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## Democratic Legitimacy and Soft Law in the EU Legal Order: A Theoretical Perspective

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## Abstract

The increased recourse to soft law by the European Union (EU) as a flexible solution to complex social and policy issues has raised several questions about the democratic legitimacy of decision-making at the EU level. With the aim to provide a normative direction for future empirical assessment of EU soft law, this article explores the democratic credentials that EU soft law measures should fulfil to ensure their legitimacy. Drawing from the intersections of liberal, republican and deliberative conceptions of democracy, this article proposes four democratic legitimacy standards for the evaluation of soft law measures in practice: parliamentary involvement, transparency, participatory quality and reviewability.

## Keywords

EU soft law; Democratic legitimacy; Liberal democracy; Republican democracy; Deliberative democracy

European governance has shown a strong tendency towards the substitution of conventional 'hard' forms of public action which are legally binding, with 'softer' forms which are instead grounded in persuasion. Throughout the development of the European Union (EU) into a complex system of decision-making, such complementary governance methods have been progressively used in all areas of EU policymaking (Hartlapp 2019: 193). Though soft governance does not always take the form of law (i.e. more emphasis might be put on coordination rather than strictly legal aspects) soft law has become a staple of soft governance, accounting for over 10 per cent of all Union law (Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019: 3). Soft law measures (SLMs) have now become a leading form of public action in response to complex social and policy issues. While in their inception SLMs were meant to increase the legitimacy of the Union (European Council 1992), there is little evidence that this has been achieved in practice. Though praised for their flexibility, SLMs become problematic as their emergence has not been met with a dynamic framework of appropriate legitimacy measures, thus furthering the already precarious democratic standing of the Union. While Eurosceptic movements are gaining more and more traction, the EU is increasingly, and rather urgently, confronted with demands of, efficiency and effectiveness on the one hand and democratic legitimacy on the other.

Soft governance is based on voluntary and non-sanctioning forms of public action. In the EU context, soft law is best defined *in negativo* to the Community Method as it deviates from the traditional decision-making processes by introducing informal, flexible regulatory instruments (Senden and van den Brink 2012; Eberlein and Kerwer 2004). These measures are not binding but can produce legal practical effects (Trubek, Cotrell and Nance 2006; Snyder 1993; Senden 2004). Thus, one should consider the political weight associated with them. For instance, such measures are often employed instead of legislation in areas where the political sensitivity is high or where legislative action is not possible (Schäfer 2006). This grey-area of EU law merits significant attention as it reveals fundamental deficiencies in the institutional architecture of the Union due to the lack of appropriate and proportionate legitimacy measures (Senden and van den Brink 2012: 11).

SLMs often come at odds with conventional standards of democratic legitimacy, for instance due to the notable lack of a parliamentary dimension. Traditionally, parliaments often confer legitimacy upon the rules and norms that govern a demos (or in the EU's case a *demos*) by exercising accountability via the deliberation and passing of laws or the checking of the executive (Tsakatika 2007: 549-550). Yet, it is evident that the parliamentary dimension of EU soft law enjoys low salience. Still, parliaments are not the only democratic legitimacy mechanism that one could employ. Competing conceptions of democracy highlight different principles that can be used for the examination of the democratic legitimacy of soft law, for example principles such as deliberation, transparency, or accountability. Such different normative conceptions of democracy can thus be used to deduct a series of legitimacy standards for the adequate assessment of SLMs. This article considers the principles put forth by three competing democratic models: liberal, republican and deliberative. The aim here is to propose a model for the assessment of the legitimacy of EU soft law that appeals to liberal, republican, and deliberative conceptions of legitimacy; in essence focusing on the intersections of the three schools of thought. In short, the objective of this article is to propose a number of normative legitimacy standards against which EU soft law may be evaluated in practice.

Regardless of their non-binding and voluntary nature, SLMs produce considerable effects through, for instance, the authoritative allocation of values or the framing of national policies, among others (Stefan 2013; Senden and van den Brink 2012; Senden 2004). These effects, along with their flexible and efficient adoption procedure, has established them as key players in the field of EU policy. Thus, their evaluation vis-à-vis democratic legitimacy standards is an important step towards

the enhancement of the legitimacy of the Union's public action. While some work in this direction has been done in anticipation to the increase of soft measures in the EU in the 2000s (see Føllesdal 2005; Borrás and Conzelmann 2007), it has focused primarily on specific mechanisms such as the Open Method of Coordination (OMC) (see Radulova 2007; Kröger 2007; Dawson 2009; Büchs 2008; Benz 2007). In essence, it has not acknowledged the empirical reality of how soft law is used in European governance and has left a great deal of developments that have occurred since under-explored. Still, in recent years, soft law has gained new academic traction with a number of studies inquiring into its use within the EU legal order (see Stefan 2020; Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019; Saurugger and Terpan 2020; Hartlapp 2019; Eliantonio, Korkea-aho and Stefan 2020; Eliantonio and Stefan 2018). As it is clear that soft law is here to stay, both in practice and scholarship, we argue that more attention should be paid to this issue. This article provides an updated view on this matter and focuses on the development of a framework of normative legitimacy standards for EU soft law that reflects liberal, republican and deliberative democratic principles.

This article proceeds as follows. The next section introduces the central concepts of this article by defining what soft law is and justifying why a critical study of its legitimacy credentials is crucial. Section three elaborates on three different normative conceptions of democracy to propose a number of legitimacy standards that are appropriate for SLMs. This section builds on liberal, republican and deliberative approaches to construct a framework against which SLMs may be assessed in practice. Section four elaborates on the democratic standards in terms of their context and relation to different types of SLMs. The final section draws some concluding remarks on the future of the study of soft law in the European legal order.

## **EU SOFT LAW AND DEMOCRATIC LEGITIMACY**

### ***In Negativo: Defining Soft Law***

The concept of soft law is not uncontested and, albeit enshrined within the notion of new governance, it is by no means new. While EU SLMs can be traced back to the 1962 'Christmas Notices', soft law has gained traction upon the call of the Commission for the supplementation of hard law with non-binding and informal governance tools in the 2001 White Paper on *European Governance*. At present, soft law measures are prominent in almost all EU policy fields (Hartlapp 2019: 193), to the extent that as of 2004 soft law accounted for more than 10 per cent of all Union law (Stefan, Avbelj, Eliantonio, Hartlapp, et al. 2019: 3).<sup>1</sup>

How, then, can we understand the concept of soft law within the context of EU law? Soft law is rarely defined on its own right, partly due to the notable lack of a comprehensive definition in the Treaties which only provide that recommendations and opinions may not have legally binding effect in Article 288 of the Treaty on the Functioning of the European Union (TFEU). This definition is hardly sufficient. Although a few defining characteristics are observed, the literature consistently defines SLMs *in negativo* to hard law (see Trubek, Cotrell and Nance 2006; Terpan 2015; Senden 2004; Saurugger and Terpan 2020; Eberlein and Kerwer 2004; de Búrca and Scott 2006; Abbot and Sindal 2000). On this premise, several definitions of soft law can be identified (see Wellens and Borchardt 1989; Thüerer 1990; Snyder 1993; Senden 2004). This article adopts Senden's (2004: 112) approach which defines soft law as 'rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects'. This definition is appropriate for our purposes as an emphasis is put on the intention of

SLMs to produce legal and practical effects which are independent of a legally binding force.

The empirical reality of SLMs should be taken into account in this discussion. As this article aims to propose a normative assessment framework for the democratic legitimacy of SLMs in practice, further exploration of its function(s) and effects is appropriate. Although the notably vast variety of SLMs can be seen as a hindrance for their systematic analysis, several classification frameworks have been put forth to operationalise their investigation (see Wellens and Borchardt 1989; Senden 2004; Chalmers 2014; Borrás and Conzelmann 2007). Here, we employ Senden's (2004) tripartite classification framework which emphasises the function of soft law. SLMs are classified as: preparatory and informative, interpretative and decisional, and formal and informal steering (Senden 2004: 118-119). The first category includes acts such as Green Papers, White Papers or action programmes which do not establish rules of conduct but are adopted with the objective of proposing a starting point for the legislative process. Interpretative and decisional SLMs fulfil two functions. Interpretative SLMs restate or summarise the interpretation that should be given to Union law provisions, for instance through guidance documents. Decisional SLMs indicate how European institutions should apply Union law provisions in individual cases, for example through Commission communications or Notices. Lastly, formal and informal steering instruments explicitly aim at the establishment of new rules by guiding legal or political action, for instance through Recommendations, and can be adopted prior, concurrent, or subsequent to legislation (Senden 2004: 119). These are summarised in table 1.

**Table 1: Summary of Soft Law Functions**

	Classification	Function	Example(s)
Category 1	Preparatory	To prepare the ground for policy or legislation or indicate the need for future action.	White papers, Green papers, Action Programmes, Action plans, Declarations
	Informative	To provide information on EU or institutional (public) action.	Inter-institutional communications, Communications, individual communications
Category 2	Interpretative	To aid with the interpretation of EU law provisions.	Guidance Notices, Guidelines, Commission Notices
	Decisional	To aid with the application of EU law by EU institutions in individual cases.	Communications, Commission Notices, Codes, Frameworks

	Classification	Function	Example(s)
Category 3	Formal Steering	To establish or promote EU policy objectives through instruments provided for in Art 288 TFEU	Recommendations, Opinions
	Informal Steering	To establish or promote EU policy objectives through instruments that have arisen through practice	Resolutions, Conclusions, Codes of Practice, Guidelines, Declarations

What effects do SLMs bring about? As with their function, there is an inherent diversity in the area of soft law regarding their potential effects. For instance, soft law can achieve subtle policy changes or shifts in public discourse by producing (authoritative) definitions of values (Jacobsson 2004: 89; Borrás and Conzelmann 2007: 535). Such changes can be observed when soft governance mechanisms such as the OMC are employed. These mechanisms work through a system of peer pressure and peer praise, benchmarking and peer reviewing (Tsakatika 2007: 551; Radulova 2007: 365; Kröger 2007: 566) which may create a common understanding of particular issues or what counts as a 'sound' policy. SLMs also produce (indirect) legal effects as they can be used as interpretation aid for EU law provisions (Senden 2004: 138), which may in turn set alternative interpretations or create obligations other than those intended by the legislator(s). This can happen through the consideration of SLMs in adjudication, an expectation created through the case law of the Court in the 1989 *Grimaldi v. Fonds des maladies professionnelles* case. Further, SLMs have a self-binding effect on the issuing institution which can be bound to comply with published measures or explain why it has chosen to deviate from it (Stefan 2013: 187). Although deviations are permissible on the basis that sufficient and acceptable legal reasons are given, such a 'regulation by publication' should not be dismissed. Institutional practice such as consistent reference to and use of a SLM may also produce similar effects by creating a *de facto* binding obligation (Beckers 2018: 580). This shows that albeit not *legally* binding, SLMs may gradually become socially, politically and morally binding (Jacobsson 2004: 82) through their effects and authority.

### **The Democratic Legitimacy of EU Soft Law: Why Should We Care?**

If governments and states are not bound by the rules of conduct put forth in SLMs, why is there a need for democratic legitimacy? The answer to this question is connected to the potential effects of SLMs as summarised above. While democratic legitimacy is commonly reserved for hard law due to its coercive character (traditionally expressed through sanctions) we argue that SLMs are not alien to coercion. SLMs, for instance, are based on peer pressure and peer praise, fear or exclusionary practices, all of which are effective coercive tactics (Zerilli 2010: 6; Wolterstorff and Cuneo 2012: 15-16). Indeed, while non-binding and voluntary, SLMs are influential due to their effects which can range from long-term policy changes, to subtle shifts in discourse, and setting standards of 'good' policy (Tsakatika 2007: 551; Radulova 2007: 365; Kröger 2007: 566; Jacobsson 2004: 89; Büchs 2008:

767; Borrás and Conzelmann 2007: 534) or to prepare, interpret or even replace law (Senden 2004: 118-119).

By means other than an explicit legal force, SLMs produce important practical and legal effects through the creation of a common discourse or a common symbolism, the fulfilment of a socialisation function, or the creation of peer pressure or praise to achieve policy changes. In this sense, SLMs entail an authoritative allocation of values and do rely on some form of 'coercion', albeit not to the same extent or in the same way as hard law, due to their purposive selection and interpretation of norms and values. Therefore a discussion on their legitimacy is imperative. This discussion is becoming more critical as SLMs have been shown to be increasingly used in EU crisis management (see Wessel 2020; Terpan and Saurugger 2020). In fact, during the 2020 COVID-19 crisis alone, a massive body of substantive SLMs has been adopted to mitigate the effects of the crisis, ranging from coordinating the economic response to managing the safe lifting of lockdowns (Stefan 2020: 664).

What is the state of affairs regarding the democratic legitimacy of EU soft law? Among other things, SLMs have been heavily criticised due to their tendency to circumvent traditionally legitimate decision-making fora such as the European Parliament (EP). While the recourse to soft law may enhance the discretion of the EU institutions, that often happens to the detriment of Member States and EU democracy as competences may not be respected and legitimate decision-making avenues are bypassed (Stefan, Avbelj, Eliantoni, Hartlapp, et al. 2019: 34-35; Dawson 2009: 201-203). In essence, the adoption of soft law lacks institutional, procedural and democratic guarantees. The EP itself has expressed concern regarding the notable absence of a parliamentary dimension of soft law by issuing a number of resolutions in this regard. Indeed, as early as 1968 the EP warned against the neglect of the procedural decision-making formalities by the Council, particularly around parliamentary consultation and the Commission's right of initiative (European Parliament 1969). An additional two resolutions have been published on the same issue: one in June 2003 in reference to the OMC (European Parliament 2003) and most notably in 2007 on the institutional and legal implications of the use of soft law where the EP critically asserted SLMs escape the appropriate legislative bodies and defies the rule of law, as well as the principles of subsidiarity and proportionality (European Parliament 2007).

As EU SLMs possess considerable normative power, they deserve additional attention regarding their democratic legitimacy. This may be achieved through the further inclusion of the EP in the process. Parliaments, and their innate accountability mechanisms, are traditionally understood to convey legitimacy upon the norms that govern a demos as they have the capacity to authoritatively check the rule-making processes and publicly deliberate values and principles involved in policy choices (Tsakatika 2007: 549). The absence of *ex-post* parliamentary review, then, can have negative repercussions, for instance in regard to interpretative and decisional SLMs as the Commission has the discretion to interpret EU law in an overly flexible or subjective manner which may create confusion, or even additional legal obligations (Senden and van den Brink 2012: 16). In this sense, a lack of parliamentary involvement equals a lack of democratic legitimacy. This situation not only creates an institutional imbalance, but also has severe consequences on the transparency and legal certainty of EU law (Senden and van den Brink 2012: 16).

Further, literature on the legitimacy of EU soft law pays particular attention to its justiciability, or lack thereof. This shortcoming is particularly relevant for the case of interpretative and decisional SLMs which, regardless of their non legally binding nature, may produce several indirect legal effects (for instance, the creation of additional legal obligations as argued in the above paragraphs) on the basis of the principles of equal treatment and legitimate expectations, or through their capacity to fulfil a standard-setting role for judicial interpretation and review (Senden 2004:

239-240). While SLMs may not bring about binding legal effects, some obligations on the actors involved might be imposed without ensuring judicial protection (Senden and van den Brink 2012: 55). A reason for this weakness originates from a rigid understanding of the notion of legal effects, deriving from Art 263 TFEU, which does not incorporate the indirect effects that SLMs may have (Senden and van den Brink 2012: 68-69; Eliantonio 2020; Eliantonio and Stefan 2018: 464-465). Consequently, the justiciability of soft law is very limited, albeit not impossible, essentially making the level of judicial protection against potentially unlawful soft law-making rather low (Senden and van den Brink 2012: 55; Eliantonio and Stefan 2018: 467). The limited justiciability of SLMs, and the subsequent lack of judicial protection, furthers the claims of a legitimacy deficit of EU soft law.

Given the above discussion, we argue that the farther SLMs are removed from conventional legitimacy guarantees while maintaining their current level of impact, the more the necessity for democratic legitimacy increases. Since the presence of SLMs in the EU legal order seems to increase, and as soft law is currently relatively immune to traditional legitimacy guarantees, there is a growing need for the concrete setting of legitimacy standards applicable to soft law. Such a need goes well beyond the bounds of 'output' in terms of how effective and efficient SLMs are, and requires consideration that includes the 'input' and 'throughput' stages as well. Therefore, SLMs need to be brought under democratic control or be otherwise legitimised. As different instruments fulfil several functions, it is vital that this diversity is recognised vis-à-vis the demand for democratic legitimacy. The assessment of SLMs in this regard should be tailored to the function of the measures. In this light, we can identify the SLMs that may be more problematic on account of their need for democratic legitimacy.

In reference to the taxonomy adopted in this article (Table 1), some functions seem to have a greater need for legitimisation. Since preparatory and informative instruments only fulfil a pre-law function as potential predecessors to EU legislation, these instruments may only prepare the discussion which will ultimately take place in fora which are inherently endowed with democratic legitimacy. For this reason, this article does not consider preparatory and informative instruments. However, interpretative, decisional, and steering instruments play a significant role in the EU decision-making process. Thus, these instruments require democratic legitimisation, and the development of an assessment framework that reflects their functions is in order.

## **THREATS AND OPPORTUNITIES: COMPETING DEMOCRATIC CONCEPTIONS**

Having argued that soft law is an appropriate object of scrutiny against standards of democratic legitimacy: we now ask what might these standards look like? Competing democratic conceptions answer this question differently. While some emphasise participation or deliberation, others highlight accountability or reviewability as principles that ensure democratic legitimacy.

There is little consensus on what legitimacy *is* in the political philosophical or political scientific literature. Thus, the concept in itself remains elusive. Still, we can distinguish between empirical-descriptive and normative conceptions of legitimacy; the former referring to the Weberian understanding of legitimacy as the belief of the ruled in the good faith and validity of the ruler, while the latter referring to a normative 'level' of acceptability and justification of the exercise of political power and authority (Beetham 1991: 17-18). In essence, the divide is between power as justified because people believe in its legitimacy versus justified in terms of the *beliefs* of the people (Beetham 1991: 11). Here we abide to the latter normative



understanding which holds that legitimate public action complies with a set of substantive standards (Sadurski 2006: 377), which may however shift over time as a result of social change. Still, if such standards are absent, legitimacy is not attainable (Beetham 1991: 11). This is the main contribution of this article: to propose a set of standards which are compatible with soft law and can enhance its democratic legitimacy if and when adhered to in practice. For the purposes of this article, we understand legitimacy as a normative property of political institutions that underpins questions about who has the right to create norms and how those should come about (Besson and Marti 2018: 508). As such, legitimacy embodies several aspects of 'good' governance, from procedural integrity, to values and sources of authority (Beetham 2012: 107).

There is a necessary epistemological remark to be made here regarding the translation of legitimacy principles into tangible assessment criteria. While legitimacy principles stem from a more philosophical understanding of legitimacy, for instance revolving around values such as the public good, openness, equity, fairness and so on (see Mansbridge 2015; Besson and Marti 2018; Beetham and Lord 2013), they often speak to problems that can be understood empirically. For instance, the principle of transparency stems from a philosophical premise relating to the openness of government and the right of civil society to 'check' the rulers. However, the same principle can be used to carry out matter-of-fact inquiries into the political state of affairs of a given entity (for example a state, a government, an institution) on the basis of specific relevant indicators. The framework that this article proposes takes into account both normative and empirical considerations, viewing them as mutual drivers in the assessment of legitimacy for soft law.

With this in mind, we recognise that the norms on which legitimacy may rest are not present across the board. Thus, to navigate through the conceptually rich field of democratic theory, this article pays respect to the well-established normative distinction between liberal, republican and deliberative democracies as conceptualised by Habermas (1994). Though not mutually exclusive on all accounts, these conceptions emphasise different principles, thus allowing for a comprehensive assessment of the democratic legitimacy of SLMs from several perspectives. Be that as it may, this analysis comes with two caveats. First, the purpose of the following paragraphs is to extract abstract standards based on the ideal-types of these conceptions which are diverse within themselves. The point here is to highlight their fundamental legitimacy principles. Second, while in this article we focus on the intersections among the three schools of thought (as opposed to their differences), there are trade-offs between different principles that should be considered. These will be addressed in the next section.

### **Legitimacy and Liberal Democracy**

There are two main themes that can be identified in the liberal tradition: aversion to arbitrary authority, and belief in the free expression of individual interests (Smith 1968: 276). Along these lines, liberalism is conceptualised in terms of limiting the power of the ruler, of recognising the rights and liberties of individuals in a political system and of establishing constitutional checks on the governing power (Mill 2011: 2). Such a governing power comes into being through free and fair elections in which citizens can express their preference at an equal level and with equal weight (Held 2006: 94). Liberal democracies are usually moderated through legal means, for instance through a (codified) constitution, which are put in place to protect individuals' rights and freedoms and prohibit their infringement by other individuals or by governments (Habermas 1994: 2; Addink 2019: 93). Essentially, in terms of negative liberties of non-interference. In this conception, the government is an apparatus of public administration which follows strict established procedures and serves the aggregated interests of a market-structured society (Habermas 1994: 1).

In its contemporary conception, having been adjusted to the societal pluralism of present day society, liberal democracy is a form of representative democracy which subjects the decision-making power of the elected representatives to the rule of law, emphasises accountability and the role of institutions in ensuring it, and protects the rights and freedoms of individuals (Wolterstorff and Cuneo 2012: 113-114; Habermas 1994: 1; Goldmann 2001: 143; Beetham and Lord 2013: 16; Addink 2019: 93). Since the liberal democratic process occurs in the form of compromises between competing interests represented in institutions such as parliaments, democratic legitimacy may be ensured through, *inter alia*, equal voting rights or a representative parliament that openly debates (Habermas 1994: 6) and through mechanisms that hold authority into account. In this sense, liberal democracy emphasises accountability, transparency, division of powers, the rule of law, and public debate (Held 2006; Frykman and Mörth 2004; Habermas 1994).

SLMs are at odds with most of the principles of liberal legitimacy outlined here. In terms of accountability, SLMs are rarely brought under parliamentary, judicial or administrative review. The inherent aspects of soft law, which are frequently quoted as its most positive characteristics, namely its voluntary nature and lack of binding force, become obstacles to its democratic legitimacy when it comes to liberal democracy. Specifically, the intrinsic vagueness of soft law regarding who is accountable for the practical and legal effects that may occur, and the ambiguity of the political commitments that accompany a SLM act as an innate impediment to their democratic legitimacy (Frykman and Mörth 2004: 159). Further, the lack of a uniform application of soft law and the possible additional legal obligations that interpretative and decisional SLMs may bring about, impair the adherence of SLMs to the rule of law and the principle of legal certainty (Senden 2004: 339-340), thus further weakening their democratic legitimacy in accordance to liberal democratic principles.

Most importantly, the salience that liberal democratic approaches assign to the role of parliaments conflicts with the distinct lack of a parliamentary dimension. This parliamentary dimension, or lack thereof, and the legitimacy that it inherently carries is problematic on two accounts. Firstly, due to the implication of experts or technocrats in soft policy formulation instead of fairly elected politicians, the principles of representation and accountability are often neglected (Frykman and Mörth 2004: 159; Borrás and Conzelmann 2007: 536). Secondly, as parliaments are traditionally understood to define the norms that governs the demos, a lack of a parliamentary dimension for instruments that do ultimately bear significant normative power endangers their legitimacy as SLMs cannot be brought under public scrutiny, nor adapted or revoked *ex-post*. A further implication of this is a critical lack of transparency in interest representation as actors with higher influence in the political process may act 'unchecked'.

Against this background, in order for soft law to be accommodated within liberal democracy it must adhere to certain standards of accountability, transparency, the rule of law, and must have a parliamentary dimension. While SLMs seem to underperform on almost all accounts, compliance with these standards is not impossible if adequate measures are taken.

### **Legitimacy and Republican Democracy**

Republicanism's roots are found in the ideals of equal and active citizenship of Athenian and Roman democracies. Its current form is, in a way, a revival of such self-government (Honohan 2002: 15; Held 2006: 29). The republican conception emphasises citizenship and active participation in the political process and highlights the role of communities and interactions (the demos of democracy) in the formation of values that guide state action (Honohan 2002; Held 2006; Habermas 1994;

Goldmann 2001; Frykman and Mörth 2004). State action, as such, aims at the realisation of common aspirations, shared norms, and collective ideals formed through interactions (Habermas 1994: 3-4). In essence, the participation of individual or community-based actors is crucial for the definition of norms and are the core of the principle of self-government that is central to republican democracy. These shared norms become the basis for the development of policies, which in turn should reflect the norms of the community.

The republican approach deviates from the negative liberties of liberalism and assigns positive liberties to the citizenry. In essence, citizens are not only protected from the interference of the state, but they are active participators in the political process (Habermas 1994: 2). In this sense, the state apparatus is not there to protect the private rights of individuals, but to guarantee an inclusive environment in which citizens are free to define the norms which lay in the interest of all (Habermas 1994: 2). While such a holistic definition of norms may seem unrealistic or unfeasible (especially in a demos such as the EU), it is possible to understand this premise in contrast to the principles of liberalism as outlined above. The relationship here between citizen and state is that of a trustor and a trustee (Pettit 2002: 8). In short, republicanism does not only treat citizens as legally and politically equal, but also seeks to create a community where the value of their identities is recognised and exists in the public sphere (Honohan 2002: 111). The rule of law is significant here. Although liberal approaches assign salience to the rule of law as a means of protection, republicanism views the rule of law as an essential way to introduce and enable rights and freedoms for citizens (Viroli 2002: 149; Pettit 2002: 36). In practice this entails that the decision-making process is transparent and open enough for citizens to be able to take part in it (Pettit 2002: 188). In essence, decisions that apply to the citizenry should be taken in a transparent and open manner.

Based on these principles of republican democracy, we can deduce that the principal legitimisation means of republicanism rely on active participation in the political process, the rule of law and transparency. On this basis, the accommodation of soft law in its current form is problematic. Firstly, the uncertainty of a European demos impairs the very premise of this conception as republican legitimacy depends on the expression of the common identity of a society. Then, a requisite aspect for SLMs to be legitimate is to reflect a common understanding of the norms or values that they propagate. While some argue that without a common European demos the development of democratically legitimate policies is impossible (for example Scharpf 1999), others argue that there is a way to accommodate soft law in this legitimacy definition. For instance, a way for soft law to come to terms with republican legitimacy is to increase the involvement of national actors into the articulation process of SLMs (Frykman and Mörth 2004). Essentially, bringing the different *demos* into one multifaceted demos. Further, as civil society organisations and independent social actors increasingly gain traction in EU policy, we could adjust our understanding of a *demos* to this reality. Apart from the involvement of parliaments or actors in the soft law making process, the republican legitimacy deficit of soft law could be remedied by the increased involvement of societal actors in the decision-making process.

SLMs in their current form can hardly be accommodated within republican legitimacy, which revolves around the openness and transparency of the political process, and the sharing of norms in a community that shares a collective (political) identity. However, through the enhancement of transparency and the strengthening of the participation of societal actors, a community which represents such values and ideas could be created.

## Legitimacy and Deliberative Democracy

The schools of thought we have surveyed thus far enjoy a long tradition. Deliberative democracy provides a more recent perspective on the organisation of government and the aims of the political process. Deliberative theory has gained popularity and has been often examined in the context of soft governance (see Usui 2007; Radulova 2007; Jacobsson 2004; de la Porte and Nanz 2004). While liberal and republican approaches respectively conceptualise the political system as a market-structure or a community, deliberative theory conceives it as a forum where public reason and argumentation take place in the pursuit of the common good (Valadez 2001: 31). Deliberative democracy assigns a lesser role to the authority of representatives or the process of elections, but focuses on the authority of the *forum* (Saward 2003: 122; Held 2006: 237-238). In this forum, policy is made through consensus-seeking via free and rational deliberation among citizens (Goldmann 2001: 143).

Thus, we can understand deliberative democracy through conceptualising the political process as a 'give-and-take' or active dialogue of public reasoning between citizens and states (Parkinson 2006: 1). There are certain safeguards that should be in place for deliberation to occur. Deliberative democracy foresees institutional measures that guarantee the equality between citizens and the accessibility of the deliberative forum (Dahl 1989: 1; Beetham 1994: 28). This may be achieved through ensuring that all citizens have an equal voice and access to the process of public deliberation, that the process takes place in a transparent manner, that all institutional barriers that could hinder participation are removed, and that accessible fora of deliberation are developed (Valadez 2001: 31-32).

In deliberative theory, the source of legitimacy is not at all based on the predetermined will of the individuals of a society. Instead it is found in the process of will-formation and the process of deliberation (Manin 1987: 351; Elster 1997: 143). This notion of deliberation is central. Legitimacy rests on the public deliberation of free and equal citizens (Bohman 1998: 401) and requires a constant stream of input (Bohman 1996: 198). At the very core, deliberative theory stipulates that legitimacy derives from the participation of citizens in decision-making via an active dialogue (Bohman 1996: 151). This dialogue should take place in an institutionalised and open manner (Bohman 1996: 239). A lack of this would hinder the legitimation of political power and, by extension, public policies. In this sense, deliberative democracy puts forth deliberation and debate on the forefront of democratic legitimation. In other words deliberative democratic legitimacy is conferred upon decisions through the elaboration on the reasons, explanations and accounts of political decisions (Valadez 2001: 32-33; Saward 2003: 120-124; Held 2006: 237). Thus, public deliberation can act as a catalyst for the democratic legitimacy of such decisions as it enables the public to endorse or reject the laws and policies that affect them (Lafont 2015: 45).

On similar grounds to republican principles of political participation, deliberative theory deems political decisions as legitimate when equal participation of relevant members of the citizenry are involved in the process; and when those subjected to the effects of a law or policy are involved in the deliberation (Parkinson 2006: 4; Lafont 2015: 45; Gutmann and Thompson 1996: 344; Dryzek 2001: 651). Such deliberation should take place in all stages of the decision-making process, spanning from problem definition to agenda-setting and implementation (Parkinson 2006: 3), and should be responsive to and reflect the wishes of the general public (Beetham 1994: 26-30). Here, there is a contrast between deliberative and liberal legitimacy. While the latter rests on the powers of the ballot and on majority rule, the former depends on the deliberation and defence of political decisions (Saward 2003: 120-124).

In theory, SLMs supposedly comply with these requirements. For instance, the OMC was designed to rely on deliberation (Radulova 2007: 376). However, empirical research indicates that such deliberation does not take place. To the contrary, the OMC is seemingly a closed and technocratic process which barely allows for the participation and deliberation at any stage (Radulova 2007: 376-377; de la Porte and Nanz 2004: 283-284). Furthermore, the transparency of soft law *making* is also almost completely opaque (Senden 2013: 65), indicating that the safeguards that need to be put in place for SLMs to gain 'deliberative legitimacy' are barely there. While it is impossible to include the input of everyone at the EU level, this can be done through the establishment of citizens' fora, the introduction of 'mini-publics', or the establishment of 'information-pooling' mechanisms that have the capacity to gather a representative sum of input (Lafont 2015: 48-49; Eberlein and Kerwer 2004: 132-134).

The principles of legitimacy derived from each of the three normative democratic conceptions examined here are summarised in Table 2.

**Table 2: Summary of Legitimacy Principles**

School of Thought	Central Legitimacy Principle(s)
Liberal Democracy	Accountability, transparency, the rule of law, parliamentary involvement, representation
Republican Democracy	Political participation, transparency, the rule of law, protection from corruption
Deliberative Democracy	Political participation, deliberation, public scrutiny, transparency

## A DEMOCRATIC LEGITIMACY FRAMEWORK FOR EU SOFT LAW

This section attempts to translate the democratic legitimacy principles outlined above (Table 2) into concrete and empirically comprehensible legitimacy standards for SLMs. The standards proposed in this section pay particular attention to the intersections of the above conceptions and the relevance of each principle to the legitimacy deficits of SLMs as presented in this article. As previously discussed, SLMs of an interpretative and decisional or steering nature have been shown to play a significant role in the EU decision-making process. The former are used to interpret EU law provision by the courts, while the latter are used as 'soft' guidance for national or EU policy. The proposed standards should be tailored to their specific functions.

### Legitimacy Standards

While the legitimacy principles advanced by each normative approach are distinct, some commonalities can be found, especially given the current debates on the legitimacy of soft law which are centred around its weak parliamentary dimension, its lack of transparency and its accountability deficit. Firstly, albeit to different degrees, all three conceptions of legitimacy emphasise the role of parliaments as fora of democratic legitimation. For instance, parliaments can act as accountability

mechanisms and representative fora, and can be a forum of deliberation. Further, given the notable lack of a parliamentary dimension of SLMs in practice, parliaments are significant at both a theoretical and an empirical level. Therefore, the standard of *parliamentary involvement* for SLMs seems necessary.

Secondly, Table 2 reveals that the principle of transparency is central to all three normative approaches. For liberal, republican and deliberative theorists transparency enhances the legitimacy of governance instruments as it enables monitoring and scrutiny by the public and increases accountability. As soft law has been criticised for its 'closed-door' approach when it comes to the articulation or deliberation of SLMs, transparency and openness during such stages is significant. In this sense, a standard of *transparency* should be respected.

Third, from a deliberative and republican perspective, the principles of political participation and deliberation are necessary elements of democratic legitimacy. For republicans, societal input during in decision-making ensures that policies take account of and can be responsive to actual societal demands, thus fulfilling their purpose to serve the people. Deliberative theorists find the equal access to the deliberation process of decisions ensures their democratic legitimacy. At present, citizens are overwhelmingly only the addressees of Union policy action, be it hard or soft, and are seldom the authors (Kies and Nanz 2013: 1). This holds true for SLMs, as they enjoy low levels of political participation and a weak deliberative quality (Radulova 2007; de la Porte and Nanz 2004). Hence, for both approaches it is necessary for the positive assessment of the democratic legitimacy of SLMs that these measures possess certain *participatory qualities*.

Lastly, the principle of accountability is, for the most part, emphasised in the liberal tradition, and the attention that this topic has received indicates that this dimension of soft law deserves further consideration. The importance of review mechanisms when it comes to soft law has been highlighted (see Senden and van den Brink 2012; Eliantoni and Stefan 2018). To cover these concerns, the principle of accountability can be translated into a standard of *reviewability* which may ensure the valid exercise of public power through SLMs. The democratic legitimacy standards that have been deducted are summarised in Table 3.

**Table 3: SLMs Democratic Legitimacy Standards**

Standard	Democratic Principle(s)	Democratic Conception(s)	Possible Indicators
Parliamentary Involvement	Representation, accountability, public debate, deliberation	Liberal, republican, deliberative	Involvement of parliamentarians in soft law making, ex-post parliamentary control
Transparency	Accountability, monitoring, public scrutiny, accessibility	Liberal, republican, deliberative	Availability of translations, authorship, document accessibility
Participatory Quality	Political participation, public debate, deliberation, discursive interactions	Deliberative, republican	Participatory opportunities, openness and inclusiveness of participation

Standard	Democratic Principle(s)	Democratic Conception(s)	Possible Indicators
Reviewability	Accountability, public scrutiny, protection from arbitrary authority	Liberal, republican	Judicial Review, ex-post parliamentary control

Before moving on to the operationalisation of these standards, there are some limitations that need to be addressed. First and foremost, the proposed framework is not exhaustive and does not address the internal diversity of the three schools of thought in full. Democratic theory constantly evolves, is reshaped in response to social change and is often adjusted to particular societal contexts. Here, we have focused on the central tenets of liberal, republican and deliberative theory. Further, the emphasis here was on the commonalities of the three approaches with the aim to construct a framework that is relevant and endorsed from all three perspectives. Thus, there are some trade-offs that need to be dealt with. Despite differences between the three schools of thought which make them incompatible in some ways, there are compromises to be made on the basis of intersecting principles. Here we focus on those. For instance, an increased political participation of relevant actors in the decision-making process is at odds with the principles of liberal theory which foresee that all actors have equal standing in the process. Still, these do not necessarily negate each other and they can co-exist even when contrasting. Moreover, there are trade-offs between the legitimacy and the efficiency of SLMs. While this may be the case, we argue that such a consideration cannot preclude the scrutiny of SLMs in regards to their democratic legitimacy in the input and throughput stages. The legitimacy concerns for soft law are significant and should be addressed, even to the partial detriment of output. The point here is that legitimacy, both in terms of principles and phases, is not a zero-sum game.

## Operationalisation

### *Parliamentary Involvement*

Discontent with the level of parliamentary involvement in the development and monitoring of SLMs has been ardent (see Tsakatika 2007; Senden and van den Brink 2012; Mörth 2004; Borrás and Conzelmann 2007). Certainly, soft and hard law instruments cannot entail equal levels of parliamentary involvement. However, a compromise for the needs of SLMs can be reached. In reference to the criticism in this regard and the legitimacy principles analysed above, parliamentary involvement can occur at two stages: *ex-ante* and *ex-post*.

The *ex-ante* stage of parliamentary involvement for SLMs speaks to the involvement of parliamentarians in the soft law making process. As parliaments enable debates on norms and values, the participation of parliaments in the input process ensures the representation of interests, the reflection of common ideas and values, and the deliberation between political actors. The *ex-post* stage refers to the control that parliaments can exercise over the effects of SLMs. This measure is also related to issues of accountability and may take the form of review and is thus also related to the standard of reviewability. To ensure democratic legitimacy from this perspective, soft instruments should be open to review by the EP which should have the capacity to adapt, amend or revoke SLMs.

In consideration of the function that SLMs can fulfil, a parliamentary dimension is necessary for both categories: interpretational and decisional, and steering. Albeit *ex-ante* and *ex-post* parliamentary involvement are relevant for both types of

instruments, some distinction can be made. For the case of interpretative and decisional instruments, parliamentary input is particularly significant due to the role of the EP as a co-legislator. Such SLMs are used by courts and have the capacity to elucidate EU law and may produce indirect legal effects other than those intended by the legislator (Senden 2004: 16). From this perspective salience of parliamentary input for interpretative and decisional SLMs is high. For steering instruments that aim to guide policy, parliamentary involvement in the form of *ex-post* review may ensure the monitoring of the practical and legal effects of such instruments, thus enhancing accountability.

### Transparency

Transparency can be understood as a precondition or a basis for the democratic legitimacy of SLMs (Borrás and Conzelmann 2007: 543). In the context of soft law, and given the current criticism on the opacity of its decision-making process, transparency may refer to the availability and ease of access of information relating to all stages of soft law, from agenda-setting, to the publicity of the decision-making process, and the establishment of monitoring mechanisms available to the general public. Such transparency could relate to the availability of translations, to the clear assignment of authorship, the publicity of decision-making, or the accessibility of relevant documents. This standard is particularly important for SLMs as their emergence does not depend on elected officials, but usually falls in the hands of executives, private actors and experts (Tsakatika 2007: 551; Borrás and Conzelmann 2007: 543). By ensuring that the processes are transparent and all relevant information is widely available, each instrument or decision becomes susceptible to public and institutional scrutiny, thus accommodating principles of liberal, republican and deliberative legitimacy. This requirement is also in line with the approach of the EU institutions as stipulated in the *Better Regulation Guidelines* (European Commission 2017: 46) which instruct that all evidence and processes of decision-making in the Union should be made available to the general public.

As this standard is a rather basic condition for legitimacy, little distinction between interpretative and decisional or steering SLMs can be made. Since interpretative and decisional SLMs are used to give meaning or clarifications to Union law, it is imperative that transparency regarding actor participation in the drafting process is ensured. Steering instruments are intended to influence domestic and EU policy and so it is important that information on the decision-making processes (such as who is involved) affiliated with each instrument are made publicly available. Thus, instruments of both types require openness in regards of their articulation, with interpretative and decisional instruments emphasising the transparency of the value allocation and the participation of actors in their articulation, and steering instruments highlighting the transparency of the decision-making processes.

### Participatory Quality

As an inherent aspect of democracy, the possibility for the public to participate in the political process freely and equally is an essential legitimacy criterion for republican and deliberative theories, and a central requirement for the legitimacy of SLMs. However, we must note that a 'participatory deficit' can be identified across the Union and is not particular to SLMs. To remedy this, there have been considerable efforts to engineer participatory avenues (Abels 2009: 3) which can be extended to the case of SLMs. Certainly, some restrictions should be made as the participation of actors in all stages of the development of soft law measures is not possible. However, some measures can be put in place. The participatory quality of SLMs may be remedied through two interconnected steps: establishing participatory opportunities and ensuring access to the deliberation process for the general public.



Participatory opportunities can be realised in the form of 'mini-publics' like citizens' assemblies, or through the establishment of participation opportunities throughout the decision-making process. One can identify a variety of innovative 'experiments' in the Union that aim to increase the involvement of citizens in such processes at different geographical levels (Kies and Nanz 2013: 1). For instance, these can take the form of virtual communications, consultations or polling (Kies and Nanz 2013: 1). In line with the *Better Regulation Guidelines* (European Commission 2017: 69-70), participation may be enhanced through consultations of citizens, stakeholders and target groups which should take place at all instances of preparing legislative or policy action, and can occur throughout the policy cycle (European Commission 2017: 70). However, as consultations have been shown to be under-utilised (Radulova, Nastase and Juntson 2019), it is necessary that the participatory quality of SLMs is not limited to this particular mechanism. For instance, through communications at multiple levels and including different stakeholders at the national, regional or pan-European levels, and including citizens, civil society organisations (CSOs) or relevant actors.

An important aspect of this process, which brings us to the second step, is ensuring that all relevant actors have free and full access to the debate. This step is tied with the standard of *transparency* as outlined above, and, in particular, with the transparency of the entire soft law making processes (agenda-setting, initial deliberations, and so on). Another aspect of this is for such processes to take place in different formats. For instance, by including direct interactions between policymakers and societal stakeholders. This is to ensure that participation in consultations goes beyond the passive involvement of stakeholders, and is based on the discursive interactions so that debates can be interactive, reflexive and allow for argument.

Arguably, this standard is more relevant for steering instruments than interpretative or decisional ones. As political participation to this extent is seldom a component of law-making, hard or soft, public consultation for instruments that are meant to interpret existing Union law does not bear too much significance in terms of democratic legitimacy. On the other hand, the access to the deliberation process of steering instruments may play an important role in the early stages of the decision-making process where input from citizens and CSOs is crucial for the expression of societal needs. In this way, societal stakeholders gain the opportunity to become, at least in part, authors of the policies that govern them.

### **Reviewability**

Deriving from the principles of accountability, the rule of law and the need for critical scrutiny, the standard of the reviewability of soft law is key for the assessment of its democratic legitimacy. In this context, reviewability may take the form of justiciability. Though other forms of review are possible, for instance through the involvement of the European Ombudsman (Senden and van den Brink 2012: 58-59), the possibility for judicial review of SLMs is more in line with the legitimacy criteria put forth by liberal democracy as it includes both principles of accountability and the rule of law. However, it is also relevant to republican principles as reviewability of SLMs can protect societal stakeholders from being subjected to arbitrary and 'unchecked' power. In practice, the standard of reviewability could be fulfilled by facilitating the admissibility of soft law measures for judicial review.

This standard is consistent with the capacity of soft law measures to be employed as interpretation aids by courts and national authorities. Justiciability is particularly relevant for soft law as it can become politically, morally and socially binding through its effects (Jacobsson 2004: 82), or through institutional practice (Beckers 2018: 580). Currently, the justiciability of soft law measures is hindered due to a rigid

understanding of the concept of legal effects that does not include the indirect legal effects that soft law produces (Senden and van den Brink 2012: 49; Eliantonio 2020; Eliantonio and Stefan 2018: 459). Thus, a more comprehensive definition of legal effects or the recognition of practical and indirect legal effects is in order for the purposes of the judicial reviewability of SLMs. While this view has been held by Advocate General Bobek (2017) in *Belgium v. Commission* who has called for a relaxation of these admissibility requirements, such a re-definition seems to be ongoing at the Member State level in reference to domestic SLMs (Eliantonio 2020), an EU-level discussion along these lines is appropriate and timely.

The standard of reviewability is applicable to interpretative and decisional and steering instruments on comparable levels. However, some distinction can be made. As interpretative and decisional instruments primarily produce legal effects and obligations, whereas steering instruments produce primarily practical effects, the justiciability of interpretative soft law measures appears to be more urgent. Due to their function, SLMs produce significant legal and practical effects that should be subjected to accountability mechanisms. While SLMs themselves come without legal sanction, it is imperative that shortcomings in the decision-making stages is properly sanctioned to ensure the dependency of the political power to the approval of the public and the protection of the latter from the former.

## CONCLUSIONS

The EU suffers from a democratic legitimacy crisis. While SLMs have become a staple of EU governance across the board, such measures are rarely brought under democratic control, thus endangering the Union's already problematic legitimacy standing. Is soft law an asset or a threat to the EU legal order? Is there a way for EU SLMs to be democratically legitimate given their elusive nature? While, thus far, the non-binding, voluntary and sanction-free nature of SLMs has been an obstacle for their democratic legitimation, this article has argued that SLMs are not only an appropriate subject of democratic scrutiny, but that their assessment against standards of democratic legitimacy is a necessary and urgent step.

How can one identify such standards? Drawing from liberal, republican and deliberative schools of democratic thought, and with a basis in the current debates on the legitimacy of soft law measures in the EU, this article highlighted several democratic legitimacy principles that provide some normative direction for the study of SLMs. In particular, for SLMs to be democratically legitimate according to the three democratic conceptions, they should comply with standards of *parliamentary involvement*, *transparency*, *participatory quality* and *reviewability*. SLMs are currently underperforming on most accounts and there is room for improvement. Particularly, we have argued that the democratic legitimacy of SLMs will be enhanced when adhering to the standards proposed here. In essence, the more SLMs contain a strong parliamentary involvement in the *ex-ante* and *ex-post* phases, are open to judicial review (and potentially other types of review), set out sufficient avenues for public participation and deliberation, and are transparent in their articulation, adoption and implementation, the higher degree of democratic legitimacy.

Against this background, our contribution here is twofold. First, the framework proposed here can be utilised in further empirical research to assess the democratic legitimacy of SLMs in practice. Second, it informs future governance debates on the legitimacy aspects of soft legal action. Both these contributions become more relevant in the current context. As some preliminary studies have shown (for example Stefan 2020), SLMs have been employed on a large scale to 'bridge' the crisis-management competences of the Union during the COVID-19 crisis. Such an

extensive adoption of SLMs has brought to attention the potential legitimacy deficiencies of soft law as a form of public action. The point here is that as recourse to soft law increases, a critical study of its democratic legitimacy is crucial.

It is more than clear that EU soft law is here to stay. This article proposed a framework for the empirical analysis of SLMs that may clear the road for a new angle of studying the democratic legitimacy of soft law. The work conducted here is hardly exhaustive and should not be regarded as a panacea for the democratic assessment of soft law. Thus, the issue of the legitimacy of SLMs remains open. Given the inherent variation of the pragmatic reality of soft law, our article endeavours to provide some normative direction for the empirical study of SLMs in the pursuit of establishing soft law as a legitimate and acceptable form of public action in the EU legal order.

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## ENDNOTES

<sup>1</sup> Unfortunately, an updated statistic on the volume of soft law in the EU legal order does not exist. Therefore, this number should be read as indicative of the increasing soft law dimension in European governance.

## REFERENCES

- Abbott, Kenneth W. and Duncan Sindal (2000). *'Hard and Soft Law in International Governance'*. International Organization, 54(3): 421-456. <https://doi.org/10.1162/002081800551280>
- Abels, Gabriele (2009). *"Citizens" Deliberations and the EU's Democratic Deficit. Is There a Model for Participatory Democracy?* (Tübinger Arbeitspapiere, TAI F Nr. 1). Online: <https://dx.doi.org/10.2139/ssrn.2131362> [accessed 10 July 2020].
- Addink, Henk G. (2019) *Good governance: concept and context*. Oxford: Oxford University Press.
- Beckers, Anna (2018). 'The Creeping Juridification of the Code of Conduct for Business Taxation: How EU Soft Law Can Transform into Hard Law'. *Yearbook of European Law*, 37(1): 569-596. <https://doi.org/10.1093/yel/yey006>.
- Beetham, David (2012). *'Political Legitimacy'*. In E. Amenta and K. Nash and A. Scott (eds), *The Wiley-Blackwell Companion to Political Sociology*. New Jersey: Wiley-Blackwell Publishing: 120-129.
- Beetham, David (1994). *'Key Principles and Indices for a Democratic Audit'*. In D. Beetham (ed), *Defining and Measuring Democracy*. London: SAGE: 25-43.

- Beetham, David (1991). *The Legitimation of Power*. London: Macmillan Education.
- Beetham, David and Christopher Lord (2013). *Legitimacy in the European Union*. New York: Routledge.
- Benz, Arthur. (2007). 'Accountable Multi-Level Governance by the Open Method of Co-ordination?'. *European Law Journal*, 13(4): 505-522. <https://doi.org/10.1111/j.1468-0386.2007.00381.x>
- Besson, Samantha and José Luis Martí (2018). 'Legitimate actors of international law-making: towards a theory of international democratic representation'. *Jurisprudence*, 9(3): 504-540. <https://doi.org/10.1080/20403313.2018.1442256>
- Bobek, Michal (2017). *Opinion of Advocate General Bobek delivered on 12 December 2017 Case C-16/16P Kingdom of Belgium v European Commission*. Online: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CC0016> [accessed 27 July 2020].
- Bohman, James (1998). 'The Coming of Age of Deliberative Democracy'. *Journal of Political Philosophy*, 6(4): 400-425. <https://doi.org/10.1111/1467-9760.00061>
- Bohman, James (1996). *Public deliberation: pluralism, complexity, and democracy*. Cambridge, Mass.: MIT Press.
- Borrás, Susanna and Thomas Conzelmann (2007). 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn'. *Journal of European Integration*, 29(5): 531-548. <https://doi.org/10.1080/07036330701694865>
- Büchs, Milena (2008). 'How Legitimate Is the Open Method of Co-Ordination?'. *Journal of Common Market Studies*, 46(4): 765-786. <https://doi.org/10.1111/j.1468-5965.2008.00804.x>
- Chalmers, Damian (2014). 'Union Law making'. In D. Chalmers, G. Davies and G. Monti (eds), *European Union Law: Texts and Materials*. Cambridge: Cambridge University Press: 106-155.
- Dahl, Robert A. (1989). *Who governs?: democracy and power in an American city*. New Haven: Yale University Press.
- Dawson, Mark (2009). *Soft Law and the Rule of Law in the European Union: Revision or Redundancy?* (EUI Working Papers (RSCAS) 2009/24). Online: <https://ssrn.com/abstract=1415003> [accessed 12 June 2020].
- de Búrca, Gráinne and Joanne Scott (2006). *Law and new governance in the EU and the US*. Oxford: Hart.
- de la Porte, Caroline and Patrizia Nanz (2004). 'The OMC – a deliberative-democratic mode of governance? The cases of employment and pensions', *Journal of European Public Policy*, 11(2): 267-288. <https://doi.org/10.1080/1350176042000194430>
- Dryzek, John (2001). 'Legitimacy and Economy and Deliberative Democracy'. *Political Theory*, 29(5): 651-669. <https://doi.org/10.1177/0090591701029005003>
- Eberlein, Burkard and Dieter Kerwer (2004). 'New Governance in the European Union: A Theoretical Perspective'. *Journal of Common Market Studies*, 42(1): 121-142. <https://doi.org/10.1111/j.0021-9886.2004.00479.x>
- Eliantonio, Mariolina (2021). 'Judicial Review of Soft law Before the European and the National Courts: A Wind of Change Blowing from the Member States?'. In M. Eliantonio, E. Korkea-aho, and O. Stefan (eds). *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. [forthcoming]: Hart: n.p.
- Eliantonio, Mariolina, Emilia Korkea-aho, and Oana Stefan (2021) (eds). [forthcoming]. *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*. Hart.
- Eliantonio, Mariolina and Oana Stefan (2018). 'Soft Law Before the European Courts: Discovering a 'Common Pattern'?'. *Yearbook of European Law*, 37: 457-469. <https://doi.org/10.1093/yel/yey017>
- Elster, Jon (1997). *Deliberative Democracy*. New York: Cambridge University Press.
- European Commission (2017). *Commission Staff Working Document: Better Regulation Guidelines* (SWD (2017) 350). Online: <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf> [accessed 19 June 2020].
- European Council (1992). *Conclusions of the Presidency*. Online: [https://www.consilium.europa.eu/media/20492/1992\\_december\\_\\_edinburgh\\_\\_eng\\_.pdf](https://www.consilium.europa.eu/media/20492/1992_december__edinburgh__eng_.pdf) [accessed 17 May 2020].

- European Parliament (2007). 'European Parliament resolution P6\_TA(2007)0366 on institutional and legal implications of the use of 'soft law' instruments'. Official Journal of the European Union, C187 E/75.
- European Parliament (2003). 'European Parliament resolution P5\_TA(2003)0268 on the application of the open method of coordination'. Official Journal of the European Union, C68 E/604.
- European Parliament (1969). 'Résolution du Parlement européen du 8 mai 1969, sur les actes de la collectivité des États membres de la Communauté ainsi que les actes du Conseil non prévus par les traités adoptée à la suite du rapport fait au nom de la Commission juridique par M. Burger'. Official Journal of the European Union, C63/18.
- Føllesdal, Andreas (2005). *The seven habits of highly legitimate new modes of governance* (NEWGOV New modes of governance working paper DTF/D01a). Online: [http://www.eu-newgov.org/database/DELIV/DTFD01a\\_Seven\\_Habits\\_of\\_Highly\\_Legitimate\\_NMG.pdf](http://www.eu-newgov.org/database/DELIV/DTFD01a_Seven_Habits_of_Highly_Legitimate_NMG.pdf) [accessed 10 June 2020].
- Frykman, Henrik and Ulrika Mörth (2004). 'Soft Law and Three Notions of Democracy: The Case of the EU'. In U. Mörth (ed), *Soft Law in Governance and Regulation: An Interdisciplinary Analysis*. Cheltenham: Edward Elgar: 155-170.
- Goldmann, Kjell (2001). *Transforming the european nation-state: dynamics of internationalization*. London: SAGE.
- Gutmann, Amy and Dennis Thompson (1996). *Democracy and Disagreement*. Cambridge: Belknap Press.
- Habermas, Jürgen (1994). 'Three Normative Models of Democracy'. *Constellations*, 1(1): 1-10. <https://doi.org/10.1111/j.1467-8675>
- Habermas, Jürgen and Max Pensky (2001) *The postnational constellation: political essays*. Cambridge, UK: Polity Press (Studies in contemporary German social thought).
- Hartlapp, Miriam (2019). 'Soft law implementation in the EU multilevel system: Legitimacy and governance efficiency revisited'. In N. Behnke, J. Broscheck and J. Sonnicksen (eds), *Configurations, Dynamics and Mechanisms of Multilevel Governance*. London: Palgrave Macmillan: 193-210.
- Held, David (2006). *Models of Democracy*. Cambridge: Polity.
- Honohan, Iseult (2002). *Civic republicanism*. London: Routledge.
- Jacobsson, Kerstin (2004). 'Between Deliberation and Discipline: Soft Governance in the EU Employment Policy'. In U. Mörth (ed), *Soft law in governance and regulation : an interdisciplinary analysis*. Cheltenham: Edward Elgar: 81-101.
- Kies, Raphaël and Patrizia Nanz (2013). *Is Europe listening to us? Successes and failures of EU citizen consultations*. Farnham: Ashgate.
- Kröger, Sandra (2007). 'The End of Democracy As We Know It? The Legitimacy Deficits of Bureaucratic Social Policy Governance'. *Journal of European Integration*, 29(5): 565–582. <https://doi.org/10.1080/07036330701694881>
- Lafont, Cristina (2015). 'Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-Publics Shape Public Policy?'. *Journal of Political Philosophy*, 23(1): 40-63. <https://doi.org/10.1111/jopp.12031>
- Manin, Bernard (1987). 'On Legitimacy and Political Deliberation'. *Political Theory*, 15(3): 338-368. <https://doi.org/10.1177/0090591787015003005>
- Mansbridge, Jane (2015). 'A Minimalist Definition of Deliberation'. In P. Heller and R. Vijayendra (eds), *Deliberation and Development: Rethinking the Role of Voice and Collective Action in Unequal Societies*. Washington: World Bank Group: 27-50.
- Mill, John Stuart (2011). *On liberty*. Luton: Andrews.
- Mörth, Ulrika (2004). *Soft law in governance and regulation: an interdisciplinary analysis*. Cheltenham: Edward Elgar.
- Parkinson, John (2006). *Deliberating in the real world*. Oxford: Oxford University Press.
- Pettit, Philip (2002). *Republicanism: A Theory of Freedom and Government*. Oxford: Oxford University Press.

- Radulova, Elissaveta (2007). 'The OMC: An Opaque Method of Consideration of Deliberative Governance in Action?'. *Journal of European Integration*, 29(3): 363-380. <https://doi.org/10.1080/07036330701442372>
- Radulova, Elissaveta, Andreea Nastase and Jaanika Juntson (2019). Interest aggregation in the policy-shaping stage of EU decision-making: an exploration into the Commission's proclivity to outsource the analysis of the collected input from public consultations (Conference paper presented at the Annual ECPR conference. Poland, September 2019). Online: <https://ecpr.eu/Filestore/PaperProposal/9d480312-ea10-4882-af3a-80d08b9e5b3d.pdf> [accessed 05 July 2020].
- Sadurski, Wojciech (2006). 'Law's Legitimacy and "Democracy-Plus"'. *Oxford Journal of Legal Studies*, 26(2): 377-409. <https://doi.org/10.1093/ojls/gql008>
- Saurugger, Sabine and Fabien Terpan (2020). 'Normative transformations in the European Union: on hardening and softening law'. *West European Politics*, 44(1), 1-20. <https://doi.org/10.1080/01402382.2020.1762440>
- Saward, Michael (2003). *Democracy*. Cambridge: Polity.
- Schäfer, Armin (2006). 'A New Form of Governance? Comparing the Open Method of Co-Ordination to Multilateral Surveillance by the IMF and the OECD'. *Journal of European Public Policy*, 13(1): 70-88. <https://doi.org/10.1080/13501760500380742>
- Scharpf, Fritz W. (1999). *Governing in Europe effective and democratic?* Oxford: Oxford University Press.
- Senden, Linda (2013). 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control'. *European Law Journal*, 19(1): 57-75. <https://doi.org/10.1111/eulj.12013>
- Senden, Linda (2004). *Soft law in European Community law*. Oxford: Hart.
- Senden, Linda and Anton van den Brink (2012). Checks and Balances of Soft EU Rule-Making'. Study conducted for Policy Department C: Citizens' Rights and Constitutional Affairs. Online: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2042480](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042480) [accessed 18 June 2020].
- Smith, David (1968). 'Liberalism'. In D. Sills (ed), *International Encyclopedia of the Social Sciences* (Vol. 9): 276-282.
- Snyder, Francis (1993). 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques'. *The Modern Law Review*, 56(1): 19-54. <https://doi.org/10.1111/j.1468-2230.1993.tb02852.x>
- Stefan, Oana (2020). 'COVID-19 Soft Law: Voluminous, Effective, Legitimate? A Research Agenda'. *European Papers*, 5(1): 663-670.
- Stefan, Oana (2013). *Soft law in court: competition law, state aid and the Court of Justice of the European Union*. Alphen aan den Rijn: Kluwer Law International.
- Stefan, Oana, Matej Avbelj, Mariolina Eliantoni and Miriam Hartlapp et al. (2019). *EU Soft Law in the EU Legal Order: A Literature Review* (SoLaR Working Paper No. 1). Online: <https://ssrn.com/abstract=3346629> [accessed 21 November 2019].
- Terpan, Fabien. (2015). 'Soft Law in the European Union—the Changing Nature of EU Law'. *European Law Journal*, 21(1): 68-96. <https://doi.org/10.1111/eulj.12090>
- Terpan, Fabien and Sabine Saurugger (2020). 'Soft and Hard Law in Times of Crisis: Budget Monitoring, Migration and Cybersecurity'. *West European Politics*, 44(1): 1-28. <https://doi.org/10.1080/01402382.2020.1738096>
- Thürer Daniel (1990). 'The Role of Soft Law in the Actual Process of European Integration'. In O. Jacot-Guillarmod and P. Pescatore (eds), *L'avenir du libre-échange en Europe: vers un Espace économique européen?*. Bern: Schulthess Polygraphischer Verlag.
- Trubek, David, Patrick Cotrell and Mark Nance (2006). "'Soft Law", "Hard Law", and the EU Integration'. In G. de Búrca and J. Scott (eds), *Law and New Governance in the EU and the US*. Portland: Hart: 65-94.
- Tsakatika, Myrto (2007). 'A Parliamentary Dimension for Eu Soft Governance'. *Journal of European Integration*, 29(5): 549-564. <https://doi.org/10.1080/07036330701694873>

Usui, Yoichiro (2007). *'The Democratic Quality of Soft Governance in the Eu Sustainable Development Strategy: A Deliberative Deficit'*. *Journal of European Integration*, 29(5): 619-633. <https://doi.org/10.1080/07036330701694923>

Valadez, Jorge M. (2001). *Deliberative democracy: political legitimacy and self-determination in multicultural societies*. Boulder: Westview Press.

Viroli, Maurizio (2002). *Republicanism*. New York: Hill & Wang.

Wellens, Karel C. and Guustaf Borchart (1989). *'Soft Law in European Community Law'*, *European Law Review*, 14: 267-321.

Wessel, Ramses (2020). *'Normative Transformations in EU External Relations: The Phenomenon of "Soft" International Agreements'*, *West European Politics*, 44(1): 1-12. <https://doi.org/10.1080/01402382.2020.1738094>

Wolterstorff, Nicholas and Terence Cuneo (2012). *Understanding liberal democracy: essays in political philosophy*. Oxford: Oxford University Press.

Zerilli, Filippo M. (2010). *'The rule of soft law'*. *Focaal*, 56: 3-18. <https://doi.org/10.3167/fcl.2010.560101>