steering soft law act every four anticipates further hard law. It is this category of acts that shows most promise for a qualitative study on the hardening of soft law and therefore, on its effects on the multilevel system. Among the explanatory soft law acts, most are prepared as a follow-up of hard law, with an evaluative or soft regulatory function (cf. table 5). One in three of these explanatory soft law acts anticipates hard law in the field of policy concerned. While some could be preparatory documents for hard law acts with a more technical than political nature (impact assessments, ECB or committees opinions), others could be cases of hardening soft law (recommendations or resolutions becoming a base for hard law) and should be investigated further in the framework of this project.

Further variables included in the database (main addressees, link to other soft law instruments, forms of enforcement) will be used to better characterise the sample of soft law acts and help us identify the best case studies for the qualitative analysis of the effects of soft law on national policy. We are not in the condition at this stage to present them in an extensive way and we refer to future publications and to the EfSoLaw project website for their complete presentation.

Limitations and complementarity with other datasets

This paper is to be considered as a preliminary exploration of the possibilities offered by the EfSoLaw database. It shows the main tendencies in the data, but does not advance much in their analysis. Further and more theoretically informed examinations of the data are provided in the other papers presented in this panel (Ausfelder and Eick 2020; Mespoulet 2020) and are expected in the future. The database shows promise for a decisive advancement in the knowledge of the structure of EU soft law and on its relationship to hard law. The choice of a human-coded procedure for all soft law acts allows for a high reliability of the data, especially in comparison with databases that relied on the correctness of the data as registered in Eur-Lex or Pre-Lex databases, which we showed cannot be taken for granted for all of their variables. On the

other hand, the human-coded procedure shows its limits for what concerns replicability. The definition of policy sectors through EuroVoc descriptors and Eur-Lex directory codes although replicable, may be contested for the inclusion or exclusion of potential entries at the borderline of sectors (e.g. veterinary pharmaceutical regulation is to be considered together with human pharmaceutical regulation or not?). In this sense, future studies could apply different selection rules for policy sectors that would make the respective results more difficult to compare. Secondly, as the inclusion or exclusion of certain acts relied on the interpretation by the coders of their nature of legal or quasi-legal acts, i.e. on the establishment of obligations or lines of conduct for the addressees of the document, a perfect replicability of the dataset as it is by other coders cannot be fully ensured. However, the gains in terms of inclusion of variables necessitating a legal interpretation of the text, difficult to achieve through automated data collection, far outweighs the possible minimal inconsistencies in interpretation, reduced through a close surveillance of the data collection phase and continuous dialogue among the coders on dubious cases and make the dataset a trusted source for any researcher interested in exploring these policy sectors or to test theoretical hypothesis on European soft law.

Moreover, with all the limits expressed above, the EfSoLaw database remains the first elaborate quantitative effort to measure EU soft law and its characteristics in connection to the various phases of the policy process. EU Law and European public policy studies have given much attention to implementation as a distinct phase of the policy cycle (Treib 2014). However, the relative explanatory power as well as the causal interaction of different factors remains a challenge not least for a lack of systematic comparison across policy areas. What is more, implementation studies, quantitative as well as qualitative analysis, focus almost exclusively on how timely and correctly EU standards are transposed into national law (Hartlapp and Falkner 2009). Where implementation processes are conceptualized as transposition by the legislator or enforcement by the Court of Justice of the EU, *de facto* implementation and enforcement receive little attention (Hartlapp 2014; Saurugger 2012; Saurugger and Terpan 2016). Consequently, soft law is not covered or no attention is paid to similarities and differences of hard and soft law in most studies, especially the quantitative ones discussed above. This database will allow researchers to address these questions on the differences of implementation between hard and soft law, as well as questions on the effects of implementation or lack of it on the EU policy processes in various policy sectors over time.

The EfSoLaw database includes only a sample of policy sectors. The sectors are sufficiently diverse to represent various patterns of policy-making and hard to soft law balance, allowing for valuable comparative analysis. The results, while they cannot be generalised to the totality of EU law, make a sufficient sample to generate solid hypotheses on what is the actual part of EU soft law in EU policy-making and law, complementing the lack of data of existing datasets on the matter. Our study may allow future research to complement it with further cross-sectoral comparisons, as well as to test its results on a larger scale, if similar

datasets as those existing for primary and secondary European law (EUPOL, EvoEU) were to be constructed for soft law acts.

Conclusion

This paper presents for the first time the EfSoLaw dataset. It includes data on hard and soft law acts covering seven different policy sectors, allowing for the first time quantitative comparisons of soft law distribution through complete cross-sectorial data. The paper discussed the conceptual and operational choices that preceded the data collection, defending the choice of a human-coded database as opposed to an automated coding one, arguing for the limits associated with the latter for the correct interpretation of variables that are very relevant for the definition of soft law characteristics and therefore, for useful research on the effects of soft law in the EU multilevel system that is at the core of the EfSoLaw research project.

To demonstrate the potential of the detailed information contained in the EfSoLaw database, the paper starts by illustrating the distribution of data on some main variables, such as the type of acts included, the relative hard to soft law ratio and the drafters of the acts, over time and by policy sector. The paper shows how impactful the inclusion or exclusion of hard law acts with limited political implications such as decisions and implementing or delegated instruments can be in the analysis of certain policy sectors. It argues for their exclusion in all those researches that aim to achieve a salient understanding of the differences in effects between hard law and soft law in a comparative scheme including multiple countries. Moreover, the paper confirms some common knowledge on the EU policy-making showing that the Commission is the most relevant drafter of legislation in the EU, as well as the increased capacity of the EU Parliament to influence the hard law policy process after the introduction of the co-procedure as ordinary legislative procedure. We also confirm the results of previous research on the relevant and increasing role of Agencies as policy and administrative contributors to the EU.

Then, the paper analyses more in depth some of the characteristics of EU soft law that can be inferred from the dataset. We argue that to appropriately consider the contribution of soft law in a multilevel policy system that evolves over time, two fundamental dimensions have to be considered. The first is the distinction on the function of soft law, which has been for long at the centre of previous taxonomies (Senden 2004). The steering, explanatory or procedural function of soft law acts has to be considered in relationship to a second dimension, which adds relevant information to evaluate the potential for policy effects of soft law acts: the direct relationship of soft law to hard law acts, which can be either anticipated by preparatory soft law that influence their direction and content, or followed by soft law that determines with further precision their policy objectives. Finally, soft law that stands on its own in the policy process is identified, raising questions on its capacity to effect policy at any level of its making.

Further research on the characteristics of soft law will be achieved in the next months through a more precise analysis of further variables included or derived through the dataset. This will not only help in the development of a more detailed typology of EU soft law, but also help the selection of case studies for a qualitative analysis of soft law effects on national policy that will complement the quantitative analysis here introduced. This short exploration of the EfSoLaw database certainly raises more questions than it can answer. However, it shows its potential for advancing knowledge on the EU policy system and more so on the contribution of soft law to its functioning.

References

- Abbott, K. W., & Snidal, D. (2000). Hard and Soft Law in International Governance. *International Organization*, 54(3), 421–456.
- von Bogdandy, A., Arndt, F., & Bast, J. (2004). Legal Instruments in European Union Law and Their Reform: A Systematic Approach on an Empirical Basis. *Yearbook of European Law*, 23(1), 91–136.
- Börzel, T., & Knoll, M. (2012). Quantifying non-compliance in the EU: A Database on EU Infringement Proceedings. *Berlin Working Paper on European Integration*, (15), 1–24.
- Cini, M. (2001). The soft law approach: Commission rule-making in the EU's state aid regime. *Journal of European Public Policy*, 8(2), 192–207.
- Collier, D., LaPorte, J., & Seawright, J. (2012). Putting typologies to work: Concept formation, measurement, and analytic rigor. *Political Research Quarterly*, 65(1), 217–232.
- Egeberg, M., & Trondal, J. (2011). EU-level agencies: New executive centre formation or vehicles for national control? *Journal of European Public Policy*, 18(6), 868–887.
- Fjølseth, J. C. (2019). The evolution of European Union law: A new data set on the Acquis Communautaire. *European Union Politics*, 20(4), 670–691.
- Guzman, A. T., & Meyer, T. L. (2010). International Soft Law. *Journal of Legal Analysis*, 2(1), 171–225.
- Häge, F. M. (2007). Committee decision-making in the Council of the European Union. *European Union Politics*, 8(3), 299–328. <https://doi.org/10.1177/1465116507079539>
- Häge, F. M. (2011). The European union policy-making dataset. *European Union Politics*, 12(3), 455–477.
- Hartlapp, M. (2014). Enforcing Social Europe through Labour Inspectorates: Changes in Capacity and Cooperation across Europe. *West European Politics*, 37(4), 805–824.
- Hartlapp, M., & Falkner, G. (2009). Problems of operationalization and data in EU compliance research. *European Union Politics*, 10(2), 281–304.
- Hillgenberg, H. (1999). A Fresh Look into Soft Law. *European Journal of International Law*, 10(3), 499–515.
- Hübner, D. C. (2015). The 'National Decisions' database (Dec.Nat): Introducing a database on national courts' interactions with European Law. *European Union Politics*, 17(2), 324–339.

- Kluge, S. (2000). Empirically Grounded Construction of Types and Typologies in Qualitative Social Research. *Forum Qualitative Sozialforschung / Forum: Qualitative Social Research*, 1(1).
<https://doi.org/10.17169/fqs-1.1.1124>
- Knauff, M. (2010). *Der Regelungsverbund: Recht und Soft Law im Mehrebenensystem*. Tübingen: Mohr Siebeck.
- König, T., Luetgert, B., & Dannwolf, T. (2006). Quantifying European legislative research: Using CELEX and PreLex in EU legislative studies. *European Union Politics*, 7(4), 553–574.
- Láncos, P. L. (2018). A hard core under the soft shell: How binding is Union soft law for Member States? *European Public Law*, 24(4), 755–784.
- Lavergne, B. (2013). *Recherche sur la soft law en droit public français*. Toulouse: LGDJ.
- Leuffen, D., Rittberger, B., & Schimmelfennig, F. (2013). *Differentiated Integration: Explaining Variation in the European Union*. Basingstoke: Palgrave Macmillan.
- van Rijsbergen, M. (2014). On the enforceability of EU agencies' soft law at the national level: The case of the European securities and Markets Authority. *Utrecht Law Review*, 10(5), 116–131.
- Saurugger, S. (2012). Beyond non-compliance with legal norms. In T. Exadaktylos & C. M. Radaelli (Eds.), *Research Design in European Studies: Establishing Causality in Europeanization* (pp. 105–124). Basingstoke: Palgrave Macmillan.
- Saurugger, S., & Terpan, F. (2016). Do crises lead to policy change? The multiple streams framework and the European Union's economic governance instruments. *Policy Sciences*, 49(1), 35–53.
- Senden, L. (2004). *Soft Law in European Community Law*. Oxford: Hart Publishing.
- Shaffer, G. C., & Pollack, M. A. (2010). Hard vs. Soft law: Alternatives, complements, and antagonists in international governance. *Minnesota Law Review*, 94(3), 706–799.
- Stefan, O., Avbelj, M., Eliantonio, M., Hartlapp, M., Korkea-aho, E., & Rubio, N. (2019). EU Soft Law in the EU Legal Order: A Literature Review. *SoLaR Working paper*.
- Steunenberg, B., & Toshkov, D. (2009). Comparing transposition in the 27 member states of the EU: The impact of discretion and legal fit. *Journal of European Public Policy*, 16(7), 951–970.
- Terpan, F. (2015). Soft Law in the European Union-The Changing Nature of EU Law. *European Law Journal*, 21(1), 68–96.
- Tholoniati, L. (2010). The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument. *West European Politics*, 33(1), 93–117.
- Toshkov, D. (2010). "Taking Stock: A Review of Quantitative Studies of Transposition and Implementation of EU Law". *Institute for European Integration research Working Paper*.
- Treib, O. (2014). Implementing and complying with EU governance outputs. *Living Reviews in European Governance*, 9(1), 1–47.

Trubek, D. M., & Trubek, L. G. (2005). Hard and soft law in the construction of social Europe: the role of the open method of co-ordination. *European Law Journal*, 11(3), 343–364.

Van Waeyenberge, A. (2015). *Nouveaux instruments juridiques de l'Union européenne : évolution de la méthode communautaire*. Bruxelles: Larcier.