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Resisting EU Norms
A Framework for Analysis

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Resisting EU Norms
A Framework for Analysis

Abstract

This article provides a framework for analysing resistance to norms in the European Union. It argues on the one hand that the development of EU governance makes it necessary to systematically study resistances to EU norms beyond the current concentration on non-compliance with legal norms. On the other hand it develops a typology of the instruments of resistance used by domestic actors to object to the implementation of EU norms.

Based on a systematic analysis of case studies stemming from both legal and political science literature, the paper will show that resistances to EU norms have a long history in the EU. We will first analyse the forms of resistance to hard law based on the widespread secondary literature available. This will then be compared to areas in which soft law reigns, with a view to demonstrate that soft law triggers as much resistance as hard law. Based on this empirical data and using a policy instruments approach, the paper develops a typology of instruments used by domestic actors to circumvent or to resist European norms. This allows for establishing possible causalities between the political context, norms and types of resistances.

Introduction

The influence of international norms and principles at the domestic level has increased steadily over the last century and has resulted in a large number of empirically and theoretically challenging studies.[1] In its most general sense, these analyses are about explaining change – change in actors' attitudes, public policies, and institutions through international norms.

In European studies this influence has triggered a similar interest: an extensive literature has described and analysed the role of law in the European integration process.[2] In the 1960s, scholars depicted the common market as a Community of law, reflecting the ECJ's jurisprudence on primacy and self-executing acts. 'Integration through law' was viewed as a key factor in the process of creating an 'ever closer union' among the peoples of Europe (Preambule of the EC treaty, now Treaty on the Functioning of the European Union). The literature on Europeanisation[3] emphasized the impact of EU law on national law and public policies. At the same time, however, European integration has always been affected by blocking attitudes and backlashes.

Since the early 1990s, different forms of opposition, circumvention, and resistance to norms are more and more visible. Infringement procedures against the Member States have increased. A recent decision of the German Constitutional Court alludes to the limits of the integration process, especially in the field of democracy and human rights, while reminding of the persistence of national sovereignty.[4] At a more political

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[1] Amongst those J. W. Legro, 'Which Norms Matter ? Revisting the "failure" of internationalism', (1997) 51 *International Organization* 1: 31-63; A. P. Cortell, J. W. Davis, 'Understanding the Domestic Impact of International Norms: A Research Agenda', (2002) 2 *International Studies Review,* 1: 65-87; K. O'Neill, J. Babinger & S. Van Deever, 'Actors, Norms, and Impact: Recent International Cooperative Theory and the Influence of the Agent-Structure Debate', (2004) *American Review of Political Science,* 7: 149-175; A. Schaefer, 'Resolving Deadlock: Why International Organizations Introduce Soft Law', (2006) 12 *European Law Journal* 2: 196-208. And for an excellent review article see E. Graham, C. Volden & Ch. Shipan (forthcoming). 'The Diffusion of Policy Diffusion Research', (presented at the APSA Annual Convention 2009).

[2] Among those see M. Cappelletti, M. Seccombe & J. H. H. Weiler (eds.), ,*Integration Through Law*, Vol. 1, Book 1 and 2, (Walter de Gruyter. Berlin–New York, 1986).

[3] On Europeanisation in general, see two classical volumes: M. Green Cowles, J. Caporaso & T. Risse (eds), *Europeanization and Domestic Change*, (Ithaca, Cornell University Press, 2001); K. Featherstone & C. M. Radaelli (eds), *The Politics of Europeanization*, (Oxford, Oxford University Press, 2003). On the Europeanization of law see Francis Snyder, *The Europeanization of Law*, (Oxford, Hart, 2000).

[4] German Constitutional Court, Decision of June 30, 2009 on the Treaty of Lisbon. Before this decision, the German Court in Karlsruhe has taken position in two famous rulings: So Lange I (29 May 1974) and So Lange II (22 October 1986). The So Lange II Ruling of 22 October 1986, albeit weaker than the So Lange I Ruling of 29 May 1974, held that *so long as* the ECJ had a level of protection of fundamental rights substantially in competition with the protections offered by the German constitution, Germany would not longer review specific Union acts in light of their own

level, the Excessive Deficit Procedure sanctioning breaches of the Stability and Growth Pact (a deficit-to-GDP ratio higher than 3%) has been obstructed by France and Germany in 2003.

Confronted with these resistance attitudes, EU policy makers have responded in introducing mechanisms aimed at making EU governance simpler, more flexible and less formal. The aim was to reduce these attitudes of opposition through so called 'new modes of governance' that would use, instead of coercive tools, coordination mechanisms. While hard law regularly triggers non-compliance attitudes, soft law is thought to push actors to comply with the goal through a learning process leading to the transformation of actors' preferences.

A number of case studies published since the beginning of the years 2000 show, however, that resistance to soft law is as widespread as that to hard law, albeit more difficult to observe empirically. Far from being limited to the post-Maastricht era, they trace back to the very beginning of European integration, when the founding treaties entered into force, and developed tremendously since the 1990s.

This article will provide a framework for the analysis of resistances to both kinds of norms, soft and hard. At the heart of this conceptual framework, and beyond specific country or policy areas studies, a typology of instruments of administrative resistance will be provided.

The concept of resistance refers to active and passive opposition to the transposition and implementation of European norms (passive resistance being also known as inertia). It can take the forms of protest as well as attitudes such as circumventing norms through action or inaction, or adapting norms to national considerations.[5] The polymorphism of this notion invites us to list a wide range of resistances, which is challenging both at a theoretical and methodological level.

Lawyers have studied situations where Member States failed to comply with hard law: problems in transposing directives; reticence for national jurisdictions to endorse the legal reasoning of the ECJ; infringement of EU law sanctioned by the ECJ after seizure

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constitution. Initially, in *Internationale Handelsgesellschaft* [1974] Case 11–70, known as the *Solange I* case, the ECJ ruled not even a fundamental principle of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law. This had created a serious conflict between the ECJ and the German Constitutional Court..

[5] S. Saurugger, 'Beyond Non-Compliance with Legal Norms' in T. Exadaktylos & C. Radaelli (eds), *Research Design in European Studies : Establishing Causality in Europeanization* (Basingstoke, Palgrave, 2002) at 105-124.

by the Commission. Resistances have been unveiled at all levels of the administration, be it national or local, and among national jurisdictions, some of them rejecting -at least partially- the doctrines of primacy and direct effect.

As we have seen, however, hard law is not the only angle from which resistances may be scrutinized. In the European context, norms are not limited to formal legal acts such as regulations, directives or decisions (art.288 TFEU); they are also more informal rules like programmes or codes of conduct, rules that can be considered soft law because compliance is not ensured though strong enforcement mechanisms. In employment policy, for instance, these informal rules are indicators, or goals to be achieved voluntarily, no sanctions being applied in case of 'non compliance'. The implementation of these rules is monitored by the Council under the scrutiny of committees composed of Member States' and Commission's representatives. Contrary to hard law, the impact – or absence of impact of these soft norms are difficult to study empirically, although more and more present in the European Union.

Resistance to European norms is a long-standing trend in European integration. This paper's assumption is that this situation remains unchanged even though the EU's system of governance has been partially transformed since the 1990s: the traditional Community method (based on the institutional balance, the importance of supranational institutions, ECJ included, and the primacy of EU law) was confronted with a number of challenges that led to the introduction of a number of soft law mechanisms, without replacing EU hard law entirely.[6]

The aim of this paper is to provide a framework for analysis and, more particularly, to develop a typology of instruments used to resist European –soft or hard- norms.[7] A policy instrument is a "device that is both technical and social, that organizes specific social relations between the state and those it is addressed to, according to the representatives and meanings it carries. It is a particular type of institution, a technical device with the generic purpose of carrying a concrete concept of politics/society relationship and is sustained by a concept of regulation".[8] This definition is particularly

[6] For a particularly sceptical view see R. D. Kelemen,, *Eurolegalism. The transformation of law and regulation in the European Union* (Harvard University Press, 2011).
[7] M. Dawson, *New Governance and the Transformation of Law: Coordinating EU social Law and Policy* (Cambridge University Press, 2011); S. Smismans,. 'From Harmonization to Coordination ? EU Law in the Lisbon Governance Architecture', (2011) 18 *Journal of European Public Policy* 4 : 502-522.
[8] P. Lascoumes & P. Le Galès (eds), *Gouverner par les instruments* (Presses de Sciences Po, 2004) at 13.

useful as it encompasses both active resistances, consciously mobilized by actors, or passive resistance, due to a lack of material or cognitive resources, or to simple inertia. Instruments of resistance can be strategies as well as assets. The typology of instruments advanced in this paper will help provide guidance for further research on the subject, especially case-studies explaining resistances in specific areas and different historical contexts.

This paper is divided into two sections. Since the early years of European integration, the Member States are very creative in finding instruments aimed at resisting European hard law, i.e. EU norms that are legally binding and placed under the jurisdiction of national and European tribunals. These instruments have developed in areas covered by the Community method, and will be analysed in a first section. At the beginning of the 1990s, while the permissive consensus[9] was jeopardized, new modes of governance, mostly based on soft law, more and more complemented the Community method. In this context, resistances have not disappeared but, on the contrary, have diversified throughout history, in parallel to the transformation of EU law. Taking into account the benefits and limits of previous research on compliance with EU law, the second section focuses on the resistance attitudes that follows the emergence of soft law in the European Union, while the third proposes new ways of examining resistances to the implementation of European norms, be it hard of soft.

1. Compliance and non-compliance with hard law: towards more systematic analyses

The question whether national governments and administrations comply or do not comply with international norms is central to the understanding of both the state and the international system. The mere fact that national governments contribute to the creation of international norms do not entail that they comply with these norms during the implementation phase. Compliance, seen as a process whereby actors' attitudes and/or identity are in line with a specific rule,[10] is one possibility. Non-compliance is another one that is equally covered by empirical research. Both trends can be detected

[9] L. N. Lindberg & S. A. Scheingold, *Europe's Would-Be Polity: Patterns of Change in the European Community* (Prentice-Hall, Englewood Cliffs, 1970).

in the European integration process since the early 1950s (1.1). But this is only since the 1990s that these resistances have been systematically studied (1.2).

1.1. 'Integration through law' triggers resistance

The logic of 'integration through law' was embedded in the founding treaties of Paris and Rome, while at the same time resulting from the interpretation delivered by the European Court of Justice in its landmark rulings of 1963-64.[11] The law of the European Communities has created a legal order, distinct from international law, and made of norms that are self-executing and have supremacy over internal law. Member States are subject to an integrative pressure,[12] meaning that they have to comply with Community/EU law. They need to apply European rules on the one hand, and on the other hand eliminate national rules -and refrain from adopting new measures- that are contrary to European law.

The integration process has generated different forms of Europeanization affecting various branches of domestic law. But, in the meantime, the Member States have been particularly innovative in creating instruments opposing - or resisting - European law.

Even though Member States must fulfil the obligations contained in the EU treaties and legislation, national actors –collective as well as individual- may deviate from the European norms for reasons of domestic politics. Indeed, while they are constrained by the principle of sincere cooperation, under which they shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties, they also have some room of manoeuver in the ways and means of law implementation, and may use it to refuse compliance. National resistance may come from governments, parliaments, local authorities as well as tribunals. Resistance may result from either a refusal to act (a directive that is not transposed in due time; a national rule that is not abrogated although breaching EU law) or an action contrary to EU law. In both cases, the violation may be found in a legal act or in a simple practice. Legal acts breaching EU law may be located at constitutional level (constitutional courts refusing the primacy of EU law over

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[10] K. Raustiala & A. M. Slaughter, 'International Law, International Relations, and Compliance', in W. Carlsnaes, T. Risse, B. Simmons (eds.), *The Handbook of International Relations* (Sage 2002) at 539.

[11] CJCE 5 February 1963 Van Gend en Loos ; CJCE 15 juillet 1964 Costa c/ Enel.

[12] This demand of compliance is specific to the international level where sovereign states accept to be part of a supranational (EU) or international organisation (i.e. WTO). A federal form of integration must be distinguished from these types of integration: a federation refers to a system in which Member States abandon their monopoly of legitimate physical violence.

national constitutions), legislative level (national legislation contrary to EU law ; national courts refusing the primacy of EU law over posterior legislation in the Member States) as well as administrative level.[13]

From the 1950s to the 1980s, most cases of resistance occur within the areas of the common market and competition policy. The ECJ develops jurisprudence on 'national charges having equivalent effects to customs duties' and 'national measures having equivalent effects to quantitative restrictions to the free movement of goods'. While tariffs and non-tariffs barriers are removed as soon as 1st July 1968, national governments re-introduce regulations and charges, national administrations develop new practices that have equivalent effects to customs tariffs duties and quantitative restrictions. These forms of resistance have been constantly condemned/sanctioned by the ECJ on the basis of infringement procedures introduced by the Commission. Similarly, the Member States have resisted the free movement of persons by making use of the treaty provisions on employment in the public service, for which the treaty provides an exception, and limitations justified on grounds of public policy, public security or public health. In competition policy, they have maintained different forms of public aid that could hardly be justified by treaty exceptions but were more certainly related to strong national interests.

Indeed, the single market and the competition policy are not the only policy areas where national administrations resist. Each time EU competences were enlarged by treaty revisions, new forms of resistance appeared. Reports of the Commission on the implementation of EU law show that resistance to hard law can be found in most EU policies. Significantly, infringement procedures now concern a broad range of policy areas. This diversification is obvious when looking at the sectors where the Commission registers complaints on EU law issues (cf. Table 1). Clearly, all resistances cannot be measured by statistics on complaints. And it is highly questionable whether the proportion of complaints in the different sectors adequately mirrors the proportion of

[13] An illustration of this distinction can be found in the case of France. As in many countries within the civil law legal tradition, France's judicial system is divided between ordinary and administrative courts. While the ordinary accepted the supremacy of EU law in 1975, the administrative only accepted the doctrine in 1989. Before this, the supreme administrative court, the *Conseil d'Etat*, held that the administrative courts could not give precedence to EC law over a more recently adopted national law. Each time a legal conflict occured between a national law and a European, the *Conseil d'Etat* gave precedence to the last legal act adopted. This was in contrast to the supreme court of the ordinary courts, the *Cour de cassation*, which in the case of *Administration des Douanes v Société 'Cafes Jacques Vabre' et SARL Wiegel et Cie* ruled that precedence should be given to EC law over national law in line with the requirements of the Article 55 of the Constitution which accorded supremacy to ratified international treaty over national law. The *Conseil d'Etat* finally changed his position and followed the reasoning used by the *Cour de cassation* in the Nicolo ruling of 1989.

resistances actually existing in administrative practice. For example, the high level of complaints on environmental issues may be explained by NGO's activism in this field, not only by a particularly high degree of administrative resistance practices. However, the data available on complaints to the Commission indicates that resistance is indeed a phenomenon encompassing a wide array of situations and sectors.

Table 1

Complaints on EU law issues registered, in 2010, under the new Commission registration process and identified by sector

Environment	19,77%
Internal Market and Services	17,73%
Justice	14,4 %
Taxation and Customs Union	11,1%
Employment, Social Affairs and Inclusion	8,91%
Enterprise and Industry	4,72%
Health and Consumers	3,5%
Competition	3%
Mobility and transport	2,64%
Home Affairs	2,05%
Energy	1,45%

Source: Report from the European Commission, 28th Annual Report on Monitoring the Application of EU Law, 2010, COM(2011)588 final, Statistical Annex, Annexes I-III

1.2. A systematic approach to non-compliance with EU hard law

A first approach to analysing resistances to European integration can be found in the field of legal non-compliance studies. This research concentrates on the jurisprudence of the European Court of Justice with regard to the degree with which EU law is complied with at the domestic level. These mainly legal studies insist on the diversity of forms of resistance, but have categorised these forms according to the

norms and not with regard to the instruments of resistance themselves. Thus, we find in the European Union the existence of financial charges or complex administrative procedures in contradiction with the free movement of goods or persons in the EU.[14] Until the 1980s, these phenomena were rarely accounted for and even less systematically analysed.[15] No horizontal typology –comparing different areas of EU competence or EU public policy- has been developed. Little explanation has been offered to explain the resistances of states with regard to the requirement of legal compliance. Scholars argued simply that EC law is, in the end, not better or less well implemented at the domestic level than any national legal requirement.[16]

From the 1980s onwards, however, research in the field of politics has attempted to study the degree of compliance with EC/EU law more systematically. Two categories of research can be distinguished.

The first category of studies developed in the 1980s concentrated on the transposition of directives into the domestic realm. Their aim was to understand to what degree Member States transferred European rules into domestic law.[17] Their inclusion in the national legislation and regulation was measured by the appearance of these norms in the Member States official journals. The shorter the delay between the publication in the EC official journal and the national one, the higher domestic compliance with EU. These analyses were based on the underlying assumption that the transposition of directives led to higher convergence between different Member States.[18]

From the 1990s onwards, a second category of studies emerged, attempting to describe and to analyse the different degrees of compliance at the domestic level,

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[14] G. Druesne , *Droit de l'Union européenne et politiques communautaires* (PUF, 2006); L. Dubouis & Cl. Blumann,. *Droit matériel de l'Union européenne* (Domat Montchrestien, 2009); C. Barnard, The *Substantive Law of the EU: The Four Freedoms* (Oxford University Press, 2010).

[15] G. Ciavarini Azzi (Ed.), *L'application du droit communautaire par les Etats membres* (European Institute of Public Administration, 1985); S. Krislov, Cl-D. Ehlermann, J. Weiler,, 'The Political Organs and the Decision-Making Process in the United States and the European Community', in M. Cappelletti, M. Seccombe, J. H. H. Weiler (Eds.), *Integration Through Law: Europe and the American Federal Experience* (Walter de Gruyter, 1986) ; H. Siedentopf & J. Ziller (Eds.), *Making European Policies Work: The Implementation of Community Legislation in the Member States* (Sage, 1988).

[16] G. Ciavarini Azzi (Ed.), op. cit. note 15 supra at 199.

[17] In cases of Member State non-compliance, the Commission can initiate an infringement procedure with a letter of formal notice that can be followed by a reasoned opinion, a transferral to the European Court of Justice and finally a ruling by the ECJ (art. 226 ECT/art. 258 of the Treaty on the Functioning of the European Union or TFEU). If the Member State does not follow the ruling, a second infringement procedure can be initiated and financial sanctions can be imposed (art. 228 ECT/art.260 TFEU).

[18] See O. Treib, 'Implementing and complying with EU governance outputs', *Living Reviews in European Governance*, 2008, http://www.livingreviews.org/lreg-2006-1 (accessed on 24.8.2012)

including both the transposition of directives and the compliance with regulations, treaties and decisions.[19] The differences between Member States became a research object. In other words, the institutional differences between Member States were considered to be the independent variable, facilitating, or on the contrary, hindering the transposition and the implementation of European norms.[20] Two forms of resistances have been identified: passive or active resistance (Table 2).

These resistances, or more commonly called inertia, refer to an absence of change (or an absence of action, as legal studies would describe it), thus a situation in which European norms do not trigger any change at the domestic level, be it in politics, policies or polity. Other forms of resistances can take the form of domestic laws that openly contradict the European norm.

Table 2

Passive and active resistances[21]

Active resistance	**Passive resistance**
opposition against specific contents	Different interpretation
opposition against EU decision mode	Administrative problems
opposition against national decision or transposition mode - parliaments, regions, interest groups or social movements - Inter- or intraministerial conflicts	Political instability

[19] G. Falkner, O. Treib, M. Hartlapp, S. Leiber, *Complying with Europe: EU Harmonisation and Soft Law in the Member States* (Cambridge University Press, 2005); Tanja A. Börzel, Tobias Hoffmann & Diana Panke, 'Caving in or sitting it out ? Longitudinal patterns of non-compliance in the European Union', (2012) 19 *Journal of European Public Policy* 4: 454-471. O. Treib, op. cit. note 18 supra.

[20] F. G. Duina, 'Explaining Legal Implementation in the European Union', (1997) 25 *International Journal of the Sociology of Law* 2:155-180; T. Börzel & T. Risse, 'When Europe Hits Home. Europeanization and Domestic Change', (2000) 4 *European Integration online Papers* (EIoP) 15, http://eiop.or.at/eiop/texte/2000-015a.htm; T. Risse, M. Green Cowles & Caporaso (eds), *Transforming Europe: Europeanization and Domestic Change* (Cornell University Press, 2001).

The bulk of non-compliance studies, either explicitly or implicitly drawing on one or more of these variables leading to inertia, is anchored in either qualitative case study research[22], based on mixed methods,[23] or quantitative research design.[24]

In these studies, directives are used as a starting point. Directives, contrary to regulations, are considered to allow for constructing a relatively robust causality. According to the majority of studies, concentrating on directives (either in the form of a database using CELEX/EUR-LEX entries or using the Commission data on infringement procedures) allows for observing difficulties in implementing, or on the contrary the smooth transposition of EU law, as directives must be incorporated into national law. Regulations, on the contrary, are directly applicable at the national level and therefore do not offer a basis of observation about compliance processes.

Based on the comparative analysis of quantitative research undertaken in this field, scholars have developed a comprehensive typology of variables affecting non-compliance. They distinguish between variables that throughout the studies affect compliance positively: administrative efficiency, parliamentary scrutiny and coordination strength; and variables that exert a negative (or non-positive) influence: centralised/decentralised decision making, corruption levels, veto players (both public and private), members of relevant actors involved, and domestic conflict. [25]

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[21] See G. Falkner et al., op. cit. note 19 supra at 15.

[22] See in particular G. Falkner, M. Hartlapp & O. Treib, 'Worlds of Compliance: Why Leading Approaches to European Union Implementation Are Only "Sometimes-true Theories"', (1997) *European Journal of Political Research* 3 at 395-416. G. Falkner et al., op.cit. note 19 supra; G. Falkner & O. Treib, 'Three Worlds of Compliance or Four ? The EU-15 Compared to New Member States', (1998) 46 *Journal of Common Market Studies* 2 at 293-313; G. Falkner & M. Hartlapp, 'Problems of Operationalization and Data in EU Compliance Research', (2009) 10 *European Union Politics* 2 at 281-302.

[23] D. Toshkov, 'Taking Stock: A Review of quantitative studies of transposition and implementation of EU law', (2010) *EIF Working Paper* n° 01.2010, February.

[24] E. Mastenbroek, 'EU Compliance: Still a Black Hole?', (2005) 12 *Journal of European Public Policy* 6 at 1103-1120; T. Börzel, M. Dudziak, T. Hofmann, D. Panke, C. Sprungk, 'Recalcitrance? Inefficiency, and Support for European Integration: Why Member States do (Not) Comply with European Law', (2007) *Center for European Studies Working Paper* 161, Harvard University, Cambridge; T. König, & B. Luetgert, 'Troubles with Transposition? Explaining Trends in Member-State Notification and the Delayed Transposition of EU Directives', (2009) 39 *British Journal of Political Science* 1 at 163-194; T. Börzel et al., op.cit. note 19 supra.

[25] See D. Toshkov, op. cit. note 23 supra.

Table 3

Variables influencing non-compliance[26]

Positive effect	**Negative effect**
Administrative efficiency	Centralised/decentralised decision-making
Parliamentary scrutiny	Corruption levels
Coordination strength	Veto players (both public and private)
	Domestic conflict

These studies have reached a high level of sophistication, albeit a limited degree of cumulativity due to their distinct methodological approach.[27] Most of them, particularly those based on a qualitative research design, concentrate on a specific public policy. They concentrate on one or the other form of resistance – active or passive – but their methodology does not allow for understanding in which political context one or the other resistance specifically occurs. As Hartlapp and Falkner[28] underlined in particular, the elements of timeliness and correctness of implementation are problematic to measure precisely. Timeliness means to meet the transposition of a directive in due time, i.e. before the transposition date has expired. With regard to the correctness, research has shown that a directive can be perfectly transposed into national legislation, but this does not necessarily lead to practical implementation.[29] For example, the Bathing Water Directive calling for cleaner beaches was implemented very differently by EC Member States. The British government declared that beaches with 500 people per mile did not fall under the purview of the directive. Thus, only 27 British beaches, as opposed to 8,000 in the rest of the European Community needed to comply with the

[26] ibid.
[27] A. Töller, 'Measuring and Comparing the Europeanization of Public Policies', (2010) 48 *Journal of Common Market Studies* 1 at 413-440; O. Treib, op.cit. note 18 supra.
[28] G. Falkner, M. Hartlapp, S. Leiber, Oliver Treib, 'Non-Compliance with EU Directives in the Member States: Opposition Through the Backdoor?', (2004) 27 *West European Politics* 3: 452-473.
[29] E. Versluis, 'Even Rules, Uneven Practices: Opening the "Black Box" of EU Law in Action', (2007) 30 *West European Politics* 1:50-67. E. Mastenbroek, 'EU Compliance: Still a Black Hole?', (2005) 12 *Journal of European Public Policy* 6:1103-1120.

Directive. Other Member States decided to ignore the results after rainfall or decided on different periodicities. Versluis (2007)[30] and Falkner et al. (2005)[31] come to a similar conclusion when they state that the majority of technical questions of implementation are not on top of everyone's list of things to do and not very much attention is paid to enforcement of it. But while Versluis considers this a consequence of weak issue salience, Falkner et al interpret this as a lack of administrative resources. Another way altogether to look at this is to see resistance as an administrative strategy

These studies concentrate, however, nearly exclusively on the transposition (and very rarely on the implementation) of legally binding norms, which are judicially controled. As we will see below, new modes of governance have been introduced by treaty revisions since the 1990s, which equally trigger change or resistance to change at the domestic level. While the 'community method' as such has neither disappeared nor become less central in EU decision-making,[32] EU policy makers have attempted since the beginning of the 1990s to make EU governance simpler, more flexible and less formal. Confronted with critiques of the inflexibility and the coerciveness of EU regulation, these new modes of governance were thought to decrease the level of non-compliance with EU law. However, instead of eliminating Member State resistances, these new modes of governance have initiated equal rejection, opposition, inertia, which need to be taken into account if we analyse instruments of resistance in general.

2. Resistance to EU soft law

The beginning of the 1990 appears to be a crucial period for two main reasons: First, the permissive consensus that ruled European policy-making until then, allowing for European elites to take decisions without enquiring for citizens' approval on specific issues, and citizens supporting European integration without being truly interested, seemed to be put into question.[33] Second, new modes of governance appear at this

[30] E. Versluis, op. cit. note 29 supra.
[31] G. Falkner, op.cit note 19 supra.
[32] R. D. Kelemen, op. cit. note 6; R. Dehousse, 'The "Community Method": Chronicle of a Death Too Early Foretold', in Beate Kohler-Koch & Fabrice Larat (eds), *Efficient and Democratic Governance in the European Union* (CONNEX Report Series, University of Mannheim, n° 9, 2008); R. Dehousse (Ed.), *The Community Method. Obstinate or Obsolete ?* (Palgrave Macmillan, 2012).
[33] L. Hooghe & G. Marks, 'A Post-functionalist Theory of EUropean Integration : From Permissive Consensus to Contraining Dissensus', (2008) 39 *British Journal of Political Science* 3: 1-23.

particular moment in the European Union. Mostly based on soft law, i.e. norms that go beyond legal norms in the classic sense (supremacy of EU law and direct effect of directives and regulations) and where the European institutions have only poor coercive powers (excluding the judicial control of the Court), these new modes of governance have been developed both to respond to the critiques of the inflexibility and the coerciveness of EU regulation and in the hope that they would allow for circumventing domestic resistances. However, resistances have not disappeared, as can be seen from the examples stemming from the secondary literature. It is thus crucial to develop a framework that allows us to study resistances to soft law as well as non-compliance with hard law.

2.1 Circumvent State resistances through the introduction of soft law

Soft law consists of two types of rules. On the one hand those hard law rules that do not fall under the control of the European Court of Justice (this is the case of decisions in the field of Foreign and Security Policy or the Stability and Growth Pact).[34] On the other hand, non-coercive rules, which define specific objectives and foresee specific mechanisms which help framing their implementation. This second type of norms has been developed in particular since the beginning of the 1990s in the field of economic coordination (Treaty of Maastricht), employment policy (Treaty of Amsterdam), or social inclusion (Lisbon strategy).

These instruments of recommendation and guidelines such as benchmarking, best practices, peer review or indeed EU mainstreaming gave rise to a body of literature on "new forms of governance". Numerous publications emphasised the flexible nature of these non-coercive processes which are based on the desire of participants to agree, through collective deliberation, on procedural norms, forms of regulation and shared political objectives, whilst preserving a diversity of solutions and local measures.[35] The objective of these forms of governance is not to create legally binding norms with which all Member States must comply, but to allow States to maintain their national

[34] For a debate on the distinction between hard law and soft law in the EU see F. Terpan, 'Does EU Soft Law Differ from International Soft Law? Using Soft Law in a Supranational System of Governance, An Agenda for Research', International Studies Association's 53rd Annual Convention, San Diego 1-4 April 2012.
[35] I. Bruno, S. Jacquot & L. Mandin, 'Europeanization through its instrumentation', (2006) 13 *Journal of European Public Policy* 4:519-536.

specificities whilst ensuring they remain compatible with the political and economic priorities of the European Union. Thus, the emphasis is not on regulations and directives, but on the use of 'soft law'. It is not legally binding and requires only voluntary acceptance. The 'new forms of governance' are negotiated between public and private actors at different levels of the decision-making process, whilst actual political choice is left to the Member States.

Initially focused on the open method of coordination (OCM) introduced by the Lisbon Strategy for employment ,[36] evaluated at mid-term (2005) and reformed in 2010, this set of works highlights voluntary agreements, standards, labels and diversified financial and fiscal incentive measures. The scope was broadened to include major economic policy guidelines, employment policy guidelines and objectives in other political domains. However, norms developed in this way are not directly applicable or transposable into domestic law. The national authorities agree to take them into account when forming their own policies.[37] This form of governance enables co-ordination whilst limiting delegation of regulatory power to the Commission and is not subject to review by the European Court of Justice. Furthermore it tries to avoid the conflict of preferences about economic governance. In other words, these modes of governance were aimed to reduce the regulatory burden on government and business by limiting the legislative output from Brussels. The impact assessment exercise is an illustration of this particular aspect of EU governance: policy agendas did not disappear, policy instruments, on the contrary created new windows of opportunity for agents to intervene and to set agendas.[38]

Two reasons explaining these developments can be found in the literature, both of them based on the expected resistance attitudes of Member States:

A1: 'New public policy instruments' trigger more coherence between EU Member States because the main mechanism of Europeanization is learning. This assumption, shared by a number of official Commission documents, sees in different forms of learning –

[36] R. Dehousse, 'La méthode ouverte de coordination. Quand l'instrument tient lieu de politique', in P. Lascoumes & P. Le Galès op. cit. note 8 at 331-356; S. Borrás & T. Conzelmann, 'Democracy, Legitimacy and Soft Modes of Governance in the EU: The Empirical Turn', (2007) 29 *Journal of European Integration* 5:531-548.

[37] A. E. Töller, 'Voluntary Approaches to Regulation – Patterns, Causes, and Effects', in D. Levi-Faur (ed), *Handbook of the Politics of Regulation* (Edward Elgar, 2011).

[38] C. Radaelli & A. (2002) Meuwese, 'Hard Questions and Equally Hard Solutions. Proceduralisation through Impact Assessment in the European Union', (2010) 31 *West European Politics* 1:136-153.

learning by socialization, learning by monitoring, learning by arguing and persuasion – a way of re-orienting initial policy paradigms and positions. While coherence might mean different things, such as coherence in policy aims or policy strategies, this would mean that resistance or inertia, if occurring, would be extremely limited.

A2: Governments as well as European institutions can produce a shadow of hierarchy by threatening to introduce legally binding regulations if actors do not comply with voluntary or soft instruments. This assumption illustrates the complex relationship existing between voluntary regulations and statutory regulations, a relationship which is not exclusive, but most often combined.[39]

2.2. Analysing Resistance to Soft Law

However, attitudes of resistance are detectable even in those situations where soft law has been favoured. Given that there is no judicial control and no risk of being sanctioned, these attitudes are frequent. Actors are free to use whatever instrument at their disposal, in a very innovative way, each time they want to resist EU norms. Most often, oppositions are indirect, rather than direct, and they induce incremental changes.[40] Strategies of resistance develop in a concealed way throughout the implementation phase, even if a consensus on general objectives has been reached at earlier stages.

A systematic analysis of secondary literature on soft law in nine main political science and law journals[41] has shown that soft law norms, although aimed at convincing Member States that convergence is possible without major sovereignty losses, provoke as much resistances as hard law does. This is a major research result as it indicates that one of the central arguments favouring the introduction of soft law – the fact that it leads to more compliance through learning mechanisms and mimetism – has not been entirely

[39] A. E. Töller, op. cit. note 37 supra.
[40] I. Bache & A. Taylor, 'The Politics of Policy Resistance: Reconstructing Higher Education in Kosovo', (2003) 23 *Journal of Public Policy* 3:279-300.
[41] Journal of Common Market Studies, Journal of European Public Policy, Public Administration, Governance, Journal of European Integration, West European Politics, the European Journal of Political Research, European Law Review and the European Law Journal. We analysied all issues from 2000 to 2013 concentrating on the following notions found in the title and the abstract : 'Soft Law', 'Open Method of coordination', 'Governance mechanisms', 'Soft governance' and 'Soft instruments'.

met. The articles show that the Member States, at both political and administrative level, do not easily endorse non-binding rules or follow the incentives given under soft forms of governance. A particularly important debate in this literature concerns the impact of new public policy instruments such as benchmarking, mainstreaming or work programmes.[42] While some authors underline the effective impact of soft law at the domestic level more particularly in the field of social policy,[43] others have insisted on the limited effectiveness and inefficiency of soft measures, associated with 'window dressing' or 'cheap talk'.[44] A limited number of studies mainly concentrating on competition policy, and more precisely state aid regimes, insist on the indirect effect of soft law, empirically showing how soft law can be used as frames in legal interpretation and political decisions at the European and the domestic level.[45] Through a case law analysis, Stefan shows that the European Court of Justice took competition guidelines and notices seriously in its judgments. Thus effects are indeed recognised to these non legally binding instruments, but only when it serves the enforcement of hard principles of law. Hence, studies insisting on the limited capacity, or for that matter the ineffectiveness of soft law, argue that initiatives by the EU to promote common standards, which are not subject to European legislation by means of 'hard law', failed.

The articles concentrate on policy areas found in the former first pillar such as the Stability and Growth Pact or more recent economic governance measures, employment and social policy, state aid, tax competition, enlargement policy, research and educational policy or public and administrative reform.[46] None focuses on Justice and Home Affairs nor the Common Foreign and Security, or Defence policy, albeit soft law was and still is rather frequent in these areas. With regard to the reasons for non

[42] M. Citi and M. Rhodes, 'New Modes of Governance in the EU: Common Objectives versus National Preferences', (2007) *European Governance Papers (EUROGOV), N-07-01 ;* B. Eberlein and D. Kerwer, 'Theorizing the New Modes of European Union Governance', (2002) 6 *European Integration Online Papers* 5.

[43] I. Bruno, S. Jacquot & L. Mandin, op. cit. note 35 at 519-536*;* S. Jacquot, 'The Paradox of Gender Mainstreaming: Unanticipated Effects of New Modes of Governance in the Gender Equality Domain', (2010) 33 *West European Politics* 1:118-135; C. F. Sabel & J. Zeitlin, "Learning from Difference: The New Architecture of Experimentalist Governance in the EU", (2008) 14 *European Law Journal* 3: 271–327; E. Szyszczak, 'Experimental Governance: The Open Method of Coordination', (2006) 12 *European Law Journal* 4:486–502.

[44] In particular E. Radulova, 'The OMC: An Opaque Method of Consideration or Deliberative Governance in Action?', (2007) 29 Journal of European Integration 3:363-380; V. Hatzopoulos, 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU', (2007) 13 *European Law Journal* 3:309–342; D. M. Trubek & L. G. Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination', (2005) 11 *European Law Journal* 3: 343–364, to quote but a few.

[45] M. Cini, 'The soft law approach: Commission rule-making in the EU's state aid regime', (2001) 8 *Journal of European Public Policy* 2:192-207; M. Blauberger, 'Of "Good" and "Bad" Subsidies: European State Aid Control through Soft and Hard Law?', (2009) 32 West European Politics 4:719-737; O. A. Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?', (2008) 14 *European Law Journal* 6:753-772.

[46] We concentrated only on policy measures and thus excluded soft law influence on politics and polity.

compliance with soft law, the authors distinguish four different variables explaining non-compliance with soft law. The majority of authors argue that an *actor-centred hypothesis* best explains non compliance. The lack of political support of the government veto players (be those interest groups, trade unions, employers organisation, parties or the media) is used as the main variable explaining the difficulties soft law has to be taken into account at the national level.[47] Another group of studies of studies insist on a combination of *structural and actor-centred variables* in which the classical 'misfit' hypothesis re-emerges.[48] In these texts the difference in political, institutional or paradigmatic structures between the domestic and the EU level explains the difficulties with and outright oppositions to soft law implementation. A very small number of articles concentrating on social and employment policies point to the *absence of a shadow of hierarchy*, explaining that the absence of a threat by the European

[47] C. Trampusch, 'Europeanization and Institutional Change in Vocational Education and Training in Austria and Germany', (2009) 22 *Governance* 3:369–395; C. Woolfson, 'Working Environment and "Soft Law" in the Post-Communist New Member States', (2006) 44 *Journal of Common Market Studies* 1:195–215; R. Geyer & S. Lightfoot, 'The Strengths and Limits of New Forms of EU Governance: The Cases of Mainstreaming and Impact Assessment in EU Public Health and Sustainable Development Policy', (2010) 32 *Journal of European Integration* 4:339-356; C. Meyer, 'The hard side of soft policy co-ordination in EMU: the impact of peer pressure on publicized opinion in the cases of Germany and Ireland', (2004) 11 *Journal of European Public Policy* 5; U. Sedelmeier, 'Is Europeanisation through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession?', (2012) 35 *West European Politics* 1:20-38; K. Featherstone, '"Soft" co-ordination meets "hard" politics: the European Union and pension reform in Greece', *(2005)* 12 *Journal of European Public Policy* 4: 733-750; P. R. Graziano, 'Europeanization and Domestic Employment Policy Change: Conceptual and Methodological Background. Governance', (2011) 24 *Governance* 3:583–605; E. Tulmets, The Management of New Forms of Governance by Former Accession Countries of the European Union: Institutional Twinning in Estonia and Hungary', (2005) 11 *European Law Journal* 5:657–674; A. Gwiazda, 'The Europeanization of flexicurity: the Lisbon Strategy's impact on employment policies in Italy and Poland', (2011) 18 *Journal of European Public Policy* 4:546-565; D. Hodson & I. Maher, 'Soft law and sanctions: economic policy co-ordination and reform of the Stability and Growth Pact', (2004) 11 *Journal of European Public Policy* 5:798-813; M. López-Santana, 'The domestic implications of European soft law: framing and transmitting change in employment policy', (2006) 13 *Journal of European Public Policy* 4:481-499. S. Morano-Foadi, 'The Missing Piece of the Lisbon Jigsaw: Is the Open Method of Coordination Effective in Relation to the European Research Area?', (2008) 14 *European Law Journal* 5:635–654; D. Hodson & I. Maher, 'The Open Method as a New Mode of Governance: The Case of Soft Economic Policy Co-ordination', (2001) 39 *Journal of Common Market Studies* 4:719–746; P. Kapotas, 'Gender Quotas in Politics: The Greek System in the Light of EU Law', (2010) 16 *European Law Journal* 1:29-46.

[48] J. M. Magone, 'The difficult transformation of state and public administration in Portugal. Europeanization and the persistence of neo-patrimonialism', (2011) 89 *Public Administration* 3:756–782; D. M. Trubek & L. G. Trubek, op. cit. note 44 supra; M. Blauberger, op. cit. note 45 supra; M. Cini, op. cit. note 45 supra; N. Mc Guinness & C. O'Carroll, 'Benchmarking Europe's Lab Benches: How Successful has the OMC been in Research Policy?', (2010) 48 *Journal of Common Market Studies* 2:293–318; M. Lodge, 'Comparing Non-Hierarchical Governance in Action: the Open Method of Co-ordination in Pensions and Information Society', (2007) 45 *Journal of Common Market Studies* 2:343–365; C. Knill & J. Tosun, M. W. Bauer, 'Neglected faces of Europeanization: the differential impact of the EU on the dismantling and expansion of domestic policies', (2009) 87 *Public Administration,* 3:519–537; C. Knill & A. Lenschow, 'Compliance, Competition and Communication: Different Approaches of European Governance and their Impact on National Institutions', (2005) 43 *Journal of Common Market Studies* 3:583–606; D. Panke, 'Social and Taxation Policies - Domaine Réservé Fields? Member States Non-compliance with Sensitive European Secondary Law', (2009) 31 *Journal of European Integration* 4:489-509; S. d. l. Rosa, 'The Open Method of Coordination in the New Member States—the Perspectives for its Use as a Tool of Soft Law', (2005) 11 *European Law Journal* 5:618–640; E. Szyszczak, op.cit. note 42 supra; M. W. Bauer, C. Knill & D. Pitschel, 'Differential Europeanization in Eastern Europe: The Impact of Diverse EU Regulatory Governance Patterns', (2007) 29 *Journal of European Integration* 4:405-423. C. M. Radaelli, 'The code of conduct against harmful tax competition: open method of coordination in disguise?' (2003) 81 *Public* 3:513–531; E. O'Hagan, 'Too soft to handle? A reflection on soft law in Europe and accession states', (2004) 26 *Journal of European Integration* 4:379-403.

Commission to introduce such a hard law, leads to a situation where domestic actors do not comply with soft law.[49] The absence of *policy linkages* at the domestic level, referring to a situation in which soft law in one area is only implemented if linked to a policy deal in another area, is used as a variable by another small group of authors.[50]

More recently, the financial and economic crisis of the European gave rise to a new form of soft law, developped by independent financial agencies (European Financial Supervisory Authorities), whose rule-making powers are perceived to be considerable.[51] Research does not yet systematically analyse their impact implementing technical standards, as well as guidelines and recommendations, but concentrate on the politics of their development at the EU level. The study of the resistances to those recommendations at the domestic level would be worthwhile including in a systematic study of resistances to soft law.

The systematic analysis of these studies shows the various methodological and theoretical difficulties that appear with studying resistance to soft law. Even in the context of hard law, where we have a precise point of departure – a directive or a regulation – for resistance, non-compliance is complex to measure. What is a correct implementation of a EU directive? A directive might have been formally transposed in national law. There can be considerable disagreement about the suitability or adequacy of the implementation. Different factors may explain incorrect transpositions and bad applications of EU law. Studies point at the lack of media pressure on the administration or at inadequate or deficient administrative resources.

The case studies analysed in the sample of articles presented above show how difficult it is to scrutinize resistance to soft law and new modes of governance. Quantifying the number of achieved goals, or the amount of convergence areas, does not seem to be the most adequate research design. We argue that the most promising approach is to look at the way actors make use of resistance devices. The articles

[49] V. Hatzopoulos, 'Why the Open Method of Coordination Is Bad For You: A Letter to the EU', (2007)13 *European Law Journal* 3: 309–342.; M. Heidenreich & G. Bischoff, 'The Open Method of Co-ordination: A Way to the Europeanization of Social and Employment Policies?', (2008) 46 *Journal of Common Market Studies* 3:497–532.
[50] A. Gawrich, I. Melnykovska, R. Schweickert, 'Neighborhood Europeanization through ENP: the Case of Ukraine', (2010) 48 *Journal of Common Market Studies* 5:1209–1235.
[51] M. Busuioc, 'Rule-Making by European Financial Supervisory Authorities : Walking a Tight Rope', (2013) 19 *European Law Journal* 1:111-125 ; E. Chiti, 'European agencies' Rulemaking : Powers, Procedures and Assessment', (2013) 19 *European Law Journal* 1:93-110.

analysed give however, only a very scattered picture of the tools used by actors to resist soft law measures at the domestic level. The influence of public opinion and the salience of an issue is nowhere taken into account in these studies. Taking these lessons seriously, a typology of these instruments would help us to understand how domestic actors behave during the implementation phase and why they favour one attitude over another. Analysing attitudes of resistance implies to take a careful look at the instruments they mobilize.

3. An approach through policy instruments

Taking into account the achievements and shortcomings of the existing literature, this section develops a typology of resistances based on the secondary literature presented above. It aims at providing a more nuanced empirical ground to the build up of a typology going beyond the distinction between 'champions' and 'laggards', or to say it differently between those Member States who apply European norms and those who abstain from/fail to doing it. This will allow for establishing systematically whether soft law triggers indeed as much resistance as hard law and thus, how effective is the idea that soft law creates opportunities for deliberation, systematic comparisons, and learning, and thus allows Member States to abstain from delegation or pooling sovereignty.[52]

A systematic research on resistance requires developing hypotheses on why and when specific instruments are used by actors and testing those hypotheses through cross-country and cross-policy case studies. Drawing on the existing literature on non-compliance with EU law as well as the case studies on the efficiency and effectiveness of soft law, future works on resistance allow us to establish patterns, which explain the attitudes of resistance to both soft and hard law. Four main hypotheses can be developed in this context.

[52] A. Schäfer, 'Resolving Deadlock: Why International Organisations Introduce Soft Law', (2006) 12 *European Law Journal* 2:194-208 ; J. Zeitlin, 'Introduction: Governing Work and Welfare in a new Economy: European and American Limits', in J. Zeitlin & D. Trubek (eds.), *Governing Work and Welfare in a New Economy. European and American Experiments* (Oxford University Press, 2003) at 5.

H1. Compliance is triggered by the possibility of sanctions. These sanctions can be legal, when a judicial control is exerted over the national administration implementing the norm, but other forms of sanctions exist that are not legal. Social sanctions occur when non-compliance is publicly criticized by the media, the public opinion, the opposition to the government, other member states or even third states. Hence, the more salient social sanctions, the higher the probability of member states' compliance.

H2 The higher the number of actors, the higher the probability that resistance occurs. The increase of actors makes norm implementation more complex and increases the number of veto points. The higher the number of agencies, administrative actors and non-state actors associated to the implementation process, the larger the possibilities of opposition to and circumvention of norms.[53]

H3: The higher an actor's financial and social resources,[54] the higher his or her capacity to resist policy implementation. Resources allow actors to circumvent norms. This hypothesis is contrary to the hypotheses developed by non-compliance studies, according to which the absence of resources explain the poor level of norms compliance within an administration. While this can certainly be the case, arguing along these lines means considering that agency plays a minor role in norms compliance. Resources are a structural factor – we argue that it is only the use that agents make of these structural factors that explains the degree of compliance at the domestic level. This assumption is based on the idea that resistances attitudes result from an active and strategic choice made by actors capable to define their preferences. Thus, not implementing a policy objective or a public policy instrument must be considered to be an attitude of resistance.

H4: The higher the distance between policy objectives defined by the norm and those defined by the administration, the higher the probability that the actor will resist the implementation of a policy. Thus, the disposition or 'cognitive framework'[55] in which

[53] G. Tsebelis, *Nested Games: Rational Choice in Comparative Politics* (U.C. Press, 1995).
[54] Social resources refer to networks administrative actors have established in order to increase their power (media networks, decision-makers). Financial resources refer to material resources actors possess (funding, equipment etc).
[55] N. Zahariadis, 'Europeanization as Programme Implementation: Effective and Democratic ?', (2008) 10 *Journal of Comparative Policy Analysis* 3:221-238 at 218.

an administration situates itself determines the degree of resistance. The probability to see a norm implemented by an administrative actor whose 'disposition' is opposed to that of the norm to be implemented is low.

These hypotheses are not exclusive and must be combined to understand the complexity of actors' resistance attitudes. For instance, in the context of the Economic and Monetary Union, the ministries of Finance are without doubt amongst those administrations that possess the most important financial and social resources. However, the probability that they oppose the reinforced control and consultation norms of the new economic governance are rather limited as their disposition towards these norms is similar to that of the drafters of these norms.

In order to test these hypotheses, it is crucial to formulate a typology of the instruments used to resist soft as well as hard law. A policy instruments approach allows us to adapt and improve the most common typology differentiating active and passive resistance. The instruments of resistance must not be considered to be a purely functional rejection of European norms that are seen as problematic by national actors. The instruments depend, on the contrary, on the political as well as institutional and social context in which they are generated. How national actors resist EU norms and how they decide upon instruments of resistance is a consequence of existing power games and conflicts at the domestic level. These are then largely influenced by the institutional context or domestic politics. From this perspective, instruments are not "axiologically neutral and indifferently available tools. They are, on the contrary, sponsors of values, fed by an interpretation of social issues and specific conceptions of the form of regulation envisaged".[56]

Four types of instruments of resistance can be distinguished: legal instruments, economic/fiscal ones, instruments dealing with information and those having a communication dimension (Table 4).

[56] P. Lascoumes & P. Le Galès op. cit. note 8 at 13.

Table 4 - **Instruments of resistance**

Type of instrument		Main Actors
Legal Instruments	- Constitution -Legislation and Regulation -Administrative Decisions -Administrative Practice -Judicial Review	Governments/Parliaments Administrations (State/ Regions) *Private actors (companies, associations, citizens) insofar they mobilise public actors (administrations and tribunals)*
Economic and Fiscal Instruments	-taxes -Funding - commercial relations	Governments/Parliaments Administrations (State/ Regions) *Entreprises*
Informative Instruments	-expertise -statistics	Governments/Parliaments Administrations (State/ Regions) *Companies, associations* *Citizens*
Instruments of communication	-scandalisation -publicisation	Governments/Parliaments Administrations (States/ Regions) *Media, citizens, associations*

Taking this typology as a frame, future research must focus on the way these instruments are used and the role they play, in order to unveil the transformations affecting European norms and European integration more generally. While the distinction between active and passive forms of resistance[57] as introduced by the literature on non-compliance with EU law might be useful, it draws a line between voluntary and non-voluntary resistances, which is empirically difficult to distinguish. For example, when an administration justifies inertia by a lack of resource, it might be that we find, behind a seemingly non-voluntary resistance, an active attempt at circumventing a norm.

Thus, a more promising approach is to combine the typology of instruments with the forms they most usually take (Table 5): contesting, circumvention and diversion (the

[57] See G. Falkner et al, op.cit. note 19 supra.

first one being active, while the two others can be both active and passive).[58] Contesting is a deliberate refusal of a norm, which takes the form of a frontal opposition playing the function of "voice", according to Lascoumes and Le Bohic. Circumvention refers to a situation in which actors use another norm instead of the norm they should abide by. Thus, the norm is "neutralized", either temporarily or permanently. Finally, diversion relates to a situation where the norm is interpreted in a way that diverges from those initially envisaged by the legislator.

Table 5 - **Forms of resistance**

Forms of resistance	
Contesting	Deliberate refusal of the norm. Opposition to the existence and application of the norm
Circumvention	Non-usage of the norm. Hidden opposition. Replacement of the norm by another one. Application of a pre-existing diverging norm.
Diversion	Appropriation of the norm for another purpose than the one initially envisaged.

A combination of Tables 4 and 5 allows for pointing at the probability for each kind of resistance to be actually used by national actors (Table 6).

Table 6

Type of Instrument		*Contesting*	*Circumvention*	*Diversion*
Legal Instruments	-Constitution	+++	+++	---
	-Legislation and Regulation	+++	+++	+/-
	Administrative Decisions	+++	+++	+++

[58] J.-P. Le Bohic & P. Lascoumes, 'La résistance aux instruments. Formes et modèles d'analyse au sein d'un corpus d'études de cas', (2011) Communication rEr – réseau Etat recomposé, Les instruments d'action publique, 6 to 8 January 2011.

	Administrative Practice Judicial Review	+++ ---	+++ +++	+++ +/-
Economic and Fiscal Instruments	- taxes - Funding	+++ +++	+++ ---	+++ +++
Informative Instruments	- expertise -statistics	+++ +++	+++ +++	+++ +++
Instruments of communi-cation	- scandalisation - making a specific problem salient	+++ +++	--- ---	--- +++

The typology of instruments developed above must be analysed through a comparative multi-country, multi-issues study in order to test the hypotheses presented above and to understand under which circumstances which instruments is most likely to be used.

Conclusion

Oppositions as well as resistances to European integration have a history as long as the European integration process itself. These oppositions may take numerous forms, as we have seen.

While we stick to our initial assumption that resistances are as developed with regard to hard and soft law, the analysis of secondary literature in this context has also shown a number of specificities related to the type of norms and the type of public policy under scrutiny.

First, hard law can use a wider range of instruments of resistance than soft law. Actors opposing soft law can only exceptionally refer to legislative, regulatory and constitutional instruments.

Second, expertise remains one of the crucial factors of opposition or resistance, as can be seen in studies on employment policies, the liberalisation of services or

environmental policies. However, what remains yet to be explained is how contradictory expertise is used and why one is considered to be more relevant than another. One of the explanations might be the degree of network heterogeneity: the higher the heterogeneity of actors, the easier it is for political decision-makers to 'shop' amongst the contradictory ones and to chose the most politically beneficial one.

Analysing the resistances and oppositions through instruments allows us to identify the actors who use the instruments, to understand their rationality, their interests and their diverse cognitive frames, which are at play during the process of resistance. This allows us to understand the power relations amongst the main actors, and the influence exercised by their cognitive dispositions and their resources. It is crucial to avoid a normative bias, which consists in considering non-compliance as a problem to be solved because it would make the European political system inefficient. Analysing non-compliance through its instruments allows for understanding the political demands, which are carried through those same instruments. Studying the instruments of resistance also questions the prominent analytical frame, which analyses political processes at the European as well as the domestic level in terms of de-politicization introduced by New Public Management paradigms. Analysing the choice of instruments of resistance – one specific expertise instead of another, one specific statistical form instead of another, one specific administrative form instead of another – allows to understand to what degree the political system remained politicized, beyond its technical or technocratic appearance.

Finally, this approach allows us to consider the dynamic element of these resistance and opposition attitudes. Instead of being seen as a static consequence of norm introduction (a norm established at the EU level is resisted to at the domestic level), instruments of resistance or opposition to European norms allow for a dynamic understanding of European governance – resistances to norms developed at the European level influence again norms at the EU level. This fundamentally political dynamics open the path to public policy reforms. It is this politicization that studies on non-compliance, both in international relations and EU studies, must capture and make visible.