

Building a global economic regime through soft law

Abstract: This paper analyses a new, world-wide political debate on the issues of global economic coordination and regulation, exemplified by the Group of Twenty (G20). Major contending issues include the institutional aspect, i.e. who should regulate the global economy, the structural aspect, i.e. how this global regulation should be structured and organized, and the implementational aspect, that is how should globally-agreed principles and norms be implemented within national boundaries of hard law. In the Westphalian world of today, from the legal and political aspects, soft law system may open opportunities for coordinated policies to be successfully implemented on the national level. The paper firstly makes an overview of the global governance concept, analyzes the G20 agenda and presents the soft-law approach as probably the only feasible possibility to commence the process of creating a global economic policy / regulation.

Keywords: crisis; global governance; international politics; regulation; soft law

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1. Introduction

Since 2008, a world-wide debate about governing global economic relations has been gaining in significance. Many ideas, proposals and plans have been put on the table but much less of them have been elaborated afterwards and not many have been put in practice. Despite of numerous differences among the ideas and the actors, it is possible to outline two basic dilemmas: how to devise norms for the global, interdependent economy (with a proper governing structure to oversee their implementation), and how to devise a system to have the agreed norms implemented in practice. Furthermore, it is not surprising that major actors cannot agree on how this integrated and interconnected world should be regulated: should there be one global authority or a group of national authorities (which ones?) who would agree on basic regulatory aims and principles – thus avoiding or better managing future crisis? However, if we assume that this futuristic governance model will receive wider international support at certain point of time, will the present Westphalian order and the corresponding hard law system allow adequate governance structures to emerge? It is not easy to imagine whether and how nation states, as the ultimate norm-making authority will allow transnationally created norms to be implemented within their state boundaries. It is beyond doubt that the Westphalian system of states will remain the central concept in international relations for significant time in the future, despite being challenged by globalization and transnationalisation for a number of decades. Secondly, despite the crisis global effects, national policies and the related norms and measures have dominated efforts to manage the crisis. For a very long time, it has been widely and stubbornly held that policies can only be implemented if they legal, i.e. based on hard-law norms each state passes. Thirdly, almost all of the present international relations issues (including of course those related to the current crisis) are dealt with through a multi-layer political interplay with multiple levels of discussions/negotiations and numerous actors from various domains. Furthermore, intensive issue linkages from various domains of economics, finance, development, energy, social inclusion, ecology and food security present another challenge to the world economy and its regulation.

Some of the challenges outlined above may portray the scenery at which international community have started a political process aimed at designing new, global economic rules for this interconnected world economy. The Group of 20 (G20) has certainly taken the lead in creating a global economic policy forum, setting certain grounds for more coordinated national economic policies and maybe creating a basis for a world economic policy in a distant future. But, in the world of today, with firm state/legal boundaries that cut across global economy, soft law system may open opportunities for such coordinated policies to be successfully implemented on the national level.

2. Global governance and politics

For a number of years now, numerous and diverse political ideas, plans, statements and declaration were made on the causes of the current crisis and prospects of the world economy. Capital injections and nationalizations of banks, introduction of new safety nets and more stringent financial regulation, fiscal restrictions and many other measures have been implemented to manage the crisis effects. It has been widely accepted that the crisis will continue for several more years and that certain structural changes in global economic/financial order might be necessary. Since 2013, measures have started to focus sustainable economic growth, employment and further tightening of coordinated financial regulation.

Comprehensive global political interplay about causes of the crisis and steps necessary to revive global economic growth showed conflicting views and different proposals brought forward at various political and economic fora: expand state budgets / reduce budgets, less lending / more lending, etc. The intensity of these political processes and widening of their scope may lead to a conclusion that actors may chose

between different, multiple equilibria and a number of potential outcomes because structural changes today allow actors' strategic and tactical choices to interact with such changes. Various issues domains cross-cut each other and a multitude of actors emerge on such supranational scene (previously strictly reserved for governmental actors) of multinodal politics (Cerny, 2007: 2). Some authors also see this process as a relative disarmament of public authorities (Underhill and Zhang, 2006: 29). Cohen (2010) goes further and describes the structural changes as favorable conditions for the emergence of public-private hybrid regulatory regimes. Years before the current crisis, John Ruggie underlined that the present level of world 'fluidness' requires its total remake (Ruggie, 1993: 2). As the global economy and its various subsystems present some of the major areas of concern today, and as there are general calls for new/updated regulatory arrangements to be created (Sorensen, 2006: 7-9), the concept of global governance has to be introduced.

Global governance literature widely uses takes James Rosenau's explanation as a starting level: "... global governance is conceived to include systems of rule at all levels of human activity – from the family to international organizations – in which the pursuit of goals through the exercise of control has transnational repercussions" (Rosenau, 1995: 13). Dingwerth and Pattberg (2006: 186) distinguish "... global governance as a set of observable phenomena, and global governance as a political program", as two complementary ways of approaching and understanding it. Karns and Mingst (2009) develop the concept of global governance on the basis of the description provided by the Commission on Global Governance in 1995: "Governance is the sum of many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest." (Karns and Mingst, 2009: 3-4). It has to be particularly emphasized that, in addition to hard law (rules), international organizations and extemporized arrangements, Karns and Mingst include specific norms of soft law in the components of global governance.

Jordana and Levi-Faur (2004) underline that recent global developments point to a growing use of the notion of global governance in its broadest sense - as all mechanisms of social control, in contrast to a narrow understanding of the term as specific forms of governance with authoritative rules, monitoring and compliance enforcement. As such, new emerging regulation for global problems is characterized by partially voluntary agreements, lack of strong monitoring and enforcement rules and obvious disregard for the concept of national sovereignty. Kobrin (2002) sees the appearance of new global regulatory arrangements as deriving from 'patchwork' political structures in an interdependent world - actors easily overcome fluid boundaries, they adapt themselves and liaise with other actors in order to realize their interests. Kratochwil gives another dimension to regulation, especially from the international legal aspect: "...the real problems of praxis lie in the dilemmas created by colliding duties or in bringing a concrete problem under different descriptions which require (justify) different norms." (Kratochwil, 2013, 3). Kratochwil further implies that it would be more appropriate to create new agreements on certain shared practices than trying to force the application of existing norms which derive from universal principles (of market economy and economic regulation). These views had been previously extensively developed by regime theories of international relations, exemplified by Krasner (2007) who defines regimes "... as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in given area of international relations" (Krasner, 2007: 3). The regime theories are particularly useful when politics focuses specific issues or issue areas, for example, current international debates about cross-border financial regulation or the current economic crisis as a whole (its roots, consequences and modes of management to revive global economic growth).

Setting aside different views of the global governance concept, most of the literature

emphasizes its several key components: supranational arrangements, sets of rules and norms, actors' expectations, different layers and actors in the process, and necessary display of a certain level of representativeness, inclusiveness, efficiency, adaptability and fairness (Biersteker, 2011). In this sense, the next part of the paper gives a brief analysis of one of the global actors – G20, regarding its activities to update the existing economic regimes or create new rules and norms for the global economy.

3. Group of Twenty and global economy

In 1999, finance ministers of the major industrialized and emerging market countries created the G20, as a particular response to the financial crises in the last years of the decade but also as a model for larger inclusion of fast-growing emerging market economies in international deliberations. During the last several years, the G20 has outgrown its initial role and has become the major global forum for discussing global economic issues and creating new arrangements for global economy. It is thought that the group's rise resulted from several reasons, analyzed from Biersteker's point of view (2011). The current crisis has encouraged major economies to improve international cooperation in many economic and financial issue-areas, thus creating favorable conditions for the G20's role to expand greatly. Despite much criticism on its 'elitism', the G20 manages and controls a major part of the global economy, hence its relative representativeness. Since 2008, the group has been gathering not only finance ministers but also the members' leaders, thus increasing its legitimacy. Finally, the group itself has improved its structure and relations with other international actors (adaptability), and has managed to deliver certain results upon numerous commitments made by the members' leaders (efficiency).

Global political deliberations within the group have reached their peaks on the leaders' summits: the G20 summit meetings in Washington (2008), London and Pittsburgh (2009), Toronto and Seoul (2010), Cannes (2011), Los Cabos, Mexico (2012) and Saint Petersburg (2013). The summits had been probably planned to present the G20 actions as united and orchestrated but the five-year experience actually resulted in a series of compromises between the different agendas of the Anglo-Saxon pole and the continental European 'league', while only a few of the developing countries' proposals have been accepted.

During these last five years, the G20 agenda has changed its priorities and their ranking (Filipovic, 2011), under various paths of influence and on the basis of different individual values and agendas of the actors involved (Filipovic, 2012). Despite the particular actors' different agendas, a body of principles and rules (mostly in the financial area) has started to emerge shedding some light at a possible new world economic and financial order. Ocampo and Griffith-Jones (2010) emphasize that such an order should regulate all financial and capital markets on the global scale, create efficient emergency financing, control excessive indebtedness (particularly that of governments), provide guidance to national economic policies for global stability and guarantee a fair and effective international monetary system. A number of action plans and numerous proposals and measures to counter the current crisis were adopted at the summits, presenting the evolution of the G20 agenda as crisis effects widened in scope and depth. These changes not only involved changing agenda items (e.g., from private actors' risk taking to sovereign financing) and rankings (e.g., from the prominence of financial regulation in 2008 to that of employment in 2011), but also changes to the agenda's comprehensiveness (from financial regulation in 2008 to monetary and fiscal coordination in 2011 and employment in 2012 and 2013), its geographic focus (from the US in 2008 to Europe and the East in 2011, to Latin America in 2012 and Europe again in 2013) and modes of the Group's functioning (from the top leaders to specific ministerial meetings, newly formed tracks of work and the group's bodies).

The underlying objective of the first three summits (Washington, London and Pittsburgh 2008/2009) was to establish rules of cooperation and coordination in

financial regulation across and within national financial systems. That was particularly highlighted in Washington at time when the current crisis was still developing its full force. The leaders discussed the causes of the crisis and shared opinions on the needed regulatory reform and macroeconomic policies in the short- and medium-terms. The final document of the summit¹ presented an Action Plan, focused on improving transparency and accountability, strengthening international cooperation, developing sound regulation, and reforming international financial organizations. Following extensive political deliberations, the G20 London Summit in April 2009 produced three declarations targeting the economic recovery, financial system and resources needed to implement the plan of recovery². This summit was very important as it produced the first set of norms that were planned to guide further actions and/or maybe built a part of foundation of a new international economic regime. One can identify four different types of norms envisaged in the G20 London Summit documents: global standards (most binding, applicable to all countries: related to accounting standards and principles), internationally-agreed norms (subject to separate agreements: financial system regulation), best practice (desirable, recommended: activities of credit rating agencies) and a consistent approach (most flexible: basic principles of national financial regulation, for example, coverage and boundaries). The Pittsburgh Summit resulted in two important conclusions. As a sign of expanding the political community, the G20 should take over from the G8 the role of being the central/premier forum for creating a new global economic architecture. Secondly, leading intergovernmental financial institutions should be reformed to give more power to fast-growing economies.

In 2010, the summits in Toronto and Seoul showed that it was not sufficient only to react to financial distress and devise new financial regulation but also to include steering over macroeconomic policies (especially fiscal policy). Hence, it is not surprising that the Toronto Summit in 2010 showed the first signs of declining unity in dealing with the world economic problems. In contrast to the previous summits (at which only particular norms were sought to be developed), the G20 meeting in Seoul focused more on developmental issues, economic revival, employment and social protection³. Most importantly, the actors committed to developing of a common view of global economic problems, which might be seen as the birth of a set of principles or underlying values upon which a new global economic regime would be built and which would define the regime basic characteristics (Krasner, 2007). This new, common view should have macroeconomic policy as its centre, especially fiscal policy and debt reduction, as well as market-based currency policy.

The 2011 Cannes Summit⁴ resulted in certain changes as to the way the group functioning, with a new Task Force on Employment being set up and links with numerous multilateral organizations (e.g., IMF, ILO and World Bank) being enhanced. Another significant expansion of the supranational agenda targeted international monetary stability and excessive currency reserves, as well as a new regulatory category of market participants (global systemically important financial institutions - G-SIFIs).

The 2012 G20 Summit in Los Cabos saw noticeable agenda development, with five priority areas: economic stabilization and reforms, financial system strengthening and financial inclusion, remodeling the international financial architecture, improving food security and reducing the volatility of commodity prices, and promotion of sustainable development, green growth and sound environmental policies. Furthermore, it had become obvious that the group's dialogue with other international actors (the UN, international organizations, business sector (B20), experts, civil society, youth organizations), needed to broaden (Discussion Paper of the Mexican Presidency of the G20, 2012).

In 2013, when the G20 Summit in Saint Petersburg was held, discrepancies among actors in the global economy started to widen, with major industrialized countries starting their recovery contrary to the developing countries which still struggled economically and financially. The agenda targeted sustainable, inclusive and balanced growth and jobs creation on the global levels, through quality jobs and investment

¹ Full text of the document available at <http://www.g20.org/images/stories/docs/eng/washington.pdf>

² Official text of the documents available at <http://www.number10.gov.uk/Page18914>

³ Full text of the final document available at <http://www.g20.org/images/stories/docs/eng/seoul.pdf>

⁴ Available at <http://www.g20.org/images/stories/docs/eng/cannes.pdf>

(dealing with structural unemployment, vulnerable groups, food security, infrastructure, human capital), trust and transparency (IMF reform, government borrowing and fighting corruption), as well as through effective regulation (of finance, trade, energy and green growth)⁵. A need to develop mutual confidence, enhance the principle of fairness and create an overall set of rules was highly emphasized: “We understand that sound and sustainable economic growth will be firmly based on increased and predictable investments, trust and transparency, as well as on effective regulation as part of the market policy and practice. As Leaders of the world’s largest economies, we share responsibility for reinforcing the open and rules-based global economic system”⁶.

Researchers from the University of Toronto (Kirton et al, 2012) have analyzed the G20 performance on the basis of several criteria, such as domestic political management, setting directions for international principles and norms, creating adequate decision making process (to deliver clear collective commitments of binding nature), the members’ compliance level, and the development of global governance (both within the G20 and in relation to other international organizations). Taking all this into consideration, it might be concluded that a general performance of the G20 has improved since the first summit in 2008, although such a trend has not been even in all aspects. For instance, the general level of commitment was the highest after the first summit in 2008 (+0.67), then it gradually declined (London, Pittsburgh, Toronto in the range +0.23 to +0.28) and again improved in 2012 (+0.55)⁷. (Kirton, 2012: 2). In the period 2008 to 2012, the G20 members’ individual compliance averaged to +0.34. The highest compliance was achieved with the regard to the IMF reform and development, while the commitments made in the domains of structural reforms and financial regulation were much less complied with. The domain with the lowest level of the G20 commitments has been trade, i.e. commitments to refrain from protectionism (-0.35).

If we understand international regimes a possible form of global governance (Krasner, 2007), the basic principles and norms of a global economic policy defined by the G20 could be outlined as follows. Markets should remain open and liberalized (including the norms of diminishing state intervention, structural reforms of labor market and tax systems, etc), as well as international trade (with the norms to eliminate protectionist barriers). States should consolidate the fiscal policy (through the norms of fiscal deficit reduction and debt stabilization). International liquidity is of the highest importance, hence international financial institutions should be modernized while liquidity surveillance should be reinforced. Financial regulation should be strengthened and internationally coordinated for the financial markets to keep their integrity and transparency, relying on the norms of global accounting standards, higher capital base for banks, integrated stress testing mechanisms, etc. “The G20 can further promote financial regulation through enforcement of the new rules at the national level and establishment of a monitoring system by relevant international institutions action on the mandate from the G20. Such ‘leadership by example’ can help boost the G20 status as an effective and legitimate global governance forum” (Mapping G20 Decisions Implementation, 2012: 7). So, norms were designed and commitments made but what is left as a critical component in devising a global economic policy is their implementation at the national level.

4. Soft law and the lack of precise definition

Legal relations between the participants in the global economy are extremely dynamic, and legally binding norms are not always applicable. Legal relations between national authorities are not regulated only by contracts but also by international agreements in some areas. According to Goldstajn (1967: 2) “... normativism is an illusion, since it expects solution only by adopting legislation”. Goldsmith and Posner (2005:16-17) point out that theorists very seldom consider international law as a separate category within international relationship. Even international financial regulation is not considered to be law. Instead, the law is seen as the product of balance of power between

⁵ Details available at http://en.g20russia.ru/docs/g20_russia/priorities.html

⁶ From: <http://www.g20.utoronto.ca/2013/2013-0906-declaration.html> (retrieved 28. 11. 2013)

⁷ University of Toronto G20 Research Group assesses the compliance level in the following way: +1 is full compliance, 0 is partial compliance or work in progress, while -1 is non-compliance with the agreed commitment.

states. This results in dependent position of states in relation to the independent position of regulatory bodies or organizations as factors in the creation of financial regulation.

In the global, dynamic economic context, the weakness of normative approach to regulate such relationship has become apparent. Hence, numerous national as well as international organizations and other nongovernmental organizations have taken active role in resolving the unregulated market (and other social) relationship, by a new way of adoption and application of legal norms. International legal instruments have obtained predominance compared to the domestic law due to process of legal harmonization. Soft law has become an additional mechanism of the internationalization, i.e. the unification of law at the international level.

Soft law is an instrument that today practically represents a new source of law, but it does not have classic, well-defined features as a source of law, neither in the formal nor in the material sense. In a special way it is the opposite of the international imperative norms, what is commonly called *jus cogens*. While *jus cogens* still meets some basic, general, normative standards, especially with regard to the principle of legality, it becomes very controversial when it comes to soft law.

For academic community, the definition of the term soft law is quite controversial. Hard law is based on the legal norm of rule of conduct whose realization is guaranteed by the authority of state, therefore, it is based on the obligation. In contrast to hard law, the concept of soft law has not yet been fully developed, as it indicates a wide range of phenomena such as principles and tenets, model laws, recommendations, opinions, policies, codes of conduct, resolutions. There are three specific directions for defining soft law in the current theory.

The first group of theorists consider the issue of legal obligation key criterion in defining the concept of soft law. Due to the absence of obligation in soft-law norms, it can not even be considered law. Thus, Arend (1999:25) defines soft law as an "oxymoron" because "if a rule meets the criteria of law, then it should be called law". Weil (1983:413-442) states that "the norms that do not bind are neither soft law nor hard law, they simply are not law at all". Some authors in this group still attach certain importance to soft law because it can be a step towards hard law. (D Amato, 2008)

The second group of authors advocate a view that soft and hard law can coexist, recognizing in this way certain of the positive features of soft law. Although it does not have the binding character, it shapes expectations of subjects because the behavior on the basis of such rules as considered being compliant conduct (Guzman, 2005:591). Other authors in this group, e.g. Snyder (Snyder,1995:51-87), define soft law as set of rules that do not have legally binding force but still produce some legal consequences in practice.

The third group of authors (Abbott, Snidal, 2000:421-456) does not speak about the legal obligation of soft law, but its definition associate with specification of the undertaken obligations that distinguishes soft law from the classical legal instruments. These rules are not considered legally binding by themselves, but are designed with the expectation that they will be given the force of law, through national legislation or binding international agreements. Some authors (Mayer, 2010) specify that soft law can be a basis for the creation of domestic legal rules or an asset for interpretation of hard law in some areas.

There is no doubt, however, that this is a term that is used in an interdisciplinary / transdisciplinary discourse, somewhere in the intersection of law, economics and politics (Vuletić, 2011:1012). In this context we could conditionally define soft law as a non-binding normative framework whose implementation is conditioned solely by the will of the norm's addressee. The definition of soft law by the concept of normative framework helps to differentiate soft law from mere political promises. Thereby, the normative framework includes everything that formally resembles positive law in the form of a legal document, such as declaration, recommendation, goal-setting, etc. It certainly raises the question whether the soft law is law, which is the issue on which there is no consensus in the academic community, but also exceeds the scope of this paper.

So, soft law is a complex and contradictory phenomenon, with positive and negative sides. Its existence blurs the boundaries between positive law (legal regulation) and agreements (non-legal regulation) i.e. norms without built-in obligations. The principle of good will in the fulfillment of the undertaken obligations forms the basis of an agreement (Bunčić, 2012:281). Formal non-binding feature does not always reflect its non-binding essence. Different mechanisms stimulate exactly this side of soft law. Moral pressure, public statements, warnings, reprimands, naming and shaming, conditioning, granting or denial of assistance/support as well as all other non-legal sanctioning instruments, act even with more force and have strong influence on conduct of entities to which they are addressed. Control over the society has always relied not only on the legal framework of sanctions but also on the use of alternative mechanisms of regulation of social relations that do not entail direct legal obligation, and which were often more powerful than the law itself (Meyer 2009: 891-892).

The role of soft law has become increasingly important in the European Law, exemplified by the way the Lisbon strategy regulates mutual relations. This indicates that the higher degree of cohesion in a community (such as in the case of the EU), the simpler and more efficient application of soft law. According to some opinions (Peters, Pagotto, 2006:29), the existence and application of soft law is a sign of a strong society in which there is no need that all provisions are governed by hard law stipulations.

As the sources of soft law are present in the EU law besides primary and secondary sources of law, some authors consider soft law as a new source of law and they speak mostly about tertiary law source in the EU (Sender, 2004). Accordingly, soft law creates *de facto* legal effects in contrast to legally binding norms that create *de iure* legal effects. On the other hand, soft law is a reality from which we can not escape, and will likely continue to expand its reach, increasingly turning into a surrogate for hard law. Soft law certainly has some advantages due to which many countries accept it, a trend which will later be explained by the emergence of hybrid theory.

5. Legal nature of soft law

When discussing the legal nature of soft law, according to the legal realism, it is necessary to debate not on the legal nature of the law but about its purpose. This raises the question of the law function in the social system. The law has a very specific task of regulating rules of the social game for achieving particular interests, while the society is understood as a field of egoistic competition for scarce resources (Von Jhering, 1999:18-19). The law is therefore only the instrument by which motives and intentions of social actors are being made predictable or being used, where it seeks to provide a more complete protection of the interests of all participants. So, the legal nature of soft law can be determined in relation to the nature of hard law. It can be concluded that soft law is a more flexible instrument in comparison to the classical legislative method of regulating social relations. This is particularly evident regarding the issues where state is reluctant to give up its rights to achieve the defined (political) objectives while economic reality call for a different approach to the regulation of new relations. The central question about soft law is why it is used at all. One can imagine several reasons why a state sometimes prefers to avoid a given international commitment altogether (Guzman, Mayer, 2010:175). Consequently, the role of soft law and its legal nature can be better understood through the analysis of its function.

The literature offers interesting and fundamentally correct categorization of the three basic functions of soft law. The first is as a pre-law function when soft law paves the way for the creation of the provisions of hard law. The second function is law-plus function, when soft law is used for filling legal gaps and interpretation of hard law. The third is its para-law function, when it compensates the lack of hard law provisions, under the conditions that these two laws are complementary and their interaction produces positive outcomes (Peters, Pagotto, 2006:22-24).

Besides national governments, other organizations (including the G20) also rely

on the use of a wide range of legal instruments of both hard and soft law (strategies, opinions, recommendations and declarations of national and international bodies), in order to find a mix that would be more suitable for the current dynamics of economic and political relations. In order to achieve their defined goals, the state themselves, as well as international organizations, use these soft-law instruments sometimes alone and sometimes combined, because each of them has specific advantages and disadvantages. Hence, numerous instruments (often resulting from the interaction of legal instruments of hard and soft law) are used today in the creation of new national and international law.

Due to the large number of soft-law instruments, particularly in the regulation of the intra-EU relations, previously pointed out, we believe that soft law can be seen as a new source of law. It follows that the European Court of Justice and national courts in the EU, in cases where European law is applicable, can use soft law as a tool for interpreting the European law provisions. The complexity of relations within the EU and the need to regulate such relations give further impetus for interaction among European law and the instruments of soft law. Trubek, Cottrell and Nance (2005:321) have developed a hybrid theory of soft law of the European integration. They find that there is a need for a synthesis of these two areas, while examples of this interaction can be found in the European Law in the areas of fiscal policy and employment policy.

In addition, soft law can be an instrument that affects the conduct of governments. It can be the basis for dispute resolution in different relations when governments are pressured by permanent public disclosure of critical information, forming black lists or by highlighting the unacceptable conduct in areas where it is desired to achieve a certain degree of regulation. Recourse to the regulation of certain relations through soft law has another advantage for governments. A higher degree of depersonalization of the creator of legal norm makes opportunities for greater political voluntarism, possible experimentation in norm setting, and promotion of particular political, economic and other interests. Depersonalization of those who create soft law largely frees them from the responsibility for the possible outcomes. Political responsibility for domestic law is borne by parliamentary authorities, while for responsibility for soft law is borne by a relatively imaginary international community. All this leads to serious soft law deficiencies in terms of legal certainty, the principle of equality and with regard to a number of other values that are the foundation of the rule of law (Falkner, 2005: 201). This also represents one of the shortcomings of soft law as a flexible instrument of social relations regulation.

We can conclude that due to differences in the legal nature of hard and soft law, in legal theory, soft law is accepted as a fact but not as a source of law. Recent hybrid theories open the way for the definition of this law as a mixture – the interaction of soft and hard law. Such interaction creates further challenges and a tendency of “hardening” soft law, which leads, if not towards hard legal norms, than certainly towards custom creation (Bunčić, Filipović, 2011:3754-3755).

6. Forms of soft law in financial regulation

The area of international financial regulation takes advantage of soft law. In contrast to areas such as international trade, where international treaties represent the basis of regulating relations among states, international financial relations are mainly regulated by agreements. These agreements are not binding and do not have the form of legally binding contracts, which is considered as their main advantage. They help the parties to limit risks of unknown associated costs and to accept the agreed standards with more ease. On the other hand, the absence of any obligation can also bring a cheap way out of the commitments without any legal consequences. For this reason, some authors (Gersen, Posner, 2008) do not accept soft law as a regulatory tool. Hence, in the absence of the parties' obligation, the pressure to accept financial standards does not come from legal norms but originates from specific economic, political, and sometimes military conditions.

The main legal instruments of the G20, which represent the instruments of soft law, are “communiqués” and “declarations”. These legal documents are usually published at the end of the summit and inform the general public about the reached agreements.⁸ The leaders of the G20 use them to express their common positions on all major issues from the summit agenda. “Communiqués” also contain information about future initiatives and tasks of the international bodies responsible for their implementation. The soft law instruments (communiqués), as we have mentioned earlier, are not binding. In order to give them more weight and ensure their implementation, working groups are formed within the G20, in charge of issues (international accounting standards, prudential management, etc.). The working groups, in addition to the obligation of harmonizing the rules adopted in certain areas, are obliged to monitor the implementation of agreed rules and prepare reports on that. Public disclosure of such reports contribute to expanding of the range of soft-law instruments.⁹ Their use as an instrument of soft law can be confirmed through the creation of reports on the progress in certain areas and official/public display of progress (in particular sub-areas and by individual members) compared to the previous summit¹⁰, clearly putting soft law at the intersection of law, economics and politics in the globalized world.

The G20 has inter alia an important role in the creation of international financial regulations to ensure greater financial stability. The Financial Stability Board (FSB) has been established to facilitate the achievement of that objective, with its primary task to cooperate with IMF and ensure early warning of rising macroeconomic and financial risks. Specifically, the FSB has issued a series of broad recommendations and principles to strengthen the global financial system, including the Report on Enhancing Market and Institutional Resilience, aimed at improving banking capital adequacy requirements, accounting standards and margin requirements for certain trading activities¹¹. In this way, the FSB and other working bodies carry out the implementation of accepted standards and control of national bodies responsible for the implementation of standards.

Conclusion

An aspect of soft law which still remains questionable is how to ensure a higher degree of implementation of international agreement concluded / commitment taken at the national level. As noted earlier, numerous commitments (as agreed principles, rules and recommendations) have been made by the G20 members but the compliance to the commitments has neither been complete nor even among the members. If the EU is taken as a basis for comparison, we should consider a particular method used by this community to enable the implementation of the agreed rules at the national level. The analysis of different management methods in the EU and its supranational regulation might prove useful in assessing the application of same/similar methods by the G20, if a global economic regime is to be built. Besides a particular amalgamation of soft law and hard law elements, known as the hybrid theory, the most effective method in the EU is the Open Method of Coordination (OMC). For the first time, Open Method of Coordination appears in the 2000 Lisbon Strategy, which itself is a specific source of soft law within the EU. OMC is defined as a voluntary process of political cooperation based on an agreement on common goals and common measures for achieving them. National governments of the EU members include those goals in the national legislature and inform the EU about it through national reports. So far, OMC has become the most flexible approach to managing the EU, as it is based on the agreed (harmonized) criteria that allow their addressees materially and formally different ways of application and are not legally binding. Since the adoption of the Lisbon strategy, this method has been considered as an alternative to intergovernmental agreements and many of the classic methods of decision-making in the EU. Regardless of the field of application, OMC usually includes the following instruments: guidelines, practice sharing, multilateral surveillance, indicators, interactive process, the implementation in national legislation (Humburg, 2008). Mechanisms similar to OMC were applied by the Organization for

⁸ For the list of communiqués, see Communiqués, G-20, http://www.g20.org/pub_communiques.

⁹ See G-20, G20 Working group 1: Enhancing Sound Regulation and Strengthening Transparency, at i–ii, xvii, 1, 22, 40–41 (Mar. 29, 2009), http://www.g20.org/Documents/g20_wg1_010409.pdf; G-20, G20 Working Group on Reinforcing International Cooperation and promoting Integrity in Financial Markets (WG2) 11–12, 36–37 (2009), http://www.g20.org/Documents/g20_wg2_010409.pdf.

¹⁰ See, e.g., G-20, Progress Report on the Economic and Financial Actions of the London, Washington and Pittsburgh, G20, Summits (2010), http://www.g20.org/Documents2010/07/July_2010_G20_Progress_Grid.pdf (describing the progress and next steps to be taken on various summit commitments).

¹¹ See FIN. STABILITY FORUM, Report of the Financial Stability Forum on Enhancing Market and Institutional Resilience 13, 18, 25 (2008), http://www.financialstabilityboard.org/publications/r_0804.pdf.

Economic Co-operation and the IMF in the creation and implementation international financial regulation. So, even before its application within the EU, methods similar to OMC were used as instruments of soft law. Although the goal of the G20 is not the creation of supranational rules to counter the communitarian European law, the application of this method would facilitate the implementation of the commitments made by the group members.

In the EU, OMC has four levels of the implementation. At the first level, the European Council adopts the objectives and provides guidelines for their implementation (similar to the G20 final declarations after a summit). At the second level of OMC application, the European Council determines quantitative and / or qualitative indicators for assessing the effectiveness of the implementation of the objectives, following proposals of the European Commission or independent bodies. Correspondingly, various G20 working groups set indicators and monitor, for example, international standards in accounting, prudential management, capital adequacy of banks, etc. In both cases, the results achieved in different areas are then published or discussed. The third OMC level is implementation of agreed goals on national and / or regional level, but taking into account specifics of each national system and its path/level of development. Compared to the G20, this is a level that makes a critical difference in the terms of implementation. Regarding the work of the G20, it can be concluded that the third level of implementation (as in the EU) has been achieved only in certain financial areas (accounting, payments). As for the other, numerous commitments made and goals set by the G20, their implementation has still not reached this level. At the fourth OMC level, mutual assessment of the achieved results is done at the level of the European Council. Regardless of complex and multiple differences between the EU and the G20, one can see space for the OMC replication in the G20 efforts to create a new, global economic and financial regime through inter alia supranational regulation. This primarily refers to the OMC advantage of being a flexible model that can adapt to different circumstances, strength of the actors, issue-areas and their cross-linkages, etc. Its flexibility relies on several elements: time duration, type of expected results, the number of participants, the role of common institutions and the level of achieved mutual alignment in the particular field of application (issue area). Applied to the work done by the G20, perhaps the level of members' compliance would rise if the group would improve the cooperation with its members (in line with OMC method), not only in the formulation of declarations but also in clearly establishing common goals. In this way, the members may find it easier to make progress in implementing the agreed objectives. It would create new supporting processes in which member states should present more detailed plans of possible implementation (Meyer, Barber, Luenen, 2011: 18). In addition, the implementation of OMC would allow all the G20 members to be permanently included in the process. This would transform the present mechanisms for the preparation of summits and the adoption of common positions into a method i.e. an institutionalized mechanism that would foster the implementation of the agreed objectives. If this path is taken, two main challenges lay ahead: the non-binding character of OMC and structural differences among the G20 members, the latter limiting application of the principle "one measure for all". Facing these challenges probably requires hard work on combining this method with other soft-law instruments.

Another possibility for creating wider conditions to implement the G20 commitments is a synthesis of soft and hard law, known today as the hybrid theory. As noted, there is already interdependence between soft law and traditional sources of law in the legal system of the EU. Soft law provides a framework and guidelines and the concretization is done through hard legal norms. The complexity of the overall EU economic structure creates a need for interaction between hard and soft law. Thus, according to Trubek, Cottrell and Nance (2005), the hybrid theory of soft law of the European integrations is created, exemplified by the European system of fiscal coordination. Namely, the basis for fiscal coordination in the European Union is based on soft-law instruments (guidelines for economic policy and similar). However, this

system at the same time determines certain legally binding rules, such as the maximum permissible level of the member's budget deficit, with financial penalties for surpassing it¹². The question here is not about the effects of soft law, but about its syntheses with primary, hard EU law, particularly in the cases the EU faces complex and potentially contradictory objectives (Trubek, Cottrell, Nance, 2005: 34).

A need for interaction between soft and hard law also appears in the operations of the G20. The increasing number and complexity of the economic and social processes in the global economy require a higher degree of coordination and the necessity of relying on soft law in governance. Anything that is law-like can be described as a form of soft law, including formal written documents signed by states (which are not treaties); informal exchanges of promises through diplomatic correspondence; votes in international organizations; the decisions of international tribunals, etc. There are so many different forms/instruments of soft law that it is often more fruitful to think of it as a group of instruments, rather than a single one (Sheppard, 2013). There is a fear among some G20 members that an increased role of soft law can lead to loss of control over the process of political decision-making and management of their governments. However, the complexity of relationships and the need for ever increasing coordination process indicate that the soft law is inevitable as a special instrument of governance. Greater government commitment to the G20 agenda is therefore necessary in establishing common goals, in order to create at least a minimal framework to which they would be bonded and ensure its incorporation it into national law. This would create a possibility for the interaction of soft law and (in certain areas) hard law, thus probably enhancing the probability of a successful international regulation of (at least some) global issues and maybe even a global economic regime at certain point in the future.

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¹²Article 126 UFFU

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