

Law and the Open Method of Coordination: Towards a New Flexibility in European Policy-Making?

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The Lisbon process links a specific form of governance – the open method – to a particular goal. The codification of policy coordination in the economic sphere made this method available to other sectors. Its characteristics – benchmarking, national action plans and peer review – are constant, but there is considerable variation across policy sectors, as the method exists within the realm of soft law. At the same time, soft law is on a continuum with hard law, and since the Lisbon process moves into its second phase with an emphasis on national implementation, the difficulty of drawing a firm distinction between soft and hard law will become more apparent. This can already be seen in relation to economic policy coordination with ECOFIN refusing to trigger more precise obligations for recalcitrant states and the Commission responding by commencing judicial review before the European Court.

Der Lissabon-Prozess etabliert die „Offene Methode“ als spezifisches Verfahren zur Erreichung eines bestimmten Ziels. Nachdem diese Form der Politikkoordination im ökonomischen Bereich kodifiziert war, wurde sie auch auf andere Sektoren übertragen. Ihre Strukturmerkmale – benchmarking, nationale Aktionsprogramme und peer review-Verfahren – blieben dabei unverändert, allerdings variieren die konkreten Ausprägungen dieses „weichen“ Rechtsinstruments nach Politikfeldern. Da weiche und harte Steuerungsformen ein Kontinuum bilden und der Lissabon-Prozess gegenwärtig in seine zweite, umsetzungsorientierte Phase geht, werden die Schwierigkeiten, zwischen weichem und hartem Recht zu unterscheiden, noch deutlicher. Dies zeigt sich am Beispiel der wirtschaftspolitischen Koordinierung im Rahmen der EU: Während der Rat der Finanzminister eine Verschärfung der Auflagen für die betreffenden Staaten ablehnt, reagiert die Kommission mit einer Klage vor dem Europäischen Gerichtshof.

I. The Development of the Open Method

The Open Method of Coordination is a form of governance inextricably linked to the strategic goal of the EU becoming the most competitive and dynamic knowledge-based economy in the world by 2010.¹ This goal is to be achieved in the context of sustainable economic growth, more and better jobs, greater social cohesion and, following the Göteborg Council, environmental protection.² The Lisbon summit³ essentially codified a range of practices already found in a number of economic policy sectors – notably employment, structural and fiscal policy – and linked them to a particular goal and in doing so mobilised interest around an agreed strategic economic objective that ostensibly lies outside the strict parameters of the Treaty. The policy areas to which the open method is to be applied lie predominantly within Member State competence. The agreed strategic goal and economic inter-dependence in the internal market and especially in Economic and Monetary Union (EMU) create the need for

¹ The author would like to thank *Dermot Hodson, Colin Scott and Jonathan Zeitlin* for comments. The usual disclaimer applies.

² *Göteborg European Council: Presidency Conclusions, 15/6/2001, Nr. 200/1/01.*

³ *Lisbon European Council: Presidency Conclusions, 24/3/2000, Nr. 100/1/00.*

coordination. All states face the challenge, for example, of minimising unemployment and ensuring social inclusion. The open method allows for exchange of best practice and policy learning thus adding value at the EU level while primary responsibility for policy coordination and implementation is at the national level. The EU benefits as the method allows for a Union role where previously there was none⁴ or where its role is weak or where progress in a policy field has been stymied under more traditional governance methods (for example immigration, liberalization).⁵ The aim – and the challenge of the method – is to facilitate policy convergence while also recognizing national diversity.

The main characteristics of the method are the drawing up of EU guidelines with benchmarks and short- to long-term timetables for achieving particular goals. States then draw up their National Action Plans based on these guidelines that translate the EU-wide goals and benchmarks into meaningful measures for the national and regional level. The extent to which states then meet their plans is reviewed periodically. The aim is to facilitate mutual learning and peer review so as to prompt both political ownership of the process and policy learning. Peer review also allows for pressure to be brought to bear in order to ensure the Lisbon agenda remains on track and credible. While the broad parameters of the method remain constant across the policy spheres where it is applied, there are variations. For example, the employment guidelines are drawn up by the Council on the basis of a proposal from the Commission while the broad economic policy guidelines are drawn up on the basis of a Commission recommendation, the difference being that the Commission has more influence in the drafting of the employment guidelines as its proposal can only be amended by unanimity.⁶ Its exact scope is uncertain because of the potential variation in its application outside the main characteristics of benchmarking, monitoring and review. These variations may be one of the reasons why the Draft Constitution does not include one specific provision on the open method.

The Lisbon process is currently reaching the end of the first phase of policy initiative and institution building. Thus the scope of the method has extended beyond the founding policy sectors of employment and fiscal policies to flanking policies notably, enterprise, innovation, research, information (*eEurope*), education, social inclusion, pension reform and environment.

⁴ *Dehousse, R.*: The Open Method of Coordination, Paper Presented at the First Pan-European Conference on European Union Politics, Bordeaux, 2002.

⁵ *De Búrca, G.*: The Constitutional Challenge of New Governance in the European Union, in: *European Law Review* 28/6 (2003) 814ff., here 828.

⁶ Cf. Art. 128 (2) and Art. 99 (2) TEC. Although in practice amendments of the employment guidelines can take place even where there is not unanimity compare versions of Commission documents referred to in n. 3 of *Zeitlin, J.*, Social Europe and Experimental Governance: Towards a New Constitutional Compromise?, in: Micharikopoulos D. (ed.): *The Modernisation of the European Social Model & EU Policies and Instruments*, Brussels, forthcoming.

It also applies to aspects of the single market for example, energy, telecommunications and the Community patent.⁷ The linkages between the core policies of employment, economic policy and the internal market have been streamlined with guidelines now produced over a three-year cycle.⁸

A number of institutional changes have been introduced in the Council in order to facilitate the method. An annual spring economic summit is held to review the economic situation in the Union including the operation of the Lisbon process, and there has been some re-organisation of Council formations notably, the creation of a competitiveness council.⁹ The operation of the method is now entering the second phase where the key weakness so far will have to be addressed, i.e. the link between the European planning, benchmarking and reporting exercises and the outcomes that follow on from that at national level. There is concern about the extent to which responses to EU guidelines constitute little more than window dressing with no interaction between national government ministries and little apparent commitment to effective implementation by the Member States.¹⁰ Hence, the European Council acknowledged the need for a stepping up of the pace of reform at the national level and the speedier translation of agreements into concrete national measures.¹¹ The extent to which the method has moved beyond aspiration to substantive measures at the national level, which do in fact achieve structural reforms that will lead to greater competitiveness and economic growth should become apparent in the mid-term review being conducted by *Wim Kok*.¹²

A defining characteristic of the open method is that it constitutes a form of soft-policy coordination and operates solely within the realms of soft law. This article explores the inter-relationship of law and the open method arguing that just as hard and soft law exists on a continuum so the relationship between the open method and law is not so clear cut that the open method and soft law are clearly distinguishable from hard law. It develops the argument by looking briefly at economic policy coordination and in particular the litigation between the Commission and the Council currently before the European Court of Justice. It concludes by arguing that the relationship between the open method and binding legal norms is more nuanced than the description of the method in the Lisbon conclusions suggests and that this relationship and its implications for the method as a new(ish) form of governance is of greater

⁷ *Hodson, D./Maher, I.*: The Open Method as a New Mode of Governance, in: *Journal of Common Market Studies* 39/4 (2001), 719–746, here 726; *de Búrca, G.*, op. cit., 824.

⁸ *Brussels European Council*: Presidency Conclusions, 5/5/03, Nr. 8410/03, para. 17.

⁹ *Seville European Council*: Presidency Conclusions, 24/10/02, Nr. 13463/02.

¹⁰ *Economic and Monetary Affairs Committee of the European Parliament*: Report on the Broad Guidelines of the Economic Policies of the Member States and the Community for 2003–05, A5-0142/2003, final.

¹¹ *Brussels European Council*: Presidency Conclusions, 26/3/04, DN: DOC/04/1.

¹² *Ibid.*

significance as the method moves into its second phase where implementation by the states is emphasised.

II. Hard Law and Soft Law

Snyder defines soft law as “rules of conduct which in principle have no legally binding force but which nevertheless may have practical effects”¹³, while hard law does have binding legal force, is more precise with authority for its interpretation and its implementation delegated.¹⁴ *Abbott* and *Snidal* note that soft law is not inferior to hard law – its flexibility and scope of discretion may make it the most appropriate legal tool.¹⁵ For example, they suggest that where a political agreement is entered into in circumstances that are uncertain, the use of soft law signals that re-negotiation is expected in the light of those circumstances changing. Soft law also allows for agreement to be entered into more readily as states know they retain control over interpretation thus limiting the impact on sovereignty. An agreement framed in soft law has lower negotiating costs because legal obligations remain flexible; it is not necessary to spell out with great particularity the precise nature of the agreement. The lack of precision can allow an agreement to emerge, as differences, divergence and compromise are easier to accommodate. Soft law allows for policy learning and change over time and facilitates further commitments that may be deemed desirable as a result of policy learning and the development of a policy community with a concomitant increase in trust. Thus it may lead to binding legal obligations at a later stage, making it a precursor to hard law although it may not be possible in advance to say whether this will be the case. Soft law in fact may be preceded by hard law for example where policy has not been able to move forward under traditional law-making channels, recourse may be had to soft law as a means of developing trust, providing greater

¹³ *Snyder, F.*: The Effectiveness of European Community Law, in: Daintith, T. (ed.): *Implementing EC Law in the United Kingdom*, Chichester, 1995, 51-87, 64. See also *House of Lords Select Committee on the EU: The Stability and Growth Pact*, Session 2002–03, 13th Report, HL Paper 72, 11 March 2003, 12.

¹⁴ *Abbott, K.W.* et. al.: The Concept of Legalization, in: *International Organization* 54/3 (2000), 401–419, here 402; *Antenbrink, F./de Haan, J.*: Economic Governance in the European Union, in: *Common Market Law Review* 40 (2003), 1075–1106, here 1091; *Hodson D./Maher, I.*: Soft Law and Sanctions: Economic Policy Coordination and Reform of the Stability and Growth Pact, in: *Journal of European Public Policy* 11/5 (2004), forthcoming.

¹⁵ *Abbott, K.W./Snidal, D.*: Hard and Soft Law in International Governance, in: *International Organization* 54/3 (2000), 421–456, here 436.

policy learning and identification of shared values in order to move forward the policy agenda where states are not willing to concede decision-making competence.¹⁶

Hard law, on the other hand, is used where states want to secure commitments and limit flexibility making it easier to detect transgressions of the rules thus lending credibility to the arrangement.¹⁷ *Abbott* and *Snidal* note that the use of hard law signals a high level of commitment and thus provides assurance where reciprocity is expected but there is non-simultaneous performance and potentially high costs for others where there is non-compliance. Thus hard law provides greater consistency than soft law and makes the re-opening of the bargain more difficult. Negotiation usually takes longer given the greater precision making parties less willing to re-negotiate. At the same time, where there is re-negotiation, it is carried out in the shadow of the existing legal framework creating path dependency making radical change less likely. Hard law is more likely to emerge where states are members of the same “club” and have developed trust. The existence of a binding legal obligation also can be used to provide leverage at the national level where there are competing policies and interests.

It is useful to view hard and soft law as part of a continuum, with the stronger the presence of each factor (precision, delegation, obligation), the harder the law.¹⁸ This notion of a continuum also applies to sanctions. The stronger the sanction, the stronger the obligation and the greater the need for precision. Sanctions can range from reliance on loss of face, e.g. by the publication of league tables of how states are performing. If the states are members of a “club” with multiple iterative processes across many policy fields as in the case of the EU, such league tables can have some impact with states unwilling to be at the bottom. The Commission has used this to great effect in the Single Market Scoreboard. Further along the continuum, in the EU context are recommendations where a collective statement is issued noting a state has failed to meet particular standards and/or suggesting corrective action (specifying particular measures to be taken to correct the defect would mark a further degree of precision and hence a stronger sanction as the amount of peer pressure being imposed is increasing). Where a decision is taken which is enforceable in the courts, the sanction moves into the realm of hard law, as the arrangement becomes binding on the state. Finally, fines lie at the hard end of the continuum requiring full legal due process to be observed, a right of appeal and an obligation that is precise in its nature. Interpretation of the obligation would have to be delegated to the courts at some stage in the process to ensure due process. The greater the

¹⁶ *Jacobsson, K.*: Soft Regulation and the Subtle Transformation of States, Stockholm Centre for Organization Research WP 2002-4, 13.

¹⁷ *Abbott, K.W./Snidal, D.*, op. cit., 426.

¹⁸ *Abbott, K.W.* et. al., op. cit., 402.

degree of delegation in the decision to impose a sanction, the more likely it is to be effective.¹⁹ At the same time, no matter how hard the sanction, it will only remain credible if imposed appropriately meaning that there must remain some form of discretion.²⁰ Otherwise if circumstances change and compliance is difficult for all parties, the rules can be stretched to avoid their application, undermining credibility. If compliance costs nationally are very high, states may renege despite the legal obligation or, if they comply despite the high national costs, public support may be lost, forcing a re-negotiation. Finally, if hard sanctions are part of an agreement, they must be appropriate and their application must be seen as possible otherwise their significance is limited to the symbolic and may in fact mark the agreement out as lacking credibility, despite being framed in hard law.

By seeing soft and hard law as part of a single continuum, any soft policy coordination is seen as operating within a legal framework. The open method as articulated and conceived of in Lisbon is seen as firmly within the realm of soft law. There are no binding legal obligations, with sanctions at most no more than a recommendation from the Council. The method seems to operate without any role for the European courts. Implementation lies with those who frame the policy. At the same time, the method is still bounded by hard law. The Treaty – the supreme law of the EU – provides the institutional setting within which the method was articulated and is quite detailed on the most developed processes where the method is used (employment and fiscal policy). In the sphere of fiscal policy, the Treaty provisions have been further underpinned by the Stability and Growth Pact (SGP), where regulations – the most binding form of legal instrument available in the Community’s legal arsenal – and a soft law resolution further articulate how economic coordination is to operate.

The governance method used for these processes as provided for in the Treaty had been, even by the time of Lisbon, extended to other spheres, most notably structural policy (Cardiff process). With the identification of a new mobilising goal for the Treaty the coordinating processes seen in employment and economic policy were deemed the best form of governance to move forward that agenda. Thus codification had two effects. First, it allows the method to be used in areas where the Treaty had not delineated whether or how coordination of policy is to occur. Second, the method is now inextricably linked to a particular objective and a deadline. It is transformed from being a specific form of governance limited to two policy areas to being a tool available for any policy, especially where that policy is seen as linked to the core

¹⁹ *Hodson, D./Maher, I.*: Soft Law, op .cit.

²⁰ *Goldstein, J./Martin, L.L.*: Legalization, Trade Liberalization and Domestic Politics, in: International Organization 54/3 (2000), 603–632, here 621.

objective. Thus a Treaty-based method of governance with a relatively tight legal framework (with variations between employment and economic policy coordination) is linked to an objective with no treaty basis at all and applied to policy sectors where the application of something akin to the method is only weakly articulated within the Treaty or not at all.²¹ The genesis of the method and the fact that it is operated at the EU level by institutions grounded in law (the Council and its committees, the Commission), is a reminder that even though it operates within the realm of soft law it cannot be conceived of as purely a matter of political preference, despite the considerable scope of political discretion.

The linkage of the method to a particular goal allows for it to be used across a range of policy spheres – an example of spillover from one policy field to another. While the method can be seen as an alternative form of governance to the more traditional *méthode Monnet* (in essence a Commission proposal leading ultimately to the adoption of legislation by the Council and Parliament), or as the only governance tool available because of the lack of competence at the EU level, *de Búrca* notes the method has been invoked in spheres where hard law instruments have already been used, for example asylum, migration, disability, environment and liberalisation as well as spheres where the Union has no competence (youth policy).²² In addition, as the Lisbon process moves into its second phase and the emphasis shifts from policy articulation and institution-building to questions of implementation, the extent to which the method can or should lead to hard law outcomes will be more apparent.

III. Open or Closed? The Example of Economic Policy Coordination

Coordination of economic policy is firmly entrenched within the Treaty. It long predates EMU and the Lisbon process but has been given an added emphasis by both. Art. 4 TEC requires the Community and Member States to adopt an economic policy based on the close coordination of state policies, the internal market and the definition of common objectives. The policy is to be conducted in accordance with the principle of an open market economy with free competition and is to comply with the sound money, sound finance paradigm that underpins EMU. How states are to coordinate their policies is set out in Art. 99 TEC and in Regulation 1466/97²³ of the SGP, providing a clear articulation of multilateral surveillance – the open method in the macroeconomic sphere. The procedures described by the Treaty and

²¹ For example research and development (see Title VIII TEC).

²² *De Búrca, G.*, op cit., 824.

²³ OJ 1997 L 209/1, 7 July 1997.

Regulations are firmly within the realm of soft policy coordination culminating at most in nothing more than a non-binding recommendation. The process is one whereby broad economic policy guidelines are agreed at the spring summit each year. Stability programmes are drawn up in the light of the guidelines by the members of the Euro zone (convergence programmes for non-members). These programmes are in effect five year plans in relation to national fiscal policy. They are reviewed by the Economic and Finance Ministers Council formation (ECOFIN) both in terms of content and their implementation in the light of the medium term target of a budget that is close to balance or in surplus. Where a state is seen to be diverging from that target, the Council shall issue a recommendation to the state to take corrective measures. If divergence continues, another recommendation can be published, relying on peer pressure to bring the recalcitrant state into line. The difficulty with the procedure is twofold: it is very difficult to measure medium term budgetary procedures;²⁴ and there is a “get out” for the Council in that it does not have to issue a recommendation where states seems to be on an adjustment path towards a balanced budget.

Given multilateral surveillance operates within the realm of soft law, there is flexibility in its operation which has in fact undermined its credibility. Thus when a recommendation was issued against Ireland because it was seen as having an inflationary budget,²⁵ questions were raised about the accuracy of the economic forecasting used, especially as the OECD favoured the Irish approach.²⁶ Since then, the Council refused to issue a recommendation against Germany in the year of a German general election, even though it seemed in clear breach of the guidelines. At the same time Portugal avoided sanction – piggybacking on the lack of sanction against Germany.²⁷ Both were subsequently found to have excessive deficits.²⁸ Despite the absence of any hard sanction under multilateral surveillance, the care with which the Council avoided issuing a recommendation against Germany in an election year implies that states accord some weight to the process even if it has no legal ramifications. In other words, while peer pressure was not enough to stop a worsening of the budgetary position in the German case (the issue in Portugal was inaccurate economic statistics which came to light when a new

²⁴ *Hodson, D./Maher, I.*: Soft Law, op. cit.

²⁵ *ECOFIN*: 2329th Council Meeting, Brussels, 12 February 2001, Nr. 696/01.

²⁶ *OECD*: Economic Survey of Ireland: Assessments and Recommendations, Paris, 2001; *Hodson, D./Maher, I.*: The Open Method, op. cit., 736.

²⁷ *ECOFIN*: 2407th Council Meeting, Brussels, 12 February 2002, Nr. 6108/02; *Buti, M./Giudice G.*: Maastricht’s Fiscal Rules at Ten, in: *Journal of Common Market Studies* 40/5 (2002), 823–848, here 841.

²⁸ Council Decision of 5 November 2002 on an Excessive Deficit in Portugal (OJ 2002 L322/30); Council Decision of 21 January 2003 on an Excessive Deficit in Germany (OJ 2003 L 34/16).

government took office²⁹), the issuance of a recommendation was regarded as having sufficient political importance as to be avoided in an election year. This implies that “loss of face” has some value as a sanction but not enough to secure a change in behaviour where economic conditions are unfavourable to structural reform.

Multilateral surveillance is one of the most established of the policy spheres where the open method is used. Yet, the track record where states fail to meet the targets set is poor with national concerns trumping the guidelines. This highlights the weakness in the open method where the failure to delegate the decision as to when to issue a recommendation means that it can be subject to political drivers other than compliance with the guidelines and the objectives of the Lisbon process and EMU. The Draft Constitution will change this by giving the Commission the power to issue a warning (recommendations still lie within Council competence) giving some emphasis to the Community interest.³⁰

The other dimension of the SGP is the excessive deficit procedure (EDP). Regulation 1467/99³¹ and the Protocol to the Treaty set two targets: a budget deficit of not more than 3 percent of GDP and public debt less than 60 percent of GDP with the Regulation also setting time limits as to when ECOFIN must act within each stage of the procedure. The Commission issues a recommendation that a state is at risk of running an excessive deficit thus triggering the procedure for ECOFIN that must then decide whether or not such a deficit exists. It is not necessary for an early warning to be first issued under multilateral surveillance – thus the soft law and hard law aspects of the Pact remain freestanding to some degree. If the state does not take appropriate action to reduce the deficit, the Commission can recommend to ECOFIN to issue a decision to this effect and introduce a time line for the state to act. With the setting of the deadline, there is more precise obligation. However, Art. 104 (10) TEC only allows actions for failure to fulfil an obligation³² to be brought before the European Court where the other states decide that there is an ongoing failure to follow the ECOFIN decision and sanctions should be imposed ranging from the publication of additional information through to the imposition of fines.³³ The Treaty uses a permissive language – the states may proceed to impose sanctions –, while Regulation 1467/99 requires the states to impose sanctions once the conditions to apply those sanctions are met. It is not clear whether states can impose a harder

²⁹ Hodson, D.: Macroeconomic Coordination in the Euro Area, in: Journal of European Public Policy (2004), forthcoming.

³⁰ Draft Constitution Art. III 71 (4).

³¹ OJ L 209/6, 7 July 1997.

³² Art. 226 and 227 EC.

³³ Art. 104 (11) EC. Sanctions only apply to breach of the 3% threshold (see *Antenbrink, F./de Haan, J.*, op. cit., 1088).

obligation on themselves in a Regulation when the fairly precise Treaty article on which the regulation is based imposed a softer obligation.

Is there a sharp division between the operation of multilateral surveillance and the excessive deficit procedure? *Antenbrink* and *de Haan* distinguish the excessive deficit procedure from the open method by calling it a “closed method of coordination” because it contains legally binding rules and the possibility of retribution in case of breach.³⁴ *Wincott* provides more insight as to what is meant by “open” in the open method.³⁵ At the most general level, he sees it referring to the soft coordination of policy. It is open insofar as the states are free to meet the targets and benchmarks set as they wish. Directives also give states discretion as to how they are implemented but the difference with the method is that directives impose binding legal obligations. He also sees it as closely related to the question of the scope of the method, as its breadth is difficult to determine. For example, *Antenbrink* and *de Haan* consider the EDP to be different from the open method while *de la Porte* and *Pochet*³⁶ include it. *Wincott* suggests that the “hardness” of the excessive deficit procedure can be called into question. In other words, he distinguishes between the formal articulation of the procedure and its operation where the scope of discretion (to date) has been such that it has operated exclusively within the realm of soft law and hence appears to have a strong family likeness with the open method. If this is the case (and the next section will argue that it is), then the scope of the open method remains even more uncertain.

IV. How Open? Economic Policy Coordination and the Court

Formally, the SGP is a combination of soft law (multilateral surveillance) and hard law (the excessive deficit procedure) with the Pact having a preference for soft law measures. In practice, even the EDP has so far remained firmly – and controversially – within the realm of soft law. Despite the apparently tight trajectory towards sanctions suggested in Regulation 1467/99, the states have kept the procedure open by refusing to move beyond the softest part of the procedure. They have exercised their discretion under the Pact in order to avoid creating binding legal obligations on recalcitrant states and as a consequence have also avoided delegation of interpretation to either the Commission (by rejecting its advice as to how to pro-

³⁴ *Antenbrink, F./de Haan, J.*, op. cit., 1079.

³⁵ *Wincott, D.*: Beyond Social Regulation?, in: Public Administration 81/3 (2003), 533–553, here 538.

³⁶ *De la Porte, C./Pochet, P.*: Supple Co-ordination at EU Level and the Key Actors’ Involvement, in: De la Porte, C./Pochet, P. (eds.): Building Social Europe through the Open Method of Co-ordination. Brussels, 2002.

ceed) or the Court (whose jurisdiction only arises after the formal phase of the EDP is triggered). The Commission is now challenging this avoidance before the European Court, whose decision will, it is hoped, shed light on the extent to which the states retain discretion as to the openness of the procedure.

In 2003, ECOFIN found that France and Germany had excessive deficits and recommended what action was required to remedy each deficit.³⁷ The Commission found that the effective action had not been taken by either state and recommended for both that ECOFIN issues a decision to that effect and also give them notice of specific action that should be taken within a specific time frame.³⁸ By setting a deadline under a decision (a binding legal rule under the Treaty), a more precise obligation would be created for the recalcitrant states moving the procedure along the path to sanctions. ECOFIN did not have the requisite majority to follow the Commission recommendation on either France or Germany (it is worth noting that France could vote on the German recommendation and vice versa). It did not amend the Commission recommendations by setting a longer time frame and softer targets, (it did not require unanimity to do so as it is not a proposal) so clearly a majority of states did not want to harden the obligations. Instead, it adopted conclusions by a two-thirds majority vote setting out agreed steps to be taken by France and Germany explicitly stating that the EDP was in abeyance.³⁹ Thus France and Germany were given targets to work towards with the obligation to comply with them fairly soft. At the same time, the Commission's continued involvement in the process as the initial arbiter of whether or not effective action was being taken meant that there was some delegation of interpretation – even if the states intended to retain discretion as to when and how to proceed. France and Germany were also explicitly under the threat that the other states would be willing to re-activate the EDP if appropriate action was not forthcoming.⁴⁰

The Commission stated in the ECOFIN conclusions that it saw them as contrary to both the letter and the spirit of the SGP and has now sought judicial review under Art. 230 TEC.⁴¹ On-

³⁷ Council Decision of 21 January 2003 on an Excessive Deficit in Germany, *op. cit.*; Council Decision of 3 June 2003 on an Excessive Deficit in France (OJ 2003 L165/29). An early warning had been previously issued to France (see Council Opinion of 21 January 2003 on the Updated Stability Programme of France, 2004-2006 OJ 2003 C26/6).

³⁸ *EC Commission*: Commission Proceeds with Excessive Deficit for Germany, Brussels, 18 November 2003, IP/03/1560; *EC Commission*: Commission Proceeds with Excessive Deficit for France, Brussels, 8 October 2003, IP/03/1453.

³⁹ *ECOFIN*: 2546th Economic and Finance Ministers Council Meeting, Press Release, Brussels, 25 November 2003, No. 14492/03.

⁴⁰ *Bandilla, R.*: The Excessive Deficit Procedure and the Result of the ECOFIN Council of 25 November 2003, Centre for European Policy Studies, Brussels 2004, 3.

⁴¹ C- 27/04 *Commission v. Council* OJ 2004 C 35/5. *EC Commission*: Commission Sets Out Strategy for Economic Policy Coordination and Surveillance, Brussels, 13 January 2004, IP/04/35.

ly measures having legal effect can be subject to review by the European Court, so it will have to show that the conclusions can indeed have such effects or that there was a decision. The Commission argues that the failure to adopt its recommendations constituted a decision to put the EDP into abeyance – a binding legal norm. The counter-argument is that there was simply inaction in the light of the lack of the requisite majority. The Commission can, however, point to the fact that the conclusions themselves refer to there being a decision to put the EDP into abeyance. If there is a reviewable act, the Commission argues that the decision to put the EDP into abeyance was not adopted correctly because there is a precise procedure in Art. 104 which must be followed. ECOFIN had to first make a decision under Article 104(8) that there was no effective action in relation to its earlier recommendations, before it can consider whether or not to specify the measures the state must take for deficit reduction. The problem with this argument is that Article 104(8) simply refers to ECOFIN having to establish that no effective action has been taken before going public with the original recommendation. The emphasis is on the recommendation being public before proceeding to Article 104(9). This had been done in the described instance.

The Commission also considers the conclusions invalid, because while ECOFIN can reject its recommendations it must provide reasons. This obligation is a general one under EC law, and the Resolution adopted under the SGP also invites ECOFIN to always give reasons when it decides not to act on a recommendation – although an invitation is not legally binding.⁴² If the Court agrees that there is a decision and that reasons should be given as to why the EDP was put in abeyance even though the economic reasoning of the Commission was accepted, the conclusions would be invalid and, more generally, it would force a fuller disclosure of reasons for decisions to act or not forcing ECOFIN to articulate what factors other than objective economic analysis was driving its decision-making – in effect limiting ECOFIN discretion.

The Commission furthermore argues that it was not lawful to put the EDP into abeyance, as the discretion to do this is limited by Regulation 1467/99 setting down a narrow set of circumstances none of which applied in this instance. It also argues that all EU-Members other than the recalcitrant states are entitled to a vote, but only the Eurozone members in fact voted thus the voting rules were not observed making the measure invalid for procedural reasons. Even if it were to win on this point, this would be unlikely to change the scope of ECOFIN discretion.

⁴² Resolution of the European Council on the Stability and Growth Pact, OJ 1997 C 236/1.

Ultimately, the case is designed to establish the scope of ECOFIN discretion under the EDP and whether it is obliged to move out of the realm of soft law into hard law when states fail to comply with the initial recommendation to address their budget deficits. *Bandilla* suggests ECOFIN was doing less than what its full powers allow under the Pact, i.e. that it was acting within the scope of its considerable discretion.⁴³ The Commission, on the other hand, argues that it was going beyond its powers by sidestepping the formal phase of the EDP and the strong message contained in Regulation 1467/99 being designed to render the obligations under the EDP more precise and legally binding. The difference between these two views to some extent turns on the amount of weight given to the Regulation, because the Treaty only says that ECOFIN may issue a decision requiring the recalcitrant state to take certain measures – it is not required to do so. The effect of a decision hardening the EDP would be to reduce ECOFIN discretion and enhance the role of the Commission by making it more difficult for its recommendations to be avoided. Finally, given the express exclusion of the jurisdiction of the Court in Art. 104 TEC, it will be very careful in deciding whether and to what extent judicial review is possible. The role of the Court, which was seen as marginal in the Pact, is currently central. A judgment denying it has jurisdiction affirms the soft nature of much of the EDP and the wide discretion of the states and moves it much closer in practice to the open method. A judgment asserting jurisdiction, juridifies the EDP to some degree by creating scope for delegation of interpretation and moves it along the continuum of hard and soft law towards hard law and rendering less open than current practice suggests.

V. Conclusion

In Lisbon, the open method was codified, linked to a policy goal, set within a time frame and thus made available as a form of governance to other policies broadly linked to that goal. The scope of the method is uncertain. This is mainly because it is a form of soft policy coordination operating in the realm of soft law. Soft and hard law, however, exist on a continuum, can be free standing of each other or one type of law may be a precursor of the other. The interplay of the characteristics of the law (extent to which it is binding, precision of obligation and delegation of interpretation and implementation), determine how far along the continuum of law policy coordination is. The strength of sanctions also determines how hard the obligations are under the method.

⁴³ *Bandilla, R.*, op. cit.

Even when a policy sector appears to have a clear demarcation between hard and soft legal norms, the distinction may be blurred in practice. This can be seen in the operation of economic policy coordination where the excessive deficit procedure with its potential end point of a large fine, appears firmly at the hard law end of the continuum yet in practice, ECOFIN has sought to keep it within the realm of soft law. The current dispute between the Council and the Commission is an attempt by the Commission to determine (if not limit), the scope of ECOFIN discretion where states are running budgetary deficits contrary to the SGP. The dispute highlights how the states favour openness as to outcome and avoid sanctions. The approach of the Commission, on the other hand, is an attempt to narrow the scope of discretion, reduce the current openness of the EDP and render sanctions more than mere symbols. The existence of the case is indicative of the blurred boundaries between hard and soft law. Should the Commission win, the EDP will have been juridified, it will be more closed and rather than providing certainty it will raise another major question: To what extent are sanctions appropriate where states are in budgetary difficulties? This may prompt a more radical reform of the Pact.