VI. CONCLUSION

1. Summary

Having set out in Part I the fundamental research questions to be addressed in this work, the methodology applied in it and the research gap it is intended to fill, in Part II terminological and conceptual questions relating to the idea of soft law were approached. After a discussion of the historical origins of soft law, which are prominent in particular in the field of public international law, a number of different approaches towards this phenomenon, as proffered in the literature, have been presented. The subsequent comparison of these different schools of thought not only displayed the manifold ways in which the term soft law may be used, but also allowed the author to contrast some of them with his own position.

This position is based on a positivist perception of law and, consequently, also of soft law, which does not leave room for degrees of legal bindingness, as suggested by some scholars, but discerns legal non-bindingness (as opposed to legal bindingness) as the core criterion in defining soft law (as opposed to law). Soft law was defined – for the purposes of this work – as norms, enacted by entities thereby exercising public authority and thereby aiming at steering human behaviour, which are legally non-binding according to the interpretatively established will of its creators (or, as an expression of self-obligation, legally binding only upon the creators themselves).

Once defined, in a next step the characteristics of soft law were analysed in more depth, delimitating it from law, from further sets of norms – namely custom and, as a related form of law, customary law, morals, and regulation by private actors – and from other output of public bodies. Thereby also the cases of doubt have been inspected more closely, in which soft law intersects other categories of norms or other output of public bodies. As two examples of a conceptual overlap between law and soft law – arguably the most common case of doubt – first the Court's *Kadi* saga on the relationship between UN law and the EU's human rights regime and, second, its case law on the position of WTO law in the EU legal order were discussed more thoroughly. They illustrated that rules which are legally binding in one legal order – here: public international law – may be

relativised, in one or the other way, by the highest legal authority in another legal order, to the effect that their position – in this other legal order – reaches or at least comes close to that of soft law.

On the foundation of these conceptual observations which have been, practical examples apart, largely abstracted from specific legal orders, in Part III the focus was shifted to the EU legal order and thus was dedicated to fundamental questions of EU soft law. Some of the most important questions EU soft law raises relate to its potential originators and addressees, its legal bases (in other words: the competence regime applicable to soft law), its effects, in particular its legal effects, its purposes, and the available possibilities of judicial review. These sets of questions were addressed in Chapters 2–6 of Part III, whereas Chapter 1 provided an introduction and an overview of the historical and current use of soft law in the EU legal order.

The account of originators of EU soft law proffered in Chapter 2 displayed the variety of potential creators, ranging from 'expected candidates', like the institutions and the bodies, offices and agencies of the EU, to in this context more exotic actors like the MS and non-EU bodies who may – exceptionally, but still – be empowered to adopt EU soft law. It was shown that *prima facie* EU soft law may have strings attached to different legal orders – most prominently: to EU law *and* to public international law – which renders difficult the allocation of the respective acts and the determination of the legal effects applying to them. Special attention was drawn to the case of Memoranda of Understanding as concluded with beneficiary MS in the context of the so-called umbrellas during the Eurozone crisis, both in terms of their relation to EU law and public international law and in terms of their legal (non-)bindingness. Eventually, the (potential) addressees of EU soft law were referred to and, in a final sub-chapter, a conceptual line was drawn – in the context of the EU legal order – between soft law and legally non-binding acts other than soft law, thereby adding on to the more general remarks on 'other output of public bodies' in the final sub-chapter of Part II.

In Chapter 3 the EU's competence regime applicable to the creation of soft law was discussed. Beginning with an analysis of the meaning of Article 288 TFEU (mentioning two kinds of non-binding legal acts: 'recommendations' and 'opinions'), the applicability of the core rule in the context of the EU's competences, the principle of conferred powers, was examined. A closer analysis of this principle and the relevant case law of the CJEU did not provide for a clear answer to this question. The author deems there to

be sound reasons to argue in favour of the applicability of the principle of conferred powers also in the context of soft law, though. On the assumption that the principle of conferral applies in this context, special features of the EU's general competence regime were discussed. The implied powers doctrine and – as a subset of it – the *argumentum a maiore ad minus* contribute to making it much more flexible and concessive. With regard to internal soft law, the relevant competence mostly follows from the EU bodies' right to self-organisation, in respect of which they dispose of a large measure of discretion. Subsequently, the explicit competence clauses allowing for the adoption of recommendations and/or opinions as laid down in the Treaties were presented, thereby distinguishing between general and special competence clauses. In addition to that, selected primary law competences to adopt EU soft law other than recommendations and opinions, and selected special competence clauses enshrined in EU secondary law and in public international law were discussed. Eventually, after the effects for EU soft law of a lack of legal basis had been shed light on, selected questions approached at the beginning of Chapter 3 – in particular the question of whether or not the principle of conferral is applicable – were revisited with a view to the findings which the preceding analysis of the general and special competence clauses allowed us to make. While these findings could not dispel all doubts in this context, they seemed to confirm the applicability of the principle of conferral also with regard to soft law rather than to dismiss it.

Chapter 4 was concerned with the effects of EU soft law, in particular with its legal effects, that is to say the effects resulting from law. These legal effects were addressed with regard to two groups of addressees, namely the MS on the one hand and the institutions, bodies, offices and agencies of the EU, on the other hand. In both cases the effects following from the pertinent case law of the CJEU were presented, after which the potential legal bases for these effects – which the Court in its judgements rarely makes explicit – were listed and analysed in some depth. As a complement, the factual – that is to say: the non-legal – effects of soft law were addressed, both generally and with regard to the EU context. Eventually, the possibility of effects displaying legal as well as factual aspects – referred to here as 'mixed effects' – were expounded and illustrated with examples from the EU context.

In Chapter 5, two approaches for the categorisation of the purposes of soft law more generally were outlined, which were then applied in the EU context, thereby also referring to illegitimate purposes EU soft law

may serve according to the will of its creators. It was shown that these categorisations fit and are worthwhile with a view to imposing a conceptual order on the manifold purposes of EU soft law.

In the final chapter of Part III, Chapter 6, the possibilities of judicial review of EU soft law were fathomed, in particular with a view to the annulment procedure and the preliminary reference procedure. While under the former procedure true EU soft law – for lack of (intended) legal effects *vis-à-vis* third parties – cannot be annulled, the latter procedure leaves much room for national courts and tribunals to have the CJEU consider EU soft law. From among the other Court proceedings, the procedure following an action for damages according to Article 340 para 2 TFEU may reasonably lead to a consideration of EU soft law by the Court. Also the applicability of the *incidenter* review, as laid down in Article 277 TFEU, to soft law acts of general application was taken into consideration.

Following the account of the main legal questions on EU soft law provided for in Part III, the focus was narrowed to compliance mechanisms in which EU soft law *may* – and in many cases actually *does* – play a pivotal role in ensuring that MS abide by EU law. Part IV was dedicated to a presentation of the compliance mechanisms – as defined, for the purposes of this work, more closely in Chapter 1 – laid down in primary law and a selection of those provided for by the legislator in secondary law. Consequently, Chapter 2 presented, first, the Treaty infringement procedure as the general compliance procedure established in primary law. Second, compliance mechanisms other than the Treaty infringement procedure – that is to say: special compliance mechanisms, whose material scope is regularly limited to one policy field – were presented. They were divided in three different categories: 'hard mechanisms', 'mixed mechanisms', and 'soft mechanisms'. Within the category of hard mechanisms fall compliance mechanisms which only provide for hard law measures being addressed by the EU body/bodies in charge to the respective MS. These mechanisms do not (explicitly) provide for the adoption of soft law *vis-à-vis* the MS concerned. Mixed mechanisms allow the EU body/bodies in charge – in the specific sequence envisaged in each procedure – to address both soft and hard law acts to the MS concerned. Soft mechanisms only envisage the adoption of soft law acts. In their respective course, the behaviour of the MS concerned may exclusively be steered in a legally non-binding way. The special compliance mechanisms laid down in primary law have been allocated to either of these categories. In addition to that, for each category six mechanisms provided for in secondary law were presented. The main

characteristics of the presented mechanisms were then condensed in a summary.

Part V was preoccupied with the analysis of the compliance mechanisms presented in Part IV. This analysis was split in two parts, one on the classification (Chapter 2) and one on the legal assessment of the mechanisms (Chapter 3).

In terms of classification, the creation of a taxonomy of the mechanisms under a variety of different aspects was attempted. These aspects encompassed the actors involved and the policy fields affected (as indicated in the primary law basis of these mechanisms). Also the output-related structure of the mechanisms was addressed more thoroughly, going beyond the broad separation in hard, mixed and soft compliance mechanisms which underlay Part IV. Here, for example, the concrete sequence of (hard, soft and hard, or only soft law) acts was examined. Thereafter, the focus was shifted to soft law and its purposes in the context of compliance mechanisms. On the basis of the findings of Chapter III.5., in which the purposes of EU soft law more generally had been addressed, the special purposes it is intended to meet in compliance mechanisms were fleshed out. Broadly speaking, it turned out that the general purposes of EU soft law are also reflected upon in mixed and soft compliance mechanisms. In addition to that, soft law in compliance mechanisms was recognised as a tool silently bringing about institutional transformation. Eventually, the deviation of compliance mechanisms from the Treaty infringement procedure as the general compliance mechanism laid down in the Treaties was investigated, allowing the legislator to compensate some of the drawbacks of the latter procedure. Finally, the objective and subjective reasons why compliance mechanisms are designed the way they are designed were explored, thereby taking account of the concrete legal history of the compliance mechanisms addressed here.

The chapter on legal assessment first introduced, in the context of individual-concrete EU measures addressed to a MS in order to ensure its compliance with EU law, the fundamental distinction between implementation and enforcement. These two concepts root in the Treaties, in particular in Article 291 TFEU on the one hand, and Articles 258–260 TFEU on the other hand. Having described in more depth the similarities of and the differences between these two regimes, a number of characteristics – a list of indicators – was established. In most cases these indicators allowed for the allocation of (our selection of) compliance mechanisms to either implementation or enforcement, or at least to a tendency towards either of

these categories. This allocation was necessary as a first step in addressing the question to which extent the Treaties allow for the establishment of compliance mechanisms by means of secondary law.

In a next step, the primary legal bases of the compliance mechanisms laid down in secondary law were inspected with a view to their respective adequacy. Special attention was paid to Article 114 TFEU – a frequently used basis for EU secondary law in general, and for compliance mechanisms in particular. But also other Treaty provisions used as legal bases for setting up the sample of compliance mechanisms at issue here were interpreted with a view to their adequacy in the given context.

Strongly interwoven with both the distinction implementation/enforcement and the question of primary legal bases is the issue of the EU's institutional balance. This balance is struck by the Treaties and may not be distorted by means of secondary law. Against this background, it was examined whether and, if so, to which extent the secondary law-based compliance mechanisms at issue here – either on their respective own or in their entirety – challenge the EU's institutional balance, in particular by limiting the role of the Commission and the Court under the Treaty infringement procedure. In this context, also the principles of subsidiarity and proportionality are to be mentioned. They were analysed with a view to whether they suggest the use of soft law rather than hard law, in the context of compliance mechanisms this means: whether they serve as a guideline for the legislator, pointing in the direction of granting soft law powers rather than hard law powers.

The next sub-chapter was dedicated to the *epitheta* to be found in some acts of secondary law, requiring the respective addressees of soft law, for example, to take 'utmost account' of or to pay 'sufficient heed' to it. It was explored whether this actually strengthens the legal effects of soft law or whether it is nothing more than verbal ornamentation.

Finally, the legal protection which a MS may avail itself of in the context of compliance mechanisms was addressed in more detail. Apart from agencies' Boards of Appeal (if any) which may serve as an instance of legal protection, it is in particular two Court proceedings which were looked into here: the annulment procedure pursuant to Article 263 TFEU and the procedure following an action for failure to act pursuant to Article 265 TFEU.

2. Closing remarks and outlook

2.1. Soft law

Soft law has become an important complement and sometimes competitor of law, the latter standing at the core of the development of the EU as a *Rechtsgemeinschaft*.[2664] Whereas law rather relies on the general authority of the regime it belongs to, the effects of soft law much more strongly root in the authority of its specific creator, not least because here compliance is not justiciable. Thus, while both law and soft law are power-based regimes, it appears that with soft law this power basis is individualised to a larger extent, which is why in practice its effectiveness seems to show a greater variance. Nevertheless, soft law must also be perceived as a whole, that is to say as a *general* phenomenon which is to be addressed by generalised questions. Some of these questions – with regard to the EU legal order – have been addressed in this work.

As a conclusion with regard to EU soft law, let me reiterate three (related) issues: 1. Soft law should be clearly recognisable as legally non-binding and leave room for deviating behaviour – both *de iure* and *de facto*. 2. The competence regime applicable in the context of soft law in general needs to be clear (eg principle of conferral or *in dubio* approach). While obscurity in single cases can hardly be avoided, a generally obscure competence situation facilitates a decision-/policy-making culture in which soft law is – as a matter of course – adopted whenever hard rules are legally or otherwise not feasible, or where their adoption is at least cumbersome. This could easily lead to over-regulation and to a relativisation of (hard law) competences, neither of which seems to conform to the spirit of fundamental principles of EU law, such as the rule of law[2665] or the principle of subsidiarity. 3. In the EU, the lack of a clear competence regime is combined with limited possibilities of judicial review. But even in view of the restrictiveness of Article 263 TFEU, the Court would have the possibility to scrutinise soft

2664 Note the famous *dictum* of the Court in case 294/83 *Les Verts*, para 23: 'It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.' See also Trubek/Trubek, Governance 539, distinguishing rivalry, complementarity and transformation as three possible relationships between law and soft law.

2665 Attempting, in view of EU soft law, a 'dynamic' conceptualisation of this principle: Dawson, Soft Law 14–16.

law more intensely, thereby – it is true – modifying its case law. Maybe this is even what it ought to do in order to counter-balance the lax application in practice of a competence regime which is fuzzy already in theory (ie according to the letter of the law).

Regularly, policy-making actors conceive of soft law as a convenient way to make rules where the adoption of legal rules would be unduly complicated, and if its addressees feel obliged because for them it is not clear whether the rules are legally binding or not – all the better. From a legal point of view, this attitude cannot go uncriticised. A more considerate, transparent, and traceable use of EU soft law – and here in particular the above issues 1 and 2 are addressed – would contribute greatly to doing away with its somehow dubious reputation. A clear commitment to and indication of its respective legal basis in (primary or secondary) EU law would be an important part of this approach – requirements which, arguably in the vast majority of cases, would not be difficult to meet. Another part would be an improved consideration of the 'truth of form' principle, that is to say a clear indication of the intended legal effects (in particular: legal bindingness or legal non-bindingness). These measures would affect eg the communications/recommendations which the Commission has, in places, adopted where an according Commission proposal has failed during a legislative procedure, or highly authoritative interpretative acts of the Commission relating to provisions of primary law, in particular in the field of competition and State aid law.

As regards the communications/recommendations replacing (failed) legislation, the potential of abuse is palpable. Where a legislative procedure has resulted in failure of the initiating proposal, also this should be accepted as a decision of the legislator – admittedly less authoritative than a positive decision. The clandestine conversion of a proposal to generally applicable (soft law) rules certainly does not display a high degree of deference to the legislator. In places, the Court has countered this attempted usurpation of rule-making power, namely were the act at issue presented the current state of law in an incorrect manner. It is important that the Court resolutely opposes attempts of abusing soft law in that way. Otherwise the indignation about such practice may fade out, as experience with respect to another legal source, the directive, has shown. In this case the Court has accepted the unorthodox way in which the legislator made use of it, namely as a tool to bring about highly detailed harmonisation or even unification of laws, with hardly any leeway for the MS transposing these acts. Originally,

this has been considered abusive, as well,[2666] but meanwhile – due to the Court's continuous approval – it has become a widely accepted purpose of directives.[2667]

As regards the interpretative acts, they are – under names such as 'Communication' or 'Guidelines' – declared legally non-binding, but *de facto* non-compliance on the part of the States or the undertakings will most probably be interpreted by the Commission not only as non-compliance with the interpretative soft law act, but also as a violation of the interpreted act, that is to say the underlying legal provision. This will again lead to adverse effects, eg a declaration of incompatibility with the internal market by the Commission in case of State aid or a fine imposed on an undertaking for violation of Article 101 or Article 102 TFEU. In terms of the actual effects – and presumably also in terms of the effects intended by the Commission when adopting these acts – there hardly seems to be any difference as compared to a legally binding act. Would not the truth of form principle dictate to adopt these acts as legally binding acts? The legislator – on the basis of Article 103 TFEU and Article 109 TFEU, respectively – could extend the power of the Commission in this respect. The Court – and here issue 3 above is addressed – has largely accepted such acts as legally non-binding and has, consistently, held in particular actions for annulment filed against them to be inadmissible. Only exceptionally, namely where the interpretation suggested in one of these acts went against EU law, did the Court confirm the admissibility of an action pursuant to Article 263 TFEU and subsequently annull these acts. That the Court annuls these acts where they violate EU law is to be embraced. However, while the Court in examining the admissibility of actions against such soft law acts considers the case in depth, it still allows for much room for manoeuvre for the EU actors concerned, in particular the Commission. By making use of this discretion, the latter may take undue regulatory action – in particular: a far-reaching and unprecedented interpretation of a certain rule – even without violating EU law. Thus, only the blatant cases are taken up by the Court, whereas more modest, but still practically important soft law will slip through, resulting in the inadmissibility of the respective action.

2666 See Constantinesco, Recht 622–624, referring to the 'herrschende Meinung' [the prevailing view].

2667 See Geismann, Art. 288 AEUV, para 41; Nettesheim, Art. 288 AEUV, para 113; Ruffert, Art. 288 AEUV, para 25; Schroeder, Art. 288 AEUV, para 54, each with further references.

Recent Opinions of AG have suggested a more progressive, a more liberal approach in confirming the admissibility of *prima facie* soft law.[2668] So far the Court has stuck to its case law, though.[2669] By regularly refusing the admissibility of actions in these cases, on the one hand the Court limits the legal importance of these acts and does justice to the wording of the Treaties and its case law so far. On the other hand, it may risk ignoring the factual meaning of these acts and it may miss an opportunity to render its authoritative view on this phenomenon more generally. A counter-argument to the latter point of criticism could be that there already is a Court procedure which – in terms of its admissibility requirements – makes the Court easily accessible, namely the preliminary reference procedure.[2670]

Soft law has been and will remain to be a concept with many faces. Thus, whoever enters the scholarly discussion about it initially has to clarify his/her understanding of the term. This is not a shortcoming of the term, but actually indicates its sufficient flexibility to describe a multi-faceted phenomenon. But also on a more general level – in public discourse, eg in the media – the term soft law would probably stand the test as an intuitive and overall appropriate description of the subject matter: rules which are something less than, but still closely related to – or: 'in the penumbra of'[2671] – law. Unfortunately, as of now, the lively scholarly discussion does not seem to have evoked a continuous public debate – or at least this debate has not lead to a change in the use which is made of soft law. The merits and the risks of soft law have been elaborated in the literature in some depth, but – turning to the EU – the originators of EU soft law do not seem to make use of it too considerately.

In the EU soft law (addressed to MS) has been a success story, not least because its apparent ambition is low: It does not order compliance, it only suggests it. An overall picture of MS' compliance with EU soft law can hardly be drawn due to the multiplicity of different acts adopted in a variety of different situations. However, there is non-representative, but still

2668 See eg the Opinion of AG *Bobek* in case C-16/16P *Belgium Commission*, paras 123 ff.

2669 See Korkea-aho, Soft Law 290, who has limited hope in the Court adapting its approach towards soft law. For a reversal of the judicature of the French *Conseil d'État* in this context see Gundel, Rechtsschutz 600 f.

2670 See Ştefan, Soft Law 20 ff, referring to arguments against and in favour of an extensive consideration of EU soft law before the CJEU.

2671 Peters/Pagotto, Perspective 28.

evidence of remarkably strong compliance rates of EU soft law.[2672] Future research will be preoccupied with examining more closely the effects of soft law in selected policy fields, also and in particular from an empirical angle.[2673]

While it was argued that EU soft law may facilitate further integration, we should not forget about the core characteristic of this category of rules – its legal non-bindingness. Where it is addressed to MS, in principle each of them can decide for itself whether or not to comply. This constitutes a parallel to intergovernmental decision-making where each State – here: each MS – has to consent to (or, in case of consensus: not to veto) a certain measure. Where a MS does not 'consent' to a measure, it will not apply it. With soft law, the MS can decide anew in each case in which the soft law act would be applicable. Perceived from that angle, EU soft law – due to its (partly) 'intergovernmental' character – rather seems to work against Union method style integration. While this explanation may not be entirely satisfactory, either, at least it reminds us not to uncritically follow the beaten track, here: the dogma according to which soft law facilitates further integration of the EU. The EU is a *Rechtsgemeinschaft*, after all.

2.2. Compliance mechanisms

When it comes to the application of EU law in day-to-day administration, the MS and their respective authorities are the key actors. In this role, they cooperate with the Commission, eg in the field of competition law, in order to implement EU law *vis-à-vis* individuals/undertakings. At the same time, they are both addressees and creators of compliance mechanisms – creators either as Masters of the Treaties or, as participants in the Council, as (co-)legislator. *Schmidt-Aßmann* has described this as the 'eigentümliche[] triadische[] Rollenstruktur' [peculiar triadic role structure][2674] of the MS. This role structure in my view can hardly be overestimated when dealing with compliance mechanisms, as it discloses that the MS approve – not in each individual case, but in principle – of the implementation/enforcement of EU law *vis-à-vis* themselves. This is remarkable not least due to the fact that one of the findings of this work points to instances of a materialising

2672 See eg Hartlapp, Soft law.
2673 See already Eliantonio/Korkea-aho/Stefan, Soft Law.
2674 Schmidt-Aßmann, Verwaltung 1382.

risk of a creeping expansion of the EU's enforcement powers *vis-à-vis* the MS – an expansion MS in general seem to be wary of. In case of secondary law-based compliance mechanisms, however, they have – with their approval in the Council – significantly contributed to this expansion.

With regard to the relationship between the Treaty infringement procedure and special compliance mechanisms laid down in secondary law, essentially three statements can be made:

1. Compliance mechanisms – enforcement mechanisms as such, but also, due to their large quantity, the implementing mechanisms in place – lead to a restriction of the competences of the Commission and the CJEU under the Treaty infringement procedure.

2. The legislator is providing for special compliance mechanisms more and more frequently, leading to an increase in the total number of compliance mechanisms throughout the policy areas which are shaped by the EU.

3. The number of pending Treaty infringement cases has decreased drastically since the mid-2000s – in spite of an ever increasing amount of EU rules (secondary law) and in spite of the fact that the number of MS has nearly doubled since 2004, two factors which one would intuitively assume to boost the number of infringement procedures.

These three statements justify the assumption – which, as a matter of course, requires further research to be proven – that a causal relationship exists between the increasing number of compliance mechanisms in secondary law and the decrease in the number of Treaty infringement procedures performed in practice. Additional reasons for this decrease may have been the Commission's selective approach in pursuing violations of EU law, the introduction of EU Pilot, conditionality-based regimes and other EU tools created to improve compliance.[2675]

A solid account of this question would also require a quantitative analysis, reviewing the decreasing number of Treaty infringement procedures over the years, and examining possible correlations or even causalities on the part of the alternative compliance mechanisms in that respect. On a basic level, this would involve offsetting the decrease in the number of Treaty infringement procedures with a (potential) increase in the number

2675 See eg Commission, 'Enforcing EU law for a Europe that delivers', COM(2022) 518 final, 15 f. Also private enforcement is to be taken into account in this context. However, private enforcement can only play a complementary role, not least because in some policy fields it is not available (eg EMU, Schengen agreement); see Bieber/Maiani, Enforcement 1058 f.

of applications of alternative compliance mechanisms and of the number of annulment procedures launched against the hard law output adopted in the course of (mixed or hard) compliance mechanisms. Arguably, this research cannot be done in a comprehensive manner, thereby taking account of all compliance mechanisms laid down in secondary law. Rather, such research is manageable only with regard to selected policy fields, and only step by step a more encompassing picture of potential causalities may thereby be drawn. This research may also be required to take account of different compliance cultures in the different MS, which may lead to geographically heterogeneous results.[2676]

Since the early days of the European Communities, the Treaty infringement procedure has borne a strong political dimension. Objective and comprehensive legal enforcement has been impeded by:

1. an insufficient flow of information between the Commission, on the one hand, and the respective stakeholders, on the other hand, about MS' infringements;
2. the Commission's lack of resources to find out about infringements itself on a large scale; and
3. the Commission's political discretion – self-described as 'prioritisation' – to initiate or not to initiate a Treaty infringement procedure.

And still the Commission has – for a long time – attempted to further decrease the number of Treaty infringement procedures.[2677] The Treaty infringement procedure is perceived as suitable to settle 'big cases', that is cases of principle, or obvious violations, but not to be applied on an everyday basis to solve comparatively minor legal issues.

In view of the wide-spread discontent with the Treaty infringement procedure, for the latter purpose a large number of compliance mechanisms has been set up in particular in secondary law. Their functioning is regularly supported by an improved information flow between the national and the EU level, and they allow for fast(er) decision-making by the Commission or other, even more technocratic bodies. However, it is to be noted that most of them have an implementing thrust, aiming at the concretisation of EU law rather than – like the Treaty infringement procedure – at the determination and subsequent removal of its violation. On a meta-level,

2676 See Tomkin, Enforcement 292. For MS which have traditionally been weak in complying with EU law see Ioannidis, Members 476.

2677 See references by Koops, Compliance 119.

these different aims can be unified under the larger objective of ensuring MS' compliance with EU law.

In its State of the Union 2012 Address, then President of the Commission *Barroso* uttered his concern about 'threats to the legal and democratic fabric in some of our European States', pronouncing a claim for a 'better developed set of instruments' to monitor observance of this fabric in the(se) MS – 'not just the alternative between the "soft power" of political persuasion and the "nuclear option" of Article 7 of the Treaty [on European Union]'.[2678] The Treaty infringement procedure could be added to the instruments already available, but also this tool – while having confirmed the Commission's criticism in some cases[2679] – does not seem perfectly suited to address the underlying, rather structural problems referred to by *Barroso*.[2680] Neither could the specific compliance mechanisms at issue in this work prevent or at least contain these developments.

The latter compliance mechanisms are intended to deal with politically less loaded, but still relevant violations of EU law, thereby partially compensating for the staidness of the Treaty infringement procedure. Facilitating MS' observance of the fundamental principles on which the EU is built is a relatively new focus of the EU's broad objective of achieving 'compliance with Europe'[2681] – a focus which, in addition to the mechanisms just mentioned, requires (and in part has already led to the creation of) new tools.

2678 Barroso, State 10; for this speech and the ensuing 'Rule of Law Initiative' of the Commission see Besselink, Bite 134–136.

2679 <https://www.dw.com/en/top-eu-court-rules-against-polish-judicial-reform/a-51114974> accessed 28 March 2023.

2680 See also Gormley, Infringement 75 f, with further references.

2681 This term is inspired by Falkner/Treib/Hartlapp/Leiber, Europe.