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Summary

This paper analyses the expansion of the “Community Method” in European environmental and social policy. The Community Method denotes one specific mode of policy-making within the EU which usually leads to policy outputs in the form of hard law. The paper describes the development of competences and decision-making procedures in these policy areas as well as the quantitative development of hard and soft law, and it relates this development to changes in decision rules in the two policy areas.

First, the analysis reveals that the expansion of explicit legislative competences and the proliferation of qualified majority voting was a much more protracted process in social policy if compared to environmental policy. It seems that member states have been more reluctant to cede sovereignty in social policy. Second, binding and non-binding policy outputs have developed differently in both policy areas. Environmental policy was marked by a permanent prevalence of hard law. Binding legal acts show a stronger increase than non-binding legal acts. In contrast, soft law plays a more prominent role in social policy, although binding policy outputs still outnumber non-binding ones. Both binding and non-binding policy outputs have developed roughly in parallel.

In order to account for these developments, the paper discusses two contrasting hypotheses. The data yields no support for the argument that there is a general trend towards the adoption of softer, more flexible policy instruments since these are more effective in solving many of the problems faced by complex systems of governance. The alternative hypothesis that soft law is regarded as second-best solution, which is replaced by hard law as soon as institutional arrangements allow it, is supported by the observations in social policy but not by the observations in environmental policy. In conclusion, the paper points to the different levels of political conflict in both policy areas as a possible explanation for the divergent developments.

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1. Introduction

Policy-making in the European Union (EU) is marked by many different decision-making procedures, and it may result in various types of policy outputs. The “Community Method” denotes one specific mode of policy-making within the EU. The European Commission defines the Community Method as a form of policy-making where the authority to make legislative and policy proposals rests solely in the hands of the European Commission. The European Parliament and the Council of Ministers adopt legislative and budgetary acts. The Council of Ministers uses qualified majority voting. Policies are executed by the Commission and national authorities and the European Court of Justice guarantees that European law is respected in the member states (Commission of the European Communities 2001: 6). The Community Method is contrasted with other forms of the EU policy process, which are characterised by a more intergovernmentalist nature. Policy processes that strengthen national actors and limit the role of European institutions are the Open Method of Co-ordination, which is based on the principles of flexibility, subsidiarity and voluntarism, as well as forms of policy cooperation between national actors in the realms of justice and home affairs or foreign, security and defence policy (Wallace 2000: 28-34; Borrás/Jacobsson 2004: 186-189; Schäfer 2004: 1). These policy processes result in different forms of policy outputs. Although there are exceptions to the rule, the Community Method usually leads to policy outputs in the form of hard law whereas more intergovernmentalist policy processes produce soft law. Hard law creates rules that are legally binding in all Member States and provides sanctions if a Member State does not comply (Trubek/Trubek 2005: 83; Scott/Trubek 2002: 2). The feature that distinguishes hard law from soft law is whether obligations are legally binding or not. Soft law consists of rules of conduct which are not legally binding but aim to influence the behaviour or measures of certain addressees (Senden 2004: 112).

The aim of this paper is to describe the expansion of the Community Method in two policy areas, EU environmental and social policy. It analyses the development of decision-making procedures in these policy areas as well as the quantitative development of legally binding and legally non-binding policy outputs, and it relates this development back to the changes in decision rules. European environmental policy and European social policy are chosen for the comparative analysis due to their similarities. Both European environmental policy and European social policy may be classified as regulatory policies which evolved at the European level via positive integration and replaced national regulations in the Member States (Hix 2005: 251-261). Regulatory policies seek to promote the public interest by constraining private activities (Francis 1993: 1-2). In contrast to negative integration which refers to the removal of trade barriers and other obstacles to economic competition, positive integration “refers to the reconstruction of a system of economic regulation at the level of a larger economic unit” (Scharpf 1999: 45). Furthermore, both policy areas have witnessed a similar process of institutionalisation. While the EEC Treaty did not explicitly provide any competence in social or environmental policy, both policy areas gained independence since the early 1970s and decision rules have been successively changed from unanimity to qualified majority voting (Falkner 1998; Weale et al. 2000). Finally, according to a quantitative analysis of all policies adopted by the EU between January 2000 and July 2001, most of the policy measures which depart from binding policy outputs and use soft law can be found in social policy and environmental policy (Héritier 2002: 188).

Exploring and explaining the development of binding and non-binding legal instruments in both policy areas is the core focus of this paper. As far as the emergence of hard law and soft law is concerned, two contradicting hypotheses can be identified. One school of thought argues that the use of softer, more flexible policy instruments is more effective in solving many

of the problems faced by complex systems of governance. The argument goes back to the findings of the implementation research of the 1970s, which revealed shortcomings in the implementation of hierarchical, inflexible modes of steering (for an overview, see Pülzl/Treib 2006). Hence, the expectation is that policy-makers will learn from past failures and increasingly switch to more flexible policy instruments such as soft law. A similar argument has been voiced in the debate about the “Open Method of Co-ordination”. Due to the diversity of national institutions and policies in the member states, uniform regulation by hard law is regarded as inappropriate and regulation by soft law as more effective (Zeitlin/Trubek 2003). According to this hypothesis one should observe a decrease of binding policy outputs and an increase of non-binding outputs. An alternative hypothesis posits that hard law is more effective than soft law. In this view, there are policy issues that cannot easily be solved by soft law, especially problems that involve redistributive conflicts and issues that would require changes to institutionally deeply entrenched policy legacies. However, decision rules, actor constellations, and national interests can prevent the adoption of hard law. Since non-binding regulations are regarded as better than no regulations at all, soft law emerges as a second-best solution in situations where more binding solutions are politically infeasible (Héritier 2003; Schäfer 2004). The aim still is to replace non-binding policy outputs by binding legal measures. In this case, one should observe non-binding policy outputs primarily in areas with particularly high consensus requirements and/or rather high levels of political conflict, which should be accompanied by a lack of binding regulation. If the amount of hard law increases, for example due to changes in decision rules from unanimity to qualified majority voting, we should observe a parallel decrease of non-binding policy outputs.

Both hypotheses contain assumptions about the motivation of political actors. While the first hypothesis assumes that political actors presume soft law to be more suitable for European regulation than hard law, the second hypothesis assumes that political actors prefer hard law to soft law. Because it is rather impossible to reconstruct the motivations of all political actors who have been involved in the formulation of European social and environmental policy since the early 1970s, this paper looks at the institutional context, namely the decision making rules, which both constrain and enable actions of political actors. Starting from a system of unanimity, successive Treaty revisions increased the scope of qualified majority voting in social policy and in environmental policy. According to the first hypothesis, soft law should increase and hard law should decrease regardless of changes in the decision rules. According to the second hypothesis, the adoption of hard law should increase if qualified majority voting is introduced. Moreover, soft law should increase in issue areas where decisions require unanimity and regulation had hitherto been absent.

In order to shed light on the expansion of the Community Method, this paper relates changes in decision rules to the quantitative evolution of binding and non-binding policy outputs in European environmental policy and European social policy. Section 2 describes the change in decisions rules in environmental and social policy. In section 3, we discuss the data and methods used in the second step of our analysis, which explores the development of hard and soft law in both policy areas over time. Section 4 analyses the development of binding and non-binding policy outputs in European environmental policy against the background of the two hypotheses mentioned above. In section 5 European social policy is analysed in the same manner. Section 6 compares the results in environmental and social policy, and section 7 concludes with some remarks on future research.

2. Changing Competences and Decision Rules over Time

Both in European environmental policy and in European social policy explicit policy competences have been successively extended at the European level and decision rules have changed from unanimity to qualified majority voting. The changing decision rules in environmental policy are shown in Table 1. The EEC Treaty did not provide explicitly for competences in environmental policy. Environmental measures could only be taken if they contributed to the completion of the internal market.¹ Those measures had to be decided by unanimity. In 1987, the Single European Act introduced the legal basis for the adoption of legislation that seeks to protect the natural environment, and it changed the decision rules. Then, policy outputs which affect the common market could be passed by qualified majority voting whereas policy outputs which were adopted solely to protect the environment needed a unanimous vote. In 1992, the Maastricht Treaty introduced qualified majority voting to all environmental measures regardless of whether they affect the common market or not. There are only a few exceptions, like fiscal provisions, decisions about land use or the structure of the national energy supply which still require unanimity (Krämer 2003: 72-84; Knill 2003: 28-36).

¹ This was laid down in the so-called subsidiary competence provisions. Laws in the member states which “directly affect the establishment or functioning of the common market” could be approximated by unanimous Council decision on the basis of a Commission proposal (Art. 100 EEC Treaty). The Treaty also stipulated that insofar as “action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures” (Art. 235 EEC Treaty).

Table 1: The Attribution of Explicit Environmental Policy Competences to the EU in Formal Treaty Reforms

Explicit community competence for:	EEC Treaty 1957	Single European Act 1986	Maastricht Treaty 1992	Amsterdam Treaty 1997	Nice Treaty 2001
environmental measures which contribute to the completion of the internal market	-	++	++	++	++
environmental measures which are exclusively directed to protect the environment	-	+	++ (five exceptions, see below)	++ (five exceptions, see below)	++ (five exceptions, see below)
provisions primarily of a fiscal nature	-	+	+	+	+
measures affecting town and country planning	-	+	+	+	+
measures affecting quantitative management of water resources or affecting, directly or indirectly, the availability of those resources	-	+	+	+	+
measures affecting land use, with exception of waste management	-	+	+	+	+
measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply	-	+	+	+	+

- not mentioned
+ decision by unanimity
++ decision by qualified majority

Table 2 shows the changing decision rules in social policy. In social policy the EEC Treaty provided for legislative competence with regard to the free movement of workers and social security co-ordination. Only policy measures referring to the free movement of workers could be passed by qualified majority voting. As in environmental policy, further policy outputs could be adopted by unanimity if they were related to the common market. Both competences and qualified majority voting were extended by the Single European Act and subsequent treaty revisions. The Single European Act made provisions for the health and safety of workers and introduced qualified majority voting in this realm. The Maastricht Treaty provided a legal basis for the regulation of social security, employment, working conditions, and gender equality. Whereas regulations of social security required unanimity, policy outputs referring to gender equality for labour force could be passed by qualified majority voting. Measures referring to employment or working conditions had to be adopted either by unanimity or by qualified majority voting depending on the specific policy issue. In 1997, the Amsterdam Treaty provided for the opportunity to pass measures of equal opportunities and treatment of women and men and measures against social exclusion by qualified majority voting. Anti-discrimination was put forward by the Amsterdam Treaty and the Nice Treaty in 2001. While the former required unanimity for the adoption of anti-discrimination measures, the latter allowed qualified majority voting.

Table 2: The Attribution of Explicit Social Policy Competences to the EU in Formal Treaty Reforms

Explicit community competence for:	EEC Treaty 1957	Single European Act 1986	Maastricht Social Agreement 1992	Amsterdam Treaty 1997	Nice Treaty 2001
“measures” to improve transnational co-operation under Art. 137	-	-	-	-	++
“incentive measures” to combat discrimination as defined by Art. 13	-	-	-	-	++
action against discrimination on grounds of sex, race, ethnic origin, belief, disability, age, sexual orientation (new Art. 13)	-	-	-	+	+
“measures” combating social exclusion	-	-	-	++	++
“measures” assuring equal opportunities and treatment of both women and men	-	-	-	++	++
employment policy co-ordination	-	-	-	++	++
funding for employment policy	-	-	+	+	-
social security and protection of workers	-	-	+	+	+
protection of workers where employment contract is terminated	-	-	+	+	+
collective interest representation, co-determination	-	-	+	+	+
employment of third-country nationals	-	-	+	+	+
working conditions (general)	-	-	++	++	++
worker information and consultation	-	-	++	++	++
gender equality for labour force	-	-	++	++	++
integration in labour market	-	-	++	++	++
working environment (health and safety)	-	++	++	++	++
social security co-ordination	+	+	no impact	+	+
free movement of workers	++	++	no impact	++	++

- not mentioned
+ decision by unanimity
++ decision by qualified majority

3. Studying the Quantitative Development of Hard and Soft Law: Data and Methods

In order to compare the evolution of binding and non-binding legal acts in environmental policy and social policy, it is necessary that the data is collected on the same basis in both policy areas. Since the Celex database is openly accessible and available for both environmental policy and social policy, Celex is used as data source. Regulations and directives are counted as hard law. Among the non-binding policy outputs, recommendations, resolutions, declarations and conclusions are counted. Decisions are not considered because they refer only to single

member states or citizens but are not relevant to the policy of the entire EU. Moreover, communications which appear under different headings, as green papers, white papers, reports, strategies, or communications are omitted. Communications expose the policy position of the Commission on a particular problem and are sent to other European institutions (Krämer 2003: 55). However, they remain at the declaratory level and do not have a direct regulatory effect on the actors concerned by the regulation. They have an indirect effect if their objectives are taken into account by directives or regulations.

European legal acts can be adopted by different political institutions and different procedures. There are recommendations of both the Council and the Commission. In contrast, only the Council adopts resolutions. In some cases, but not in all, they are based on a proposal from the Commission. Directives and regulations can be adopted by the Council alone, by the Council and the European Parliament jointly or by the Commission. The Commission can adopt regulations and directives only if it is authorised either by the Treaty or by secondary legislation (Krämer 2003: 49-56). From a legal perspective there is no reason to exclude legal acts of the Commission from the data collection. However, the inclusion of Commission regulations is likely to bias the result in favour of binding legal acts. Commission regulations do not constitute policy measures of their own. They specify application rules or amend existing regulations and directives in order to take account of technical or scientific progress. The extent of Commission regulations is given by the respective Council directive or Council regulation (Krämer 2003: 49-50). It is debatable whether amendments of regulations and directives adopted by the Council should be counted. Amendments of regulations and directives have the same legal status as regulations and directives (Krämer 2003: 50-53). However, they differ in their political relevance. Amendments can be very short, only changing few sentences of an existing directive like the Council directive 94/33/EC amending the directive on hazardous waste or they can have far-reaching consequences like the Council directive 97/11/EC amending the directive on the assessment of the effects of certain public and private projects on the environment. Germany was threatened by a fine of 237 600 Euro per day for not implementing this directive effectively. In order to address this ambivalence, Council amendments are counted separately.

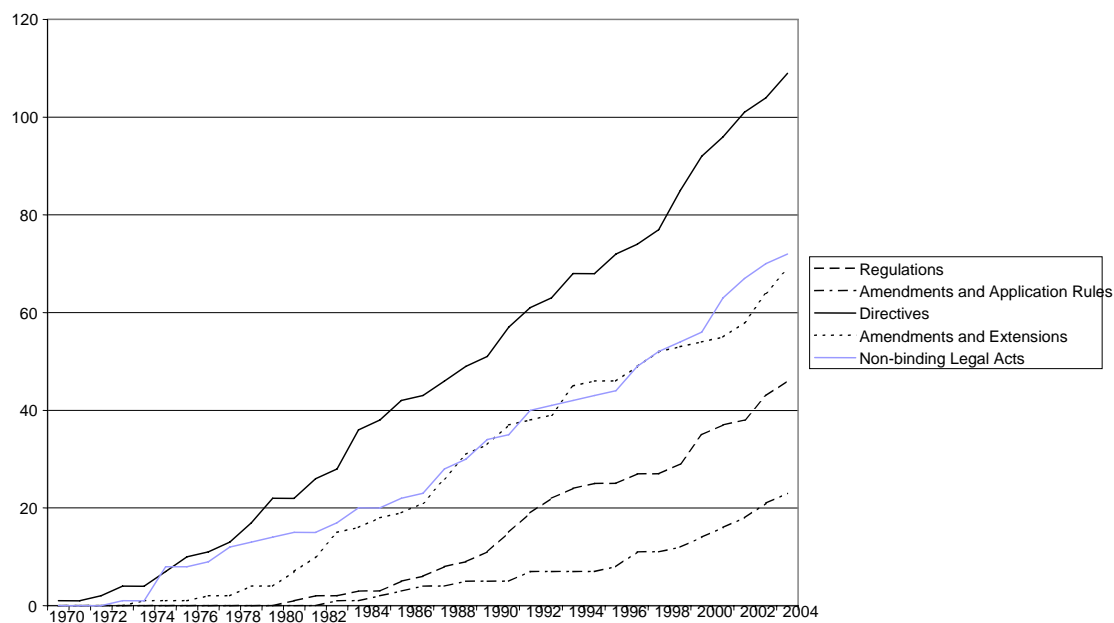
As far as non-binding legal acts are concerned, it does not seem justifiable to exclude policy measures of the Commission because voluntary environmental agreements at the European level are acknowledged by non-binding legal acts of the Commission (Commission of the European Communities 2002: 7). Voluntary agreements constitute a form of regulation which replaces hard law (Golub 1998). The population which will be analysed in this paper consists of all regulations, directives, recommendations, resolutions, declarations, and conclusions of European environmental policy and European social policy between 1970 and 2004. Whereas regulations and directives are counted only if they are adopted by the Council, the non-binding legal acts are taken into account regardless of whether they are passed by the Council or by the Commission. The year 1970 is chosen as the beginning of the analysis because both policy domains were institutionalised at the European level in the 1970s (Falkner 2004: 16; Weale et al. 2000: 53).

Despite the advantage which the Celex database provides for comparing the evolution of environmental policy and social policy, a major problem is the inaccuracy of the Celex classification scheme. The legal acts are not structured unambiguously and the classification scheme varies between menu search and expert search. Moreover, Celex subsumes legal acts under the heading of environmental policy which cannot be regarded as environmental policy outputs. Vice versa there are policy outputs which are not classified as environmental policy outputs but can be regarded as such. Measures of environmental protection can also be found in

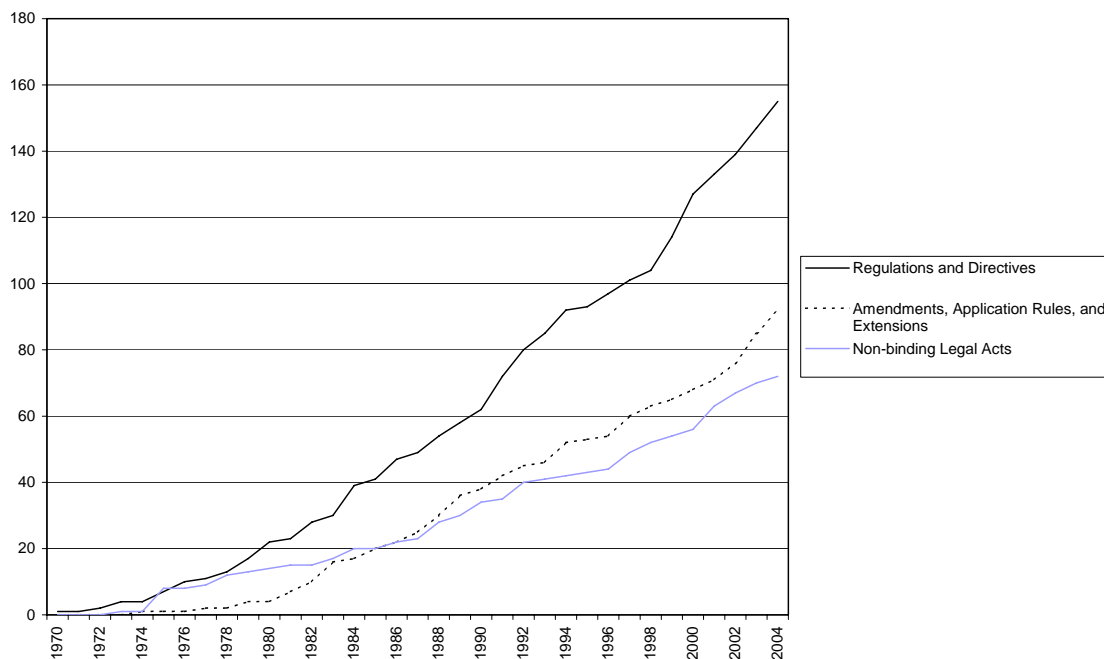
policy areas like agriculture, energy, and transport. This integration of environmental issues in other policy areas is intended in order to reach a more effective protection of the environment (Lenschow 2002). The problem of both over-coverage and under-coverage of the target population is also true for social policy. In order to generate reliable data, this analysis only uses the Celex database. However, we exclude legal acts that obviously do not fit into the respective policy area. Furthermore, legal acts that are based on the Treaty establishing the European Atomic Energy Community (Euratom) are not taken into account. On this basis, the following section discusses the evolution of legal acts in European environmental policy.

4. European Environmental Policy

In European environmental policy, a total of 319 legal acts have been adopted until the end of 2004. Directives are the most frequently used policy measure. Since the adoption of the first environmental directive in 1970, directives have outnumbered all other kinds of legal and political instruments. There was only one exception to this rule: in 1975 there were more non-binding legal acts than directives. The first non-binding legal act was adopted in 1973, and it was not before 1981 that the first environmental regulation came into force. Since the 1970s the number of EU environmental policy outputs has increased steadily. This is true for all kinds of legal acts. Although amendments of existing provisions have increased, there are still more directives than amendments of directives and more regulations than amendments of regulations. The number of non-binding legal acts has developed similarly to the number of amendments of directives since the mid 1980s. It lies between the number of directives and the number of regulations (Figure 1). Comparing binding and non-binding legal acts, the data reveals that binding policy outputs are by far exceeding the non-binding ones. Furthermore, the gap between these two different types of legal instruments is widening. This observation holds if regulations and directives that only contain amendments, applications rules or extensions of policy provisions are regarded separately. Since 1987, non-binding policy outputs have even been exceeded by binding amendments and extensions (Figure 2).

Figure 1: Increase of Legal Acts I: Environmental Policy (N=319)²

² Source: binding legal acts: Celex > menu search > legislation > directives/regulations, not restricted to legislation in force, classification headings > 15 environment, consumers and health protection > 15.10 environment, without wrong classifications; non-binding legal acts: Eur-Lex > simple search > legislation > other acts, not restricted to acts in force, classification headings > 15 environment, consumers and health protection > 15.10 environment, counted are declarations, conclusions, resolutions, and recommendations, without wrong classifications. The non-binding legal acts are collected on the basis of Eur-Lex because it is not possible to search for other legal acts than decisions, directives, or regulations via Celex menu search. Eur-Lex and Celex use the same database and the same classification.

Figure 2: Increase of Legal Acts II: Environmental Policy (N=319)³

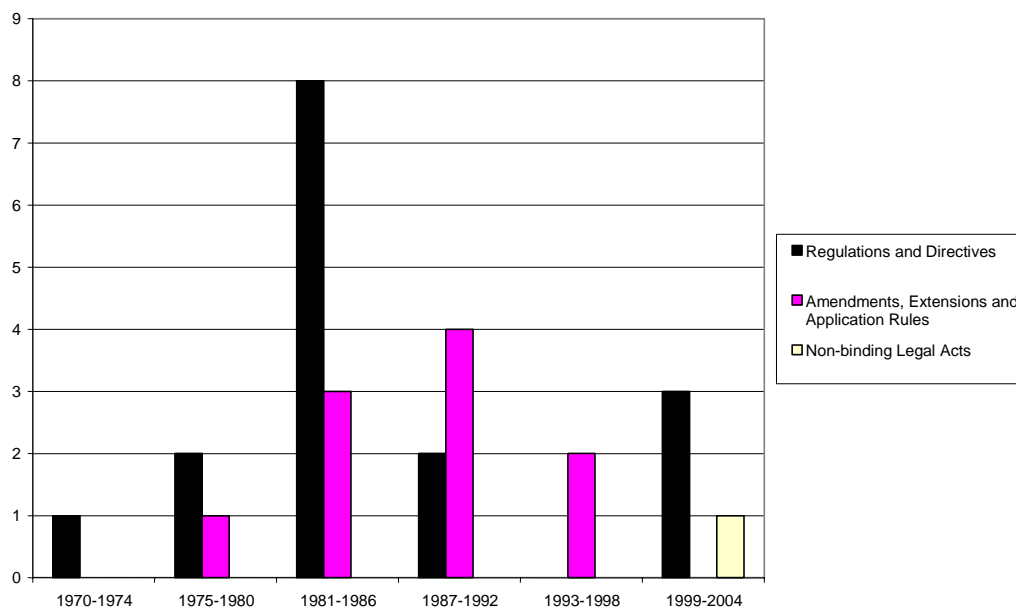
The aggregate data of the quantitative development of environmental policy outputs does not unambiguously support any of the two hypotheses outlined in the Introduction. One can neither observe a decline in the number of binding legal acts in favour of non-binding policy outputs nor a replacement of soft law by hard law. However, the analysis of aggregate data might lead to spurious conclusions. Effects in one issue area might be neutralised by effects in another issue area. Therefore, one has to look at the development of policy outputs and the change of decision rules at the level of issue areas. If non-binding policy outputs constitute an increasing share of all policy outputs in the issue area, this could be taken as evidence in support of the first hypothesis, which argues that soft law enjoys increasing popularity among political actors due to its greater flexibility. However, if the number of binding policy outputs has increased after qualified majority voting was introduced, the second hypothesis is supported, which holds that political actors regard soft law only as a second-best solution to be replaced by hard law if possible. We take a closer look at three issue areas that are representative for all other sub-fields of EU environmental policy: noise pollution, nature protection and biodiversity, as well as administration and organisation. The issue area of administration and organisation consists of horizontal provisions that are relevant for the other issue areas as well. It contains provisions that refer to administrative arrangements like the establishment of the European Environmental Agency or the creation of eco-labels as well as provisions that refer to environmental protection as a whole, like public access to environmental information or the assessment of the effects of certain public and private projects on the environment. Qualified majority voting was introduced for most measures in noise pollution by the Single European Act in 1987 and for most measures in the other two issue areas by the Maastricht Treaty in 1993 (Krämer 2003: 76-80).

In noise pollution, there are 27 policy outputs, almost all of which are legally binding. Only in 2003 the Commission passed a non-binding policy output. In comparison to the other issue areas, noise pollution (Figure 3) is not highly regulated. With one exception, between zero

³ Source: see note 2.

and two directives have been adopted per annum. Only in 1984, before the introduction of qualified majority voting, one amendment and six directives were adopted. These directives aim to approximate the laws of the member states relating to the permissible sound power level of certain machines. Each directive refers to certain machines like lawn-mowers, power generators, welding generators, cranes, compressors, and motor vehicles. Despite the introduction of qualified majority voting by the Single European Act, there was a similar amount of binding legal acts before and after 1987.

Figure 3: Absolute Number of Legal Acts: Noise Pollution (N = 27)⁴



The issue areas of waste management, water protection as well as nature protection and biodiversity show the same pattern of the development of policy outputs. Moreover, the Maastricht Treaty introduced qualified majority voting in all three issue areas. Therefore, we only discuss the development in nature protection and biodiversity, because these two sub-fields are representative for the other two issue areas as well. In nature protection and biodiversity, 40 policy outputs have been adopted since 1975. Only eight policy outputs are non-binding, while there are 20 regulations and directives and twelve amendments and extensions of binding legal acts. The introduction of qualified majority voting by the Maastricht Treaty did not boost the adoption of binding legal acts (Figure 4). The share of soft law has not increased either. On the contrary, while between 1975 and 1980, three out of four policy outputs were non-binding, the share of soft law significantly decreased in the following decades. Since the 1980s, hard law has been the dominant policy type in this issue area. However, the decrease of soft law began much earlier than the introduction of qualified majority voting (Figure 5).

⁴ Source: see note 2, assignment to the issue area according to the title of the legal act.

Figure 4: Absolute Number of Legal Acts: Nature Protection and Biodiversity (N = 40)⁵

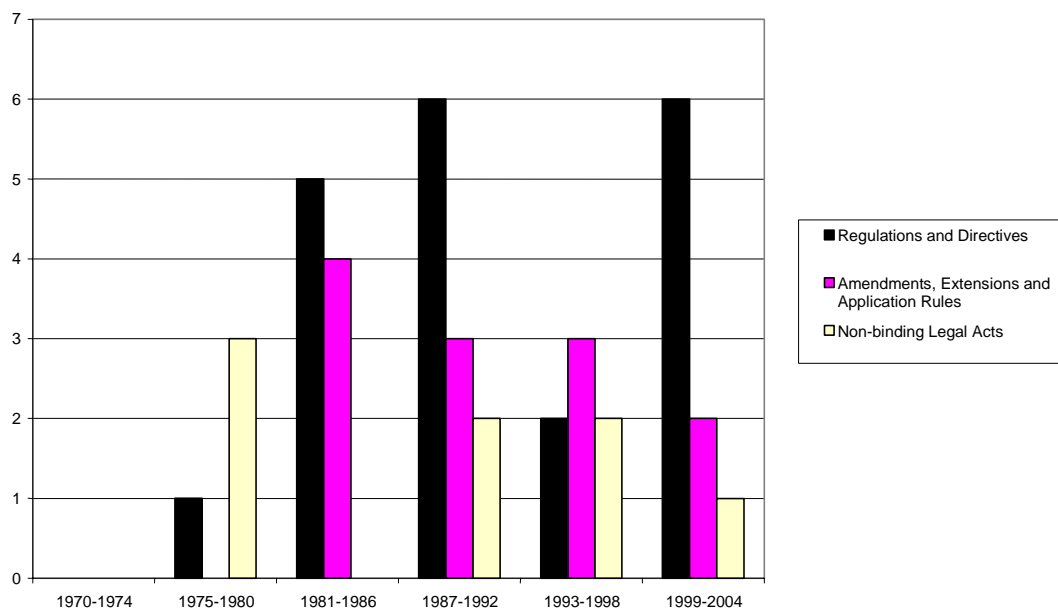
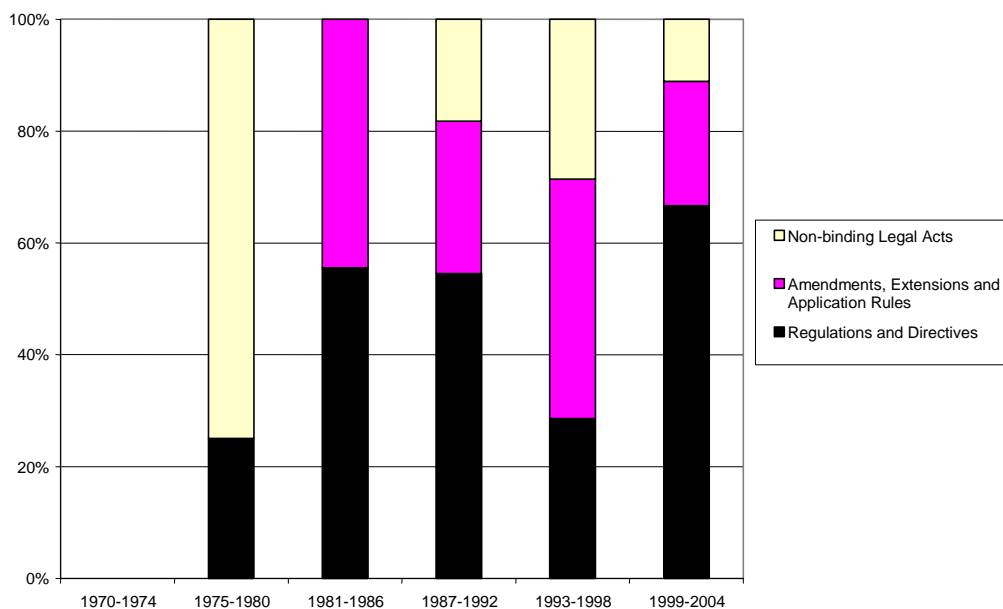


Figure 5: Ratio of Legal Acts: Nature Protection and Biodiversity (N = 40)⁶



Administration and organisation is the issue area with the highest amount of soft law. There are 23 non-binding policy outputs but only 18 regulations and directives and five amendments and extensions of hard law. In the 1970s and early 1980s, only soft law was adopted. Since the adoption of the first binding legal act in 1984, the share of hard law has increased whereas

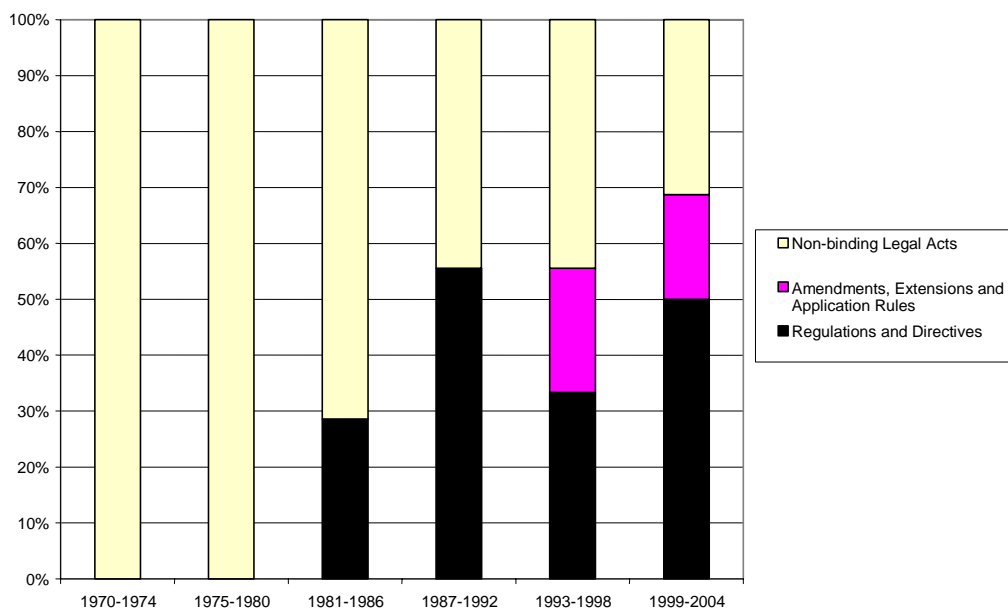
⁵ Source: see note 2, assignment to the issue area according to the title of the legal act.

⁶ Source: see note 2, assignment to the issue area according to the title of the legal act.

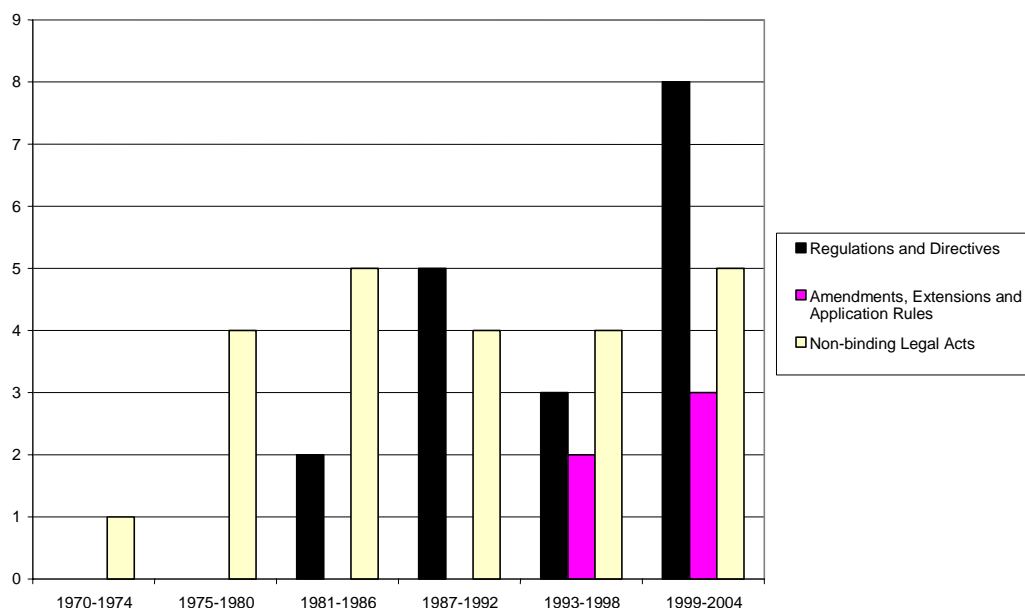
the share of soft law has decreased (Figure 6). However, binding legal acts have not shown a stronger increase after qualified majority voting was introduced in 1993 (Figure 7).

Like the aggregate data, our analysis of how binding and non-binding legal acts evolved in individual sub-areas of environmental policy supports neither the hypothesis of a growing popularity of soft law due to its greater flexibility nor the hypothesis that soft law is only a second-best option to be replaced by binding legislation of politically feasible. Binding legal acts are clearly dominant in environmental policy. The relative evolution of hard and soft law below this general trend seems to follow a pattern that cannot be accounted for by any of our hypotheses. Neither decision-making rules nor more general trends towards softer forms of steering appear to have a decisive influence in EU environmental policy. In the following section, we discuss whether the same is true for EU social policy.

Figure 6: Ratio of Legal Acts: Administration and Organisation (N = 46)⁷



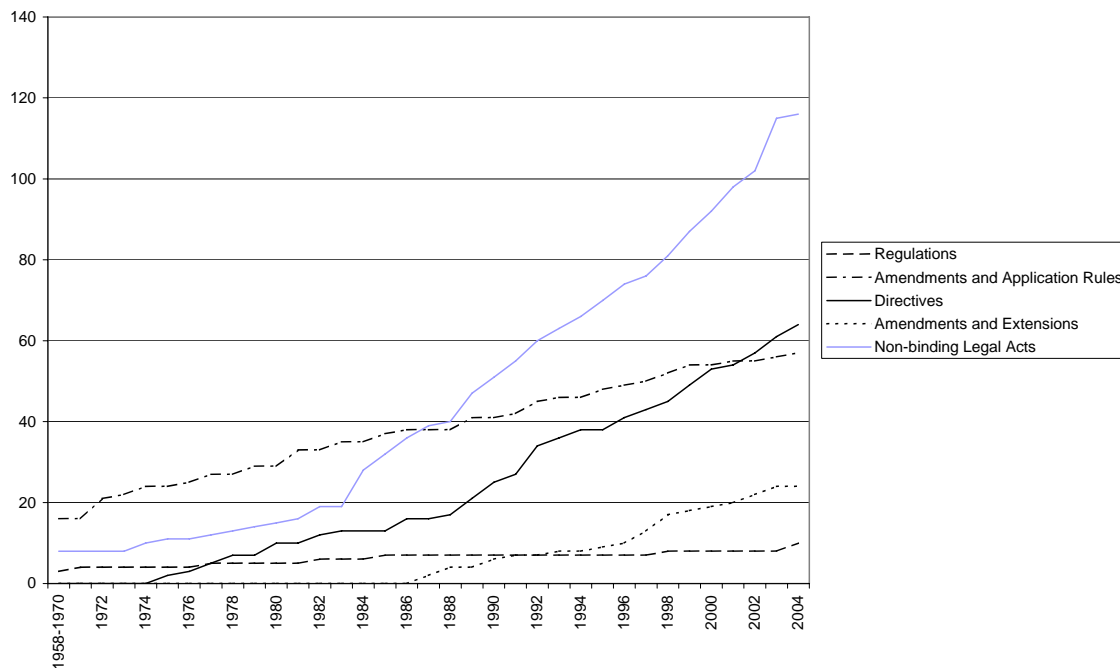
⁷ Source: see note 2, assignment to the issue area according to the title of the legal act.

Figure 7: Absolute Number of Legal Acts: Administration and Organisation (N = 46)⁸

5. European Social Policy

Until 2004, European social policy has seen the adoption of 271 policy outputs at the supranational level. Legal acts were passed before 1970. While the first directive of social policy did not come into force before 1975, the first non-binding legal act was adopted in 1963 and the first regulation in 1958. This first regulation referred to the social security of migrant workers and was amended several times in the following years. The number of regulations has remained low, whereas there has been a large amount of regulation amendments. It was not before 2002 that the number of directives exceeded the number of regulation amendments. However, during the whole period of observation there have been less directives than non-binding legal acts (Figure 8). Even if directives and regulations are put together, there is a larger number of non-binding policy outputs at any point in time. The increase of non-binding policy outputs has been accelerated since 1983, and since 1989 non-binding legal acts have outnumbered both regulations and directives and amendments, application rules, and extensions. Among the binding legal acts, amendments have always been more numerous than regulations and directives (Figure 9). If the number of all types of binding legal acts is compared to non-binding policy outputs, one can observe a parallel development. Binding and non-binding legal acts have increased to the same extent. Nevertheless there have been more binding than non-binding legal acts in social policy (Figure 10).

⁸ Source: see note 2, assignment to the issue area according to the title of the legal act.

Figure 8: Increase of Legal Acts I: Social Policy (N=271)⁹

⁹ Source: binding legal acts: Celex > menu search > legislation > directives/regulations, not restricted to legislation in force, classification headings > 5 freedom of movement for workers and social policy > 5.10 freedom of movement for workers / 5.20 social policy, without wrong classifications; non-binding legal acts: Eur-Lex > simple search > legislation > other acts, not restricted to acts in force, classification headings > 5 freedom of movement for workers and social policy > 5.10 freedom of movement for workers / 5.20 social policy, counted are declarations, conclusions, resolutions, and recommendations, without wrong classifications. The non-binding legal acts are collected on the basis of Eur-Lex because it is not possible to search for other legal acts than decisions, directives, or regulations via Celex menu search. Eur-Lex and Celex use the same database and the same classification.

Figure 9: Increase of Legal Acts II: Social Policy (N=271)¹⁰

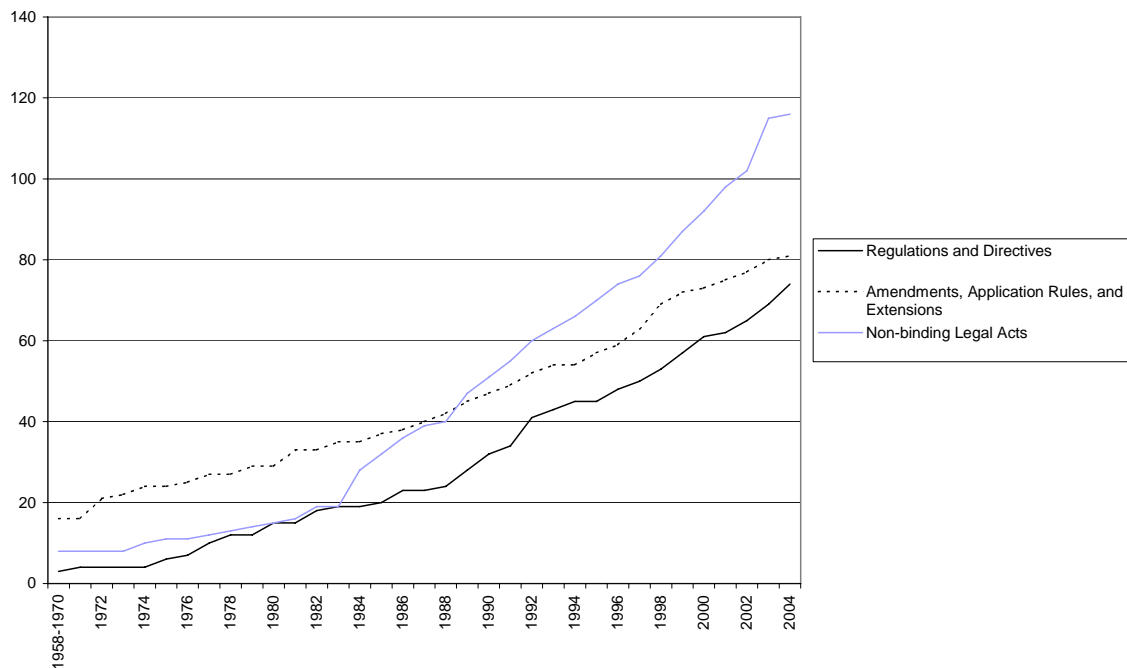
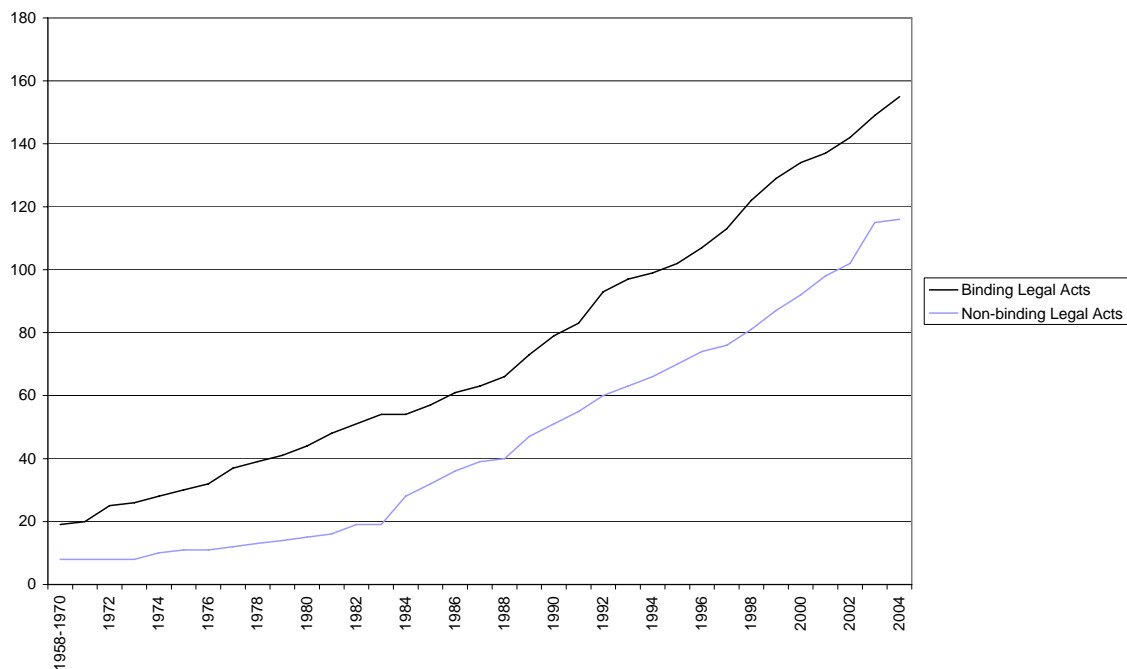


Figure 10: Increase of Legal Acts III: Social Policy (N=271)¹¹



In order to analyse whether changing decision rules have an impact on the development of hard law and soft law, we take a closer look at those issue areas where the decision rules changed for a substantial amount of measure in the cause of the last 30 years. This applies to the issue areas of health and safety of workers and working conditions. In health and safety of

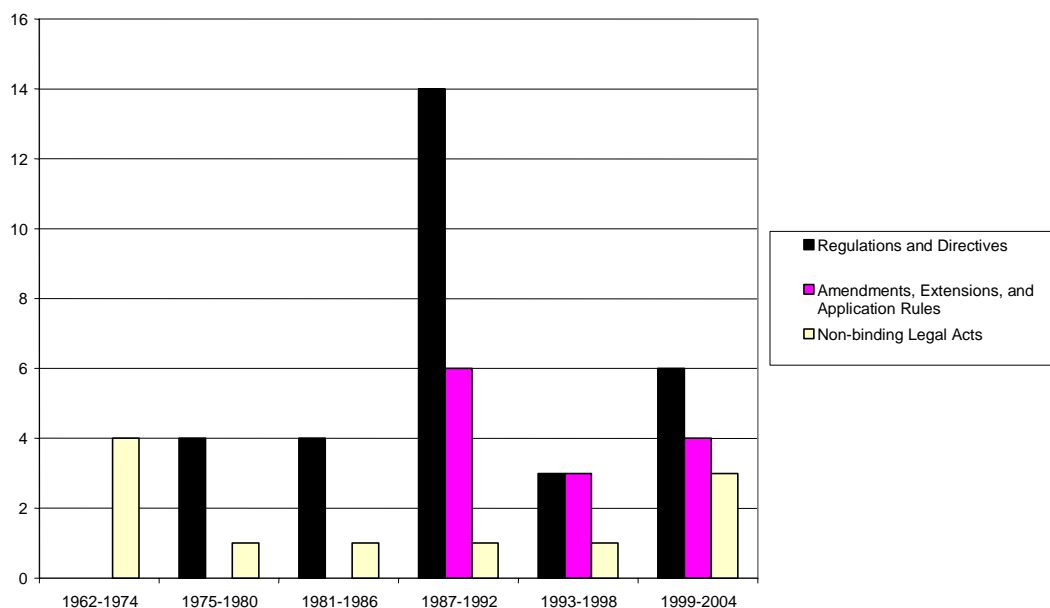
¹⁰ Source: see note 9.

¹¹ Source: see note 9.

workers, qualified majority voting was introduced by the Single European Act. In working conditions, the Maastricht Treaty changed decision rules from unanimity to qualified majority voting for a substantial amount of issues covered by this category. In order to check whether soft law primarily occurs in areas where hard law is hard to adopt, we also consider an issue area where the EU does not have an explicit competence to adopt binding legislation. This is the case for measures relating to family, youth and elderly people.¹²

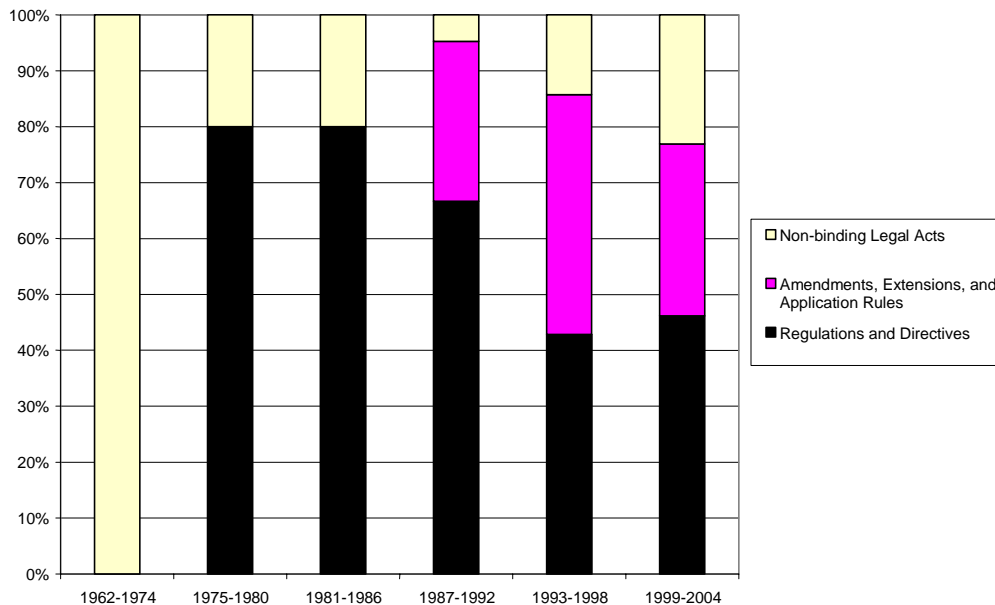
In health and safety of workers, hard law clearly prevails. There are 44 binding legal acts, including thirteen amendments and extensions, compared to only eleven non-binding policy outputs. After qualified majority voting was introduced in 1987, binding policy outputs have increased. Prior to the Single European Act, eight binding policy outputs had been adopted, whereas since the Single European Act, 23 binding legal acts and thirteen amendments and extensions have been passed (Figure 11). The share of soft law has increased since the late 1980s on a small scale. However, soft law was more prominent before the Single European Act. If the whole period from the emergence of the issue area onwards is regarded, the share of soft law has not increased at all (Figure 12).

Figure 11: Absolute Number of Legal Acts: Health and Safety of Workers (N=55)¹³



¹² It could be argued that we should not expect *any* binding legislation in areas where the EU has no explicit competence to adopt such measures. However, our analysis of the Treaty provisions in environmental and social policy above has shown that binding pieces of legislation were adopted in both areas even before the introduction of explicit competences for the respective issues. It has always been possible to use the subsidiary competence provisions of the Treaties to circumvent a lack of explicit competences. However, our argument here is that adoption is harder to achieve in the absence of an explicit Treaty base. Not only do such decisions generally require unanimity in the Council, but they are also more prone to being challenged on subsidiarity grounds.

¹³ Source: see note 9, assignment to the issue area according to the title of the legal act.

Figure 12: Ratio of Legal Acts: Health and Safety of Workers (N=55)¹⁴

The same pattern of development can be observed in the issue area of working conditions. Binding legal acts by far outnumber non-binding policy outputs. There are 27 binding policy outputs and eleven amendments and extension of binding legal acts. Eleven policy outputs are non-binding. After qualified majority voting was introduced in 1993, the amount of hard law has increased. While ten binding policy outputs and four amendments had been passed before 1993, seventeen binding legal acts and seven amendments have been adopted since 1993. Soft law has also increased slightly in absolute numbers. There were four non-binding policy outputs before the Maastricht Treaty and seven after it (Figure 13). However, the share of soft law has not increased since 1975 when the first non-binding policy output was adopted (Figure 14). Both issue areas, health and safety of workers and working conditions, do not support the hypothesis of a steady increase of soft law at the expense of hard law. Rather, they provide evidence that soft law is regarded as second-best option which is replaced by hard law if possible. The introduction of qualified majority voting boosted the adoption of binding legislation in both sub-areas, whereas soft law either decreased or remained on a low level.

¹⁴ Source: see note 9, assignment to the issue area according to the title of the legal act.

Figure 13: Absolute Number of Acts: Working Conditions (N=49)¹⁵

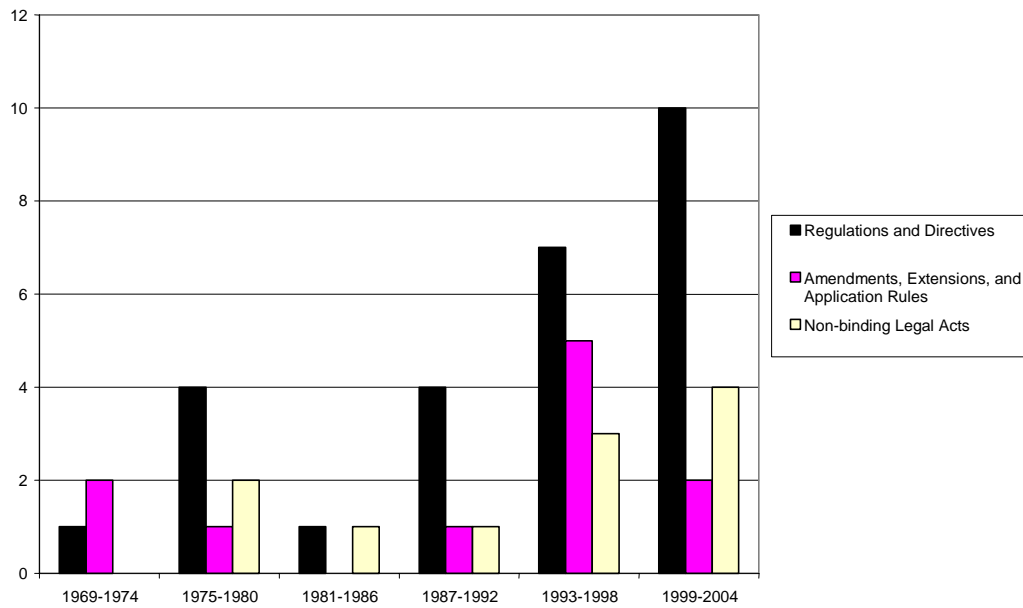
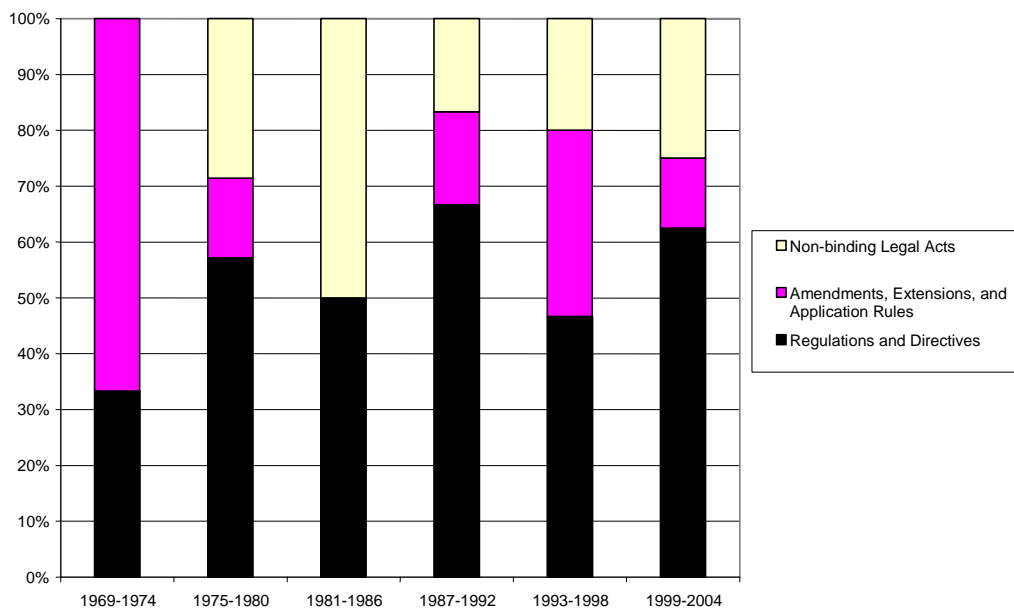


Figure 14: Ratio of Legal Acts: Working Conditions (N=49)¹⁶



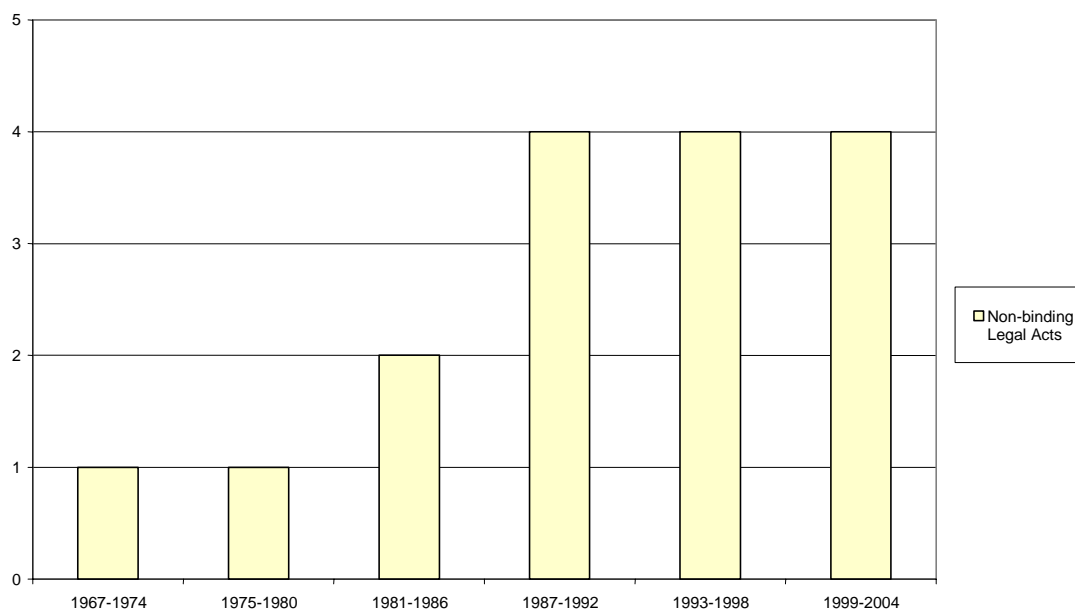
The observation that institutional arrangements affect the choice of the legal form of policy outputs is also supported by those issue areas where the EU does not have an explicit competence to adopt binding legislation. In family, youth, and elderly people hard law is absent and all existing regulations are non-binding (Figure 15). The same is true for the issue areas of

¹⁵ Source: see note 9, assignment to the issue area according to the title of the legal act.

¹⁶ Source: see note 9, assignment to the issue area according to the title of the legal act.

disabled people and horizontal provisions of social policy. In contrast to the development of policy outputs in environmental policy, which does not support any of the two hypotheses developed in the Introduction, the observation of issue areas of social policy gives evidence that soft law is primarily introduced in those issue areas where decision rules prevent the adoption of hard law and that hard law substitutes soft law if decision rules are changed from unanimity to qualified majority voting.

Figure 15: Absolute Number of Acts: Family, Youth and Elderly People (N=16)¹⁷



6. Comparing Environmental Policy and Social Policy

Comparing environmental policy and social policy, two different patterns of quantitative development of legal acts can be observed (Figure 16). In both policy domains, the number of legal acts has steadily increased. In 2004 there was a total of 590 policy outputs of European environmental policy and European social policy. However, in environmental policy binding legal acts show a stronger increase than non-binding legal acts. The gap between binding and non-binding policy outputs is widening in favour of the former. In contrast, legal acts in social policy show a parallel development. Both binding and non-binding policy outputs increase by the same amount. Since 1984 there have been more binding legal acts in environmental policy than in social policy. Non-binding policy outputs of environmental policy have not exceeded non-binding policy outputs of social policy at any time. The number of legal acts has grown faster in environmental policy than in social policy (Figure 17). Until 1987 there were more legal acts in social policy than in environmental policy, but since 1988 legal acts of environmental policy have exceeded those of social policy.

¹⁷ Source: see note 9, assignment to the issue area according to the title of the legal act.

Figure 16: Comparing Increase I: Environmental Policy and Social Policy (N = 590)¹⁸

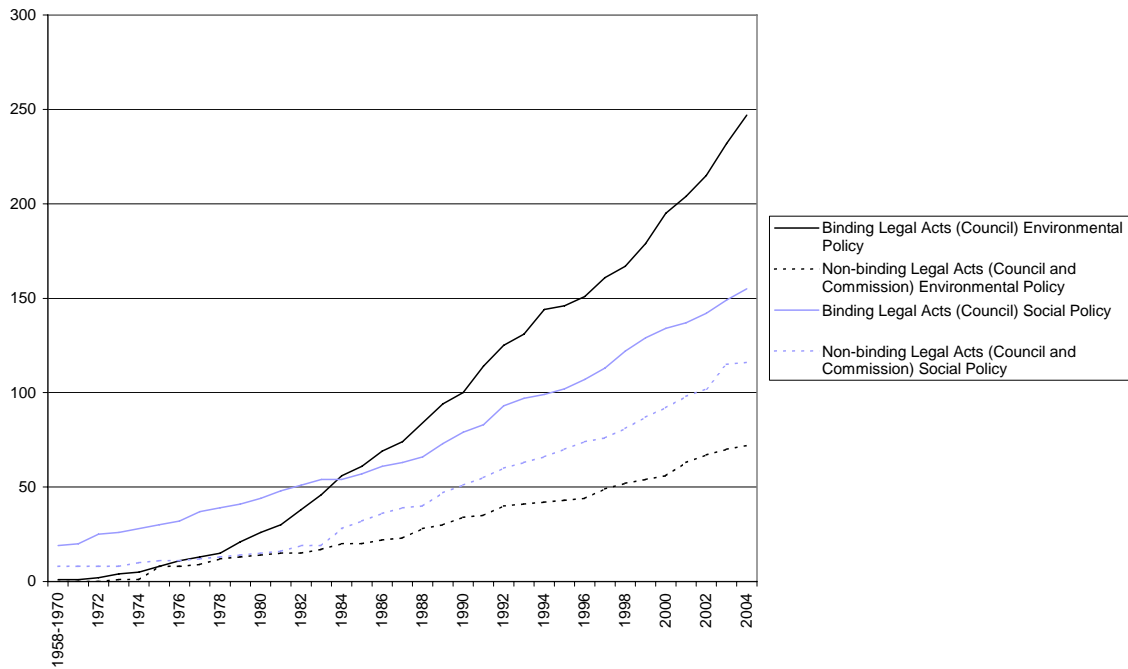
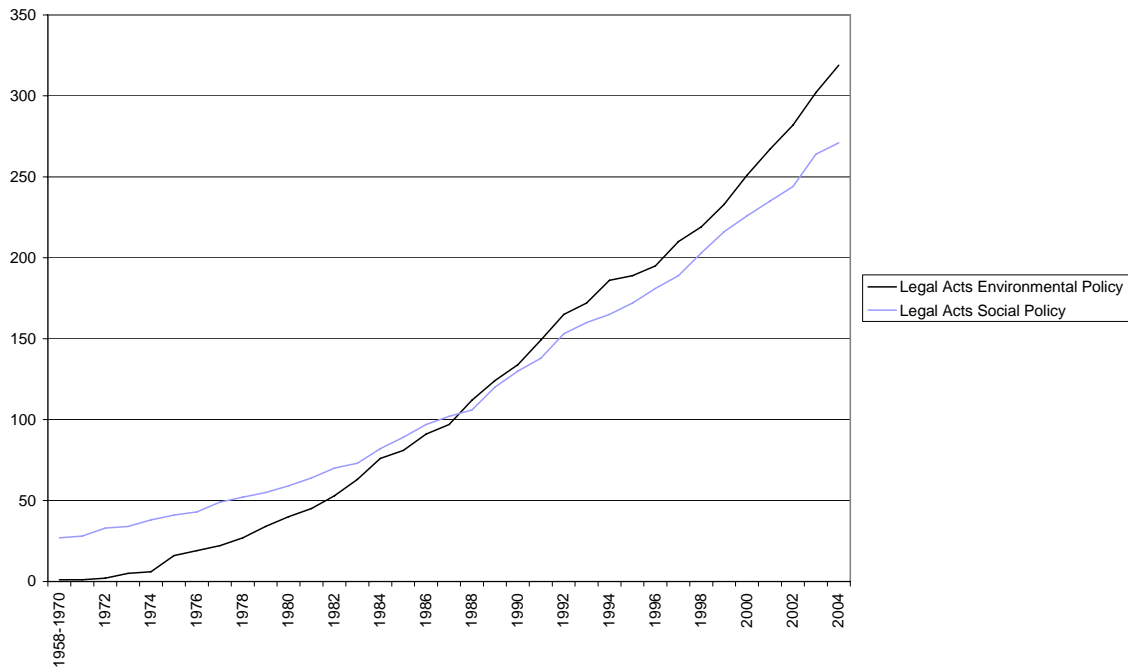


Figure 17: Comparing Increase II: Environmental Policy and Social Policy (N = 590)¹⁹



¹⁸ Source: see notes 2 and 9.

¹⁹ Source: see notes 2 and 9.

7. Conclusion

This paper addressed the expansion of the Community Method in European environmental policy and European social policy. First, we looked at the expansion of decision-making procedures and competences. This analysis revealed that the expansion of explicit legislative competences and the proliferation of qualified majority voting was a much more protracted process in social policy if compared to environmental policy. It seems that member states have been more reluctant to cede sovereignty in social policy. This is also corroborated by the fact that more issues are still subject to unanimity in social policy and that there is a number of issue areas where binding legislation is explicitly excluded. Second, we analysed the development of binding policy outputs/hard law and non-binding policy outputs/soft law in both policy areas. The type of legal output was taken as an indicator to distinguish between the Community Method and more intergovernmental forms of European policy processes. Despite the overall similarity of European environmental and social policy, binding and non-binding policy outputs have developed differently in both policy areas. While both areas have seen a steady growth of all types of legal instruments, environmental policy was marked by a permanent prevalence of hard law. The gap between hard law and soft law is even widening in environmental policy. In contrast, soft law plays a more prominent role in social policy, although binding policy outputs still outnumber non-binding ones. Both binding and non-binding policy outputs have developed roughly in parallel.

How can we account for these developments of legal output? The analysis of decision rules and the development of policy outputs at the level of sub-fields of both policy areas allows some preliminary conclusions. The hypothesis that there is a trend towards the adoption of soft law among political actors is not supported by the evolution of policy outputs in any of the two policy areas. The alternative hypothesis that soft law is regarded as second-best solution, which is replaced by hard law as soon as institutional arrangements allow it, is supported by the observations in social policy but not by the observations in environmental policy. The factor(s) specific to the respective policy area which accounts for this difference are not taken into account by this paper but might be the subject of further research. Differences between both policy areas which are relevant to the different development of policy outputs may be constituted by the type of policy problems. Problems in environmental policy might be more technical in nature, and they might be marked less by deep institutional embeddedness of domestic traditions than in social policy. Therefore, the level of political conflict might generally be lower, which facilitates the adoption of binding legal acts. In contrast, problems in social policy might be characterised by strong ideological beliefs, and possible European solutions might more often face deeply-entrenched domestic policy legacies. Hence, the level of political conflict might be generally higher, which prevents the adoption of hard law and only enables the adoption of soft law. Different types of policy problems which result in different levels of political conflict might explain why binding legal acts are dominant in environmental policy whereas non-binding policy outputs play a more prominent role in social policy. Further research is needed to clarify whether these tentative conclusions are true or not.

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