I. INTRODUCTION

1. Ambition and structure

'Soft law' allows for the steering of human behaviour by legally non-binding rules. In spite of its – from a legal perspective – apocryphal character, it may dispose of a high authority resulting in high compliance-rates, that is to say in a large measure of effectiveness. Therefore, 'soft law' – unlike what its name suggests – is to be taken seriously, also from a legal point of view. It is created and applied within the framework of the various levels of public rule-making, that of national law, European Union (EU) law and public international law. In an attempt to 'abandon our nostalgia for a world of unequivocally binding law',[1] this book focuses on the creation of 'soft law' by the EU and its institutions and other bodies. It aims at improving the understanding of EU 'soft law' as a *quasi*-legal phenomenon in general and specifically of its importance in facilitating compliance with the law of the EU by its Member States (MS). Given the often considerable steering effect of 'soft law', the inherent discrepancy – legally non-binding acts shall lead to compliance with binding law – seems to be only a *prima facie* contradiction.

As a wide-spread tool in ensuring compliance with EU law, 'soft law' shall be tested against the EU primary law framework: To which extent do the Treaties allow for the adoption of 'soft law', what are its effects and its purposes, and how can the Court of Justice of the European Union (CJEU) review EU 'soft law'? On the basis of these findings, the use of 'soft law' in ensuring compliance with EU law by the MS shall be addressed. In various policy fields (eg banking supervision or energy policy), EU law provides for procedures which often prescribe the adoption of 'soft law' as a means of *persuading* MS to apply the relevant EU law. While some mechanisms only allow for 'soft law' acts to be adopted, others also envisage the (subsequent) adoption of law (that is to say: hard law as opposed to 'soft law') – in case persuasion does not work. Again other mechanisms only permit the adoption of hard law acts directed to the MS concerned.

1 Trachtman, Direct Effect 656.

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This work proffers a structural classification and enquires on the legal feasibility of these procedures, taking into account, *inter alia*, the most important principles enshrined in the Treaties, such as the principle of subsidiarity, the principle of proportionality, or the delicate institutional balance of the EU.

In conclusion, this thesis is about two main issues which are related to each other. It explores the competences of the EU to adopt 'soft law' and the effects, the purposes and the possibilities of judicial review of this body of rules more generally. On the basis of these findings, it then presents the way in which various EU actors – within the framework of different procedures and not rarely with the help of 'soft law' – try to ensure MS' compliance with EU law (compliance mechanisms). A profound understanding of the functioning and a thorough legal evaluation of these mechanisms – of which a selection shall be presented – is possible only on the basis of a more general legal account of EU 'soft law'. Therefore, the two main concerns of this work – EU 'soft law' and said compliance mechanisms – are dealt with consecutively. That way, the book ought to contribute to a better understanding of EU 'soft law' in general, but also to the disclosure of one important field of its application in practice (compliance mechanisms), thereby addressing some of the many legal concerns these issues raise.

Having a closer look, the book's structure is the following:

Part II explores the intriguing idea of 'soft law' beyond specific legal orders. Following a discussion of different concepts of this phenomenon which can be found in the literature, a definition of 'soft law' shall be provided which shall underlie the entire work: 'soft law' as a category of norms which are enacted by different bodies as an expression of public authority, and which are aimed at steering human behaviour in a legally non-binding way (1.).

This definition shall be complemented by a delimitation of 'soft law' from other categories of norms such as law, customs, morals or private rule-making, but also from non-normative output of public bodies. For the sake of stimulating the discussion, a related phenomenon shall be presented at this point: the effects of the law of the United Nations (UN) which is in conflict with EU fundamental rights as dealt with most famously in the *Kadi* cases on the one hand and, on the other hand, the effects of the law of the World Trade Organisation (WTO) in the EU legal order. It will turn out that the effects of these specific regimes in the given context are similar to those of 'soft law'. They are not considered binding – to the extent that they conflict with EU fundamental rights (in case of UN law) or to the

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extent that an individual/undertaking or a MS relies on them (in case of WTO law). This exemplifies the close proximity of law and 'soft law', and the resulting difficulties when it comes to distinguishing them from each other (2.).

After this overview, in Part III the emphasis shall be shifted to EU law or rather: EU 'soft law'. In an attempt to classify the various forms of EU 'soft law', and following an overview of the historical and current use of EU 'soft law' (1.), the actors concerned shall be depicted, that is both the originators and the addressees of EU 'soft law' (2.). When it comes to the competence of the EU to adopt 'soft law', it is unclear, not least from the case law of the CJEU, whether the principle of conferral applies in this context. In order to address this question, but also in order to get an idea of the structural meaning of 'soft law' in primary law, the Treaty provisions allowing for the adoption of recommendations and opinions as the standard expressions of EU 'soft law'[2] shall be looked at more closely. Here we can distinguish between general empowerments such as Article 292 of the Treaty on the Functioning of the European Union (TFEU) or authorisations only with regard to a specific task. But also the possibilities to adopt other forms of EU 'soft law' (such as guidelines or resolutions), as enshrined in the Treaties, shall be reflected upon. From these findings about the structure of 'soft law' competences in the Treaties, conclusions shall be drawn with respect to the (questionable) applicability of the principle of conferral (3.).

In a next step, the effects of EU 'soft law' shall be addressed, be they legal, factual or mixed (4.). A legal effect may be an obligation of the national authority addressed to *consider* 'soft law' or even to *provide the reasons for non-compliance*, which may again emanate from the legal order of the EU, eg the principle of sincere cooperation or the protection of individuals' legitimate expectations. Factual effects root in human nature, such as the propensity to follow an existing rule – irrespective of whether it is binding or not – rather than not to follow it. In this context, also the literary discussion on the phenomenon of 'nudging' shall be reflected upon. The effects of EU 'soft law', in the terminology applied here, are mixed if it is both legal and factual circumstances which facilitate compliance, for example the rule which allows the Council to deviate from a Commission proposal addressed to it (an act of EU 'soft law') only by a unanimous decision, instead of the qualified majority which usually applies in the underlying

2 See Article 288 TFEU.

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procedure.[3] Here the legal requirement, together with the factual difficulty to reach a unanimous decision, brings about an increased authority of 'soft law'. The subsequent chapter will shed light on the varying purposes of 'soft law', eg the preparation or even the substitution of law. These purposes shall be illustrated by various examples from legal practice (5.).

Eventually, the possibilities of judicial review of 'soft law' – as essentially determined by the CJEU – shall be fleshed out. True 'soft law' acts being excluded from an annulment procedure *qua* not being 'intended to produce legal effects vis-à-vis third parties',[4] a preliminary reference pursuant to Article 267 TFEU or a damages claim may be useful tools to achieve a review of EU 'soft law' by the Court (6.).

Following this account of legal questions regarding EU 'soft law' more generally, the focus shall then turn to the question how *individualised* EU 'soft law' – addressed to a certain MS or national authority – may be and is actually used to facilitate MS' compliance with EU law in the course of what was referred to above as compliance mechanisms. Part IV shall be dedicated to presenting such mechanisms. Following an introduction (1.), those compliance mechanisms laid down in primary law and a selection of those laid down in secondary law shall be depicted (2.). In terms of their scope we can distinguish between the general Treaty infringement procedure which allows the Commission (or a MS) to pursue all kinds of non-compliance with EU law on the part of a(nother) MS before the Court on the one hand, and special compliance mechanisms which are tailored to address non-compliance only in a specific field of EU law (eg transport law or deficit rules), on the other hand. On a different level, depending on whether the respective procedures provide for EU 'soft law' acts to be addressed to a certain MS, hard (no 'soft law' acts), mixed (both 'soft law' and legal acts) and soft mechanisms (only 'soft law' acts) can be discerned.

Finally, in Part V of this work, after a brief introduction (1.), these mechanisms shall be classified with a view to the EU actors involved (these are regularly administrative bodies like the Commission or European agencies), the policy fields concerned, their procedural structure, the different purposes of 'soft law' (in mixed and soft mechanisms) and the way in which the special compliance mechanisms deviate from the general one, that is the Treaty infringement procedure. Eventually, the question why each of the

3 See Article 293 para 1 TFEU.

4 Article 263 para 1 TFEU.

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presented mechanisms is designed in its peculiar way shall be addressed (2.).

Thereafter, a legal analysis shall be proffered, tackling a variety of legal questions relating to our selection of compliance mechanisms (3.). At the beginning of this analysis, a material distinction shall be drawn between the implementation and the enforcement of EU law, as undertaken by EU actors *vis-à-vis* the MS. The core rule of the former is Article 291 para 2 TFEU, the core rule of the latter are the provisions on the Treaty infringement procedure. From these rules – but also with a view to the Treaties as a whole – the characteristics of implementation and enforcement under primary law shall be distilled, and subsequently each of the compliance mechanisms presented above shall be allocated to either category. As regards the compliance mechanisms laid down in secondary law, this allocation shall be coupled with a test of the adequacy of their respective Treaty base. Against the background of these findings, it shall then be scrutinised whether and, if so, in which way each individual compliance mechanism – or all of them in their entirety – affect(s) the EU's institutional balance. The basic assumption is that in the given context EU administrative bodies may only take decisions on the implementation of EU law, not on its enforcement. Decisions on the enforcement of EU law *vis-à-vis* the MS, taken by EU administrative bodies (eg European agencies), would negatively affect the (monopolistic) role of the CJEU (with an only supporting role of the Commission or a MS) under Articles 258–260 TFEU. In this context, also the role of the principles of subsidiarity and proportionality shall be discussed, particularly their (potential) function as promoters of a 'soft law' rather than a hard law intervention *vis-à-vis* the MS. Eventually, the diverging effects of 'soft law' provided for in the above compliance mechanisms and the means of judicial protection the MS may avail themselves of shall be analysed.

Part VI shall be a conclusion, summarising the main findings of this thesis, explaining the resulting legal concerns and pointing at related research questions which this work could not cover.

2. Methodology and embedding in legal scholarship

In terms of methodology, it is to be remarked that this work is directed towards raising and answering legal questions. It is essentially dedicated

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to doctrinal legal research, that is to say to an analysis of current law and other authoritative acts, mainly EU law (and here in particular its primary and examples taken from secondary law), EU 'soft law', and the relevant case law of the CJEU. Aspects relating to other scientific fields, in particular political, psychological or economic aspects are referred to, on the basis of pertinent literature, only selectively, where this serves a better understanding of the legal questions underlying this work. When interpreting EU rules, ie when finding out about their meaning pursuant to the expressed will of the respective rule-maker, the traditional methods of legal interpretation, as developed further by the CJEU in the context of EU law, shall be applied. These traditional methods are the verbal, the systematical, the historical and the teleological interpretation.[5] While these methods in principle range on an equal footing, when interpreting EU law (and EU 'soft law', for that matter) the CJEU applies them in its distinctive, nuanced way, thereby taking account of the multi-linguality of EU law. This idiosyncratic approach includes, in particular, legal comparison and – as a variant of the teleological interpretation – the *effet utile*.[6] The distinction between law and 'soft law' brings with it an additional aspect of the meaning of EU rules as mentioned above, namely whether a concrete 'legal act' is actually legally binding or not. According to the CJEU, either qualification is to be made 'after an analysis, conducted to the requisite legal standard, of the wording, the content and the purpose of the [relevant act], as well as of the context of which it forms part'.[7] Thus, the interpretative approach to be taken here is essentially the same as when it comes to determining the content of EU rules.

In addition to that, the book will proffer a critical engagement with the relevant legal literature. EU 'soft law' has been addressed in legal scholarship in a variety of contributions, eg the monographs by *Senden*, *Knauff*, *Ştefan* or *Láncos* (in chronological order) or the edited volume of *Elianto-*

5 The CJEU essentially follows these methods, even if it may apply a slightly different terminology; see, with further references, case C-621/18 *Wightman*, para 47; similarly, but still expressed differently: case 26/62 *van Gend & Loos*, 12: 'the spirit, the general scheme and the wording of [the respective] provisions'; for the historical interpretation see eg case C-583/11P *Inuit*, para 59; case C-370/12 *Pringle*, para 135; case C-196/21 *SR*, paras 34–41; for the case of EU 'soft law' see case C-16/16 P *Belgium v Commission*, paras 33–38 and 50–52.

6 See, *ex multis*, Lenaerts/Gutiérrez-Fonds, Law; for the aspect of multi-linguality see also McAuliffe, Language and Baaij, Fifty Years.

7 Case C-16/16 P *Belgium v Commission*, para 37.

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nio et al and *Láncos* et al.[8] These contributions, however, do not provide the strong focus on the appropriate legal bases in primary law of this 'soft law', which underlies this thesis. An elaborate account of the use of 'soft law' in the course of compliance mechanisms directed towards the MS – and an account of these compliance mechanisms more generally – cannot, to the best of my knowledge, be found in the literature. In this respect the book will break new ground. As a matter of course, there are scholarly accounts of the Treaty infringement procedure and other infringement procedures laid down in primary law – eg the contributions by *Gil Ibáñez*, *Andersen* or *Prete* (in chronological order)[9] – and there is literature on specific fields of EU law such as energy law or railway law which presents one or the other compliance mechanism. There is also literature on the increasing enforcement of EU law by EU bodies *vis-à-vis* private actors[10] – a matter which shall not be addressed in this work. However, the existing literature does not provide a thorough comparative analysis of these mechanisms, let alone an in-depth consideration of the role 'soft law' plays therein. This book is intended to make a contribution to filling this gap.

3. Some technicalities

The citation of literature in this work largely follows the Oxford University Standard for the Citation of Legal Authorities (OSCOLA) in its 4th edition. As regards the judgements and other output of the CJEU, it is in particular the indication of the European Case Law Identifier (ECLI) which will allow tracing them. In the footnotes, short citations will be used for both literature and case law.

References to other chapters of this work will indicate, in Roman numerals, the relevant Part and, in Arabic numerals, the relevant (sub-)chapter. Where the reference and the referred (sub-)chapter are contained in one and the same Part, there shall be no indication of the Part.

Abbreviations used in this work are introduced when first used in the *main* text; otherwise, the list of abbreviations at the beginning of this book will serve to explain them.

8 Senden, Soft Law; Knauff, Regelungsverbund; Ştefan, Soft Law; Láncos, Facets; Eliantonio/Korkea-aho/Ştefan, Soft Law; Láncos/Xanthoulis/Arroyo Jiménez, Legal Effects.

9 Gil Ibáñez, Supervision; Andersen, Enforcement; Prete, Infringement.

10 See eg Scholten/Luchtman, Enforcement; Scholten, Trend.

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Since the Lisbon reform, the Treaties refer to the Court of Justice of the European Union and the abbreviation CJEU is becoming more and more common. This abbreviation or simply the short term 'Court' are used in this book. These expressions should be understood broadly, so as to encompass the Court of Justice of the European Union and the Court of Justice as referred to in Article 19 para 1 of the Treaty on European Union (TEU), but also their respective predecessors under the pre-Lisbon Treaty versions. The risk of confusion appears to be minor, as the respective footnotes will regularly indicate the concrete cases which are referred to. From the case numbers or the ECLI, the concrete body – in particular the Court of Justice and the General Court (earlier: Court of First Instance) – can be identified.

For the sake of brevity, the term 'EU bodies' is normally used in a broad meaning, so as to encompass what the Treaties refer to as 'institutions, bodies, offices or agencies'.

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