

Studying EU Soft Law Effects in Social Policy



1 Introduction

This working paper presents the results of research carried out by the social policy team of the SoLaR network. The research examined how the Commission's guidelines and recommendations in the field of EU social policy take effect in a number of Member States: Finland, France, Germany, Italy, the Netherlands, UK and Slovenia. We look at the transposition into the national legal order and complement insights with exploratory interviews with administrative authorities and judges regarding their view and their use of EU social soft law. The paper consists of two parts. The first section introduces the policy area and sheds light on the substance and policy-making process of the soft law instruments studied. The second part turns to the selected Member States. We comparatively assess the effects soft law took and discuss cross cutting aspects.

2 The policy area and its soft law instruments

EU social policy has been a relevant policy field since the beginning of the EU integration process and the amount of legislation has grown over time. Yet, compared to the other policy areas studied in the SoLaR project the overall width and depth of EU integration is limited. Competences remain largely at the national level. Unlike national social policy, a core area of national spending policies, EU social policy is mostly regulative (Majone 1993; Hartlapp 2019) with some spending instruments only, importantly the European Social Fund. Soft law in this field has been studied mostly in form of the Open Method of Coordination (see for many, Dawson 2011), yet, it spans a wide range of instruments.

This Working Paper explores effects of soft law across seven Member States (France, Finland, Germany, Italy, Netherlands, Slovenia and UK). We selected three instruments to be studied in each of the Member States. First, the Recommendation on Investing in Children (2013/112/EU) is part of the social investment package for growth and cohesion (SIP). Issued in an area with little EU competences it operates through setting guidelines and issuing Member State specific recommendations, similar to the much studied OMCs. Second, the *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement* (European Commission 2010) is connected to the EU public procurement regime. It does not simply give advice on day-to-day implementation questions, but steers the hitherto existing interpretation of hard EU public procurement law into a new direction (see below). Third, the Commission Recommendation on Transparency in Equal Pay



(2014/124/EU) is linked to primary law on equal treatment as well as more specifically to secondary law in form of the equal treatment directive 2006/54/EC. This link is somewhat weaker than for other instruments studied in the SoLaR project (e.g. in environmental policy) so far, as the equal treatment directive does not directly address transparency in pay. All three instruments were adopted in a relatively short time span at EU level (2011-2014). This allows to keep context factors at the national level relatively stable which in turn sharpens our understanding of similarities and differences between the three instruments when taking effect at the national level. Notably these differences concern a) the type of soft law instrument and its connection to hard law, b) the substantial focus and c) their origin inside the EU institutions. Regarding the type of soft law instrument two of the instruments are recommendations adopted by the Commission, while the third is a Guide published by the Commission and as such is an instrument type not addressed in the treaties. Concerning substantial focus, two instruments clearly address social policy issues (child poverty and transparency in equal pay). The third instrument is situated at the intersection of economic and social policy (social goals in public procurement). Finally, looking at the origin of the instruments, they were drafted by different actors at the EU level. The Buying Social Guide stems from the desks of DGs EMPL/ Unit D.2 and MARKT/ Unit C.3, while the Recommendations on Investing in Children and Equal Pay Transparency are drafted jointly by DGs EMPL and JUST.

The following sections introduce the substance of each of the instruments and provides an overview of their formulation at EU level.

2.1 Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement

The Buying Social Guide was drafted in October 2010 and published in 2011. It is part of the EU public procurement regime that contains hard law as well as a number of soft law instruments. Generally these soft law instruments aim at improving implementation and increasing coherence between the legislative ‘spirit’ and daily procurement practices in the Member States.

EU public procurement policy seeks to ensure that domestic procurement regimes operate according to common principles on notice procedures, selection, and award criteria for all contracts above a certain threshold. The founding treaties had established a general ban on national discrimination. From the 1970s onwards secondary legislation was adopted with the aim to prevent government and state-owned bodies from favouring domestic suppliers over foreign rivals and to curb state autonomy in spending.¹

For much of the integration process the EU rules stipulated that contracts can be awarded only to the bidders with the lowest price or alternatively to tenders who are

¹ The first procurement directives adopted in the 1970s focused procedural questions (construction and works procurement 71/304/EEC and 71/305/EEC; procurement in goods 77/62/EEC). They were followed by a more detailed regime created in the 1990s with rule for public procurement in goods, service and construction as well as the parallel (less detailed) utilities regime (supply 93/36/EEC, service 92/50/EEC, works contracts 93/37/EEC and utilities 93/38/EEC). These rules were subsequently reformed in 2004 (2004/17/EC, 2004/18/EC) and most recently 2014 (2014/23/EC, 2014/24/EC and 2014/25/EC).

“most economically advantageous”. Local preferences, price preferences or set asides, e.g. for SMEs, were not permitted under EU law. The principle of “most economically advantageous” produced tensions with public actors practices and interests to pursue other goals when spending public money in public contracts. These tensions are evidenced by CJEU case law. *Gebroeders Beentjes* (C-31/87, 20 September 1988, EU:C:1988:422) confirmed the interpretation that criteria for awarding contracts should be purely economic and not social. Social criteria, such as equal pay, production conditions or employment of disadvantaged groups, could be considered only in selection processes with two stages. When in a first stage bidders had been judged to be equivalent in terms of economic advantageousness, social criteria could be considered in a second stage (C-225/98, *Pas de Calais*, 26 September 2000, EU:C:2000:494). The evolving case law was summarized in a Commission Communication (COM[2001]566). This Communication clearly limits social goals to the execution of the procurement contract. At this stage, contractual clauses can guarantee e.g. the employment of disadvantaged persons or unemployed. Regarding award criteria, however, social considerations are clearly subordinated to economic advantageousness (Commission of the European Communities 2001: 13–15). Competition and cost efficiency prevail.

This started to change slowly with the beginning of the new century. We note an opening of public procurement to other criteria than the best price. Opening towards green criteria occurred in the 2004 directives. This followed two landmark rulings (C-513/99 *Concordia Bus Finland*, 17 December 2002, EU:C:2002:495 & C-448/01, *EVN AG & Wienstrom*, 4 December 2003, EU:C:2003:651). Opening to social criteria occurred roughly a decade later. Here, the *Rüffert* ruling (C-346/06, 3 April 2008, EU:C:2008:189)² had further restricted the use of social criteria in EU public procurement, before the *Regio-Post* case (C-115/14, 17 November 2015, EU:C:2015:760) took this interpretation back.³ This uneven dynamic of green and social criteria had been explained with case law development as well as with the relative power of the Commission portfolios responsible for green criteria (DG ENV) and social criteria (DG EMPL) vis-à-vis DG MARKT (Hartlapp et al. 2014: 64–92).

It is against these developments that the EU Commission adopted *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement* (European

² In Germany since 2000 public entities had agreed to award contracts only to those bidder that granted pay at least at the level of locally applicable collective agreements. In 2008 the ECJ judged this as non-conform with EU law in two respects. First, the practice of using local collective agreements as reference rather than generally applicable collective agreements was considered to contradict the EU posting-workers directive (96/71/EC). Secondly, the practice was judged to contradict freedom of service enshrined in primary EU law (Art. 56 TFEU). Social goals are only allowed to limit this freedom where proportionate. Following the line of earlier judgements such as *Viking* and *Laval* the ECJ did not deem this limitation proportionate since they ensured social goals only for the (small) group of workers under public procurement contract.

³ In *Regio-Post* (C-115/14) the Court confirmed that bidders could be excluded from a call for not confirming payment of the Länder specific collective payments. In 2013 the city Landau had excluded *Regio Post* from a public procurement contract on postal services for failing to agree Länder specific minimum wage of 8,70€. *RegioPost* went to Court and lost the case. The Court argued that in this particular case limitations to the freedom of services were proportionate for providing benefits to all workers in the Land.

Commission 2010).⁴ A twofold purpose of the guide is highlighted by the Commission: “(a) to raise contracting authorities’ awareness of the potential benefits of SRPP and (b) to explain in a practical way the opportunities offered by the existing EU legal framework for public authorities to take into account social considerations in their public procurement, thus paying attention not only to price but also to the best value for money.” Four approaches are outlined to address social issues in public procurement: 1) inclusion of social criteria in the subject matter of the contract and/or in its technical specifications, i.e. goods or services that meet social standards, such as accessibility, 2) exclusion of bidders that have been found guilty of non-compliance with social standards, 3) award criteria, which however need to be linked to the subject matter and can be considered in addition to economic criteria only (European Commission 2010, in particular p. 37-39) and 4) contractual conditions such as employment of disadvantaged. In line with the 2001 recommendation, this fourth approach continues to be considered “generally the most appropriate stage of the procedure to include social considerations” (European Commission 2010: 44). After this soft introduction of social criteria they subsequently hardened out.

With the reform of the procurement directives in 2014 (2014/23/EC, 2014/24/EC and 2014/25/EC) social criteria entered hard law. Today different social criteria are allowed. Contracts can be reserved for sheltered workshops or sheltered employment programs for people with disabilities. Authorities are encouraged to integrate qualitative criteria, to demand innovative, energy saving solutions or to insist in sustainable and socially inclusive approaches (Art. 18(2)). Critiques note that social criteria have been strengthened in particular in the area of trade (e.g. ILO core labour standards) while social considerations linked to the provision of services (e.g. remuneration) continue to be difficult to pursue under the EU procurement regime (Krönke 2016). The latest development at EU level is the Public Procurement Package published by the Commission in October 2017. It comprises further soft law instruments, in particular the Communication “Making Public Procurement work in and for Europe” (3 October 2017) that advocates the systematic use of strategic public procurement. It identifies key difficulties and issues and gives examples of specific initiatives. Importantly these initiatives aim at a) *promotion of a greater uptake of social criteria*; b) *increase the professionalization of procurement officials* and c) *emphasis on joint procurement*. In sum, since the adoption of the Buying Social Guide, hard law, case law and soft law have further strengthened social criteria in public policy.

Against this overview on the EU public procurement regime two points seem relevant for our research. First, the dominant logic of the EU public procurement regime changed over time. For decades the lowest price prevailed. Social considerations became an explicit desideratum after 2010 only. The most important indicator is the “Buying Social Guide” drafted in October 2010 and the 2014 directive. Rather than pragmatically easing application of existing standards, soft law seems to have pushed EU policy into a direction that differed from the established path. This is closely connected to a second point. For some time a more restrictive ‘hard regime’ based on the 2004 procurement directives and CJEU case law such as *Pas de Calais* (C-225/98, 26 September 2000, EU:C:2000:494) and *Rüffert* (C-346/06, 3 April 2008,

⁴ Drafting of the guide was finished in October 2010. The guide carries not official publishing date, but the Commission press announcement is dated 28 January 2011.



EU:C:2008:18) and a ‘softer regime’, more supportive of social criteria and established with the Buying Social Guide coexisted. This renders the question of effects at the national level particularly interesting. Usage by national actors will be crucial in light of contradictory impulses from Brussels.

2.2 Commission Recommendation Investing in children: breaking the cycle of disadvantage (2013/112/EU)

The Commission Recommendation Investing in children: breaking the cycle of disadvantage was adopted on 20 February 2013 as part of the social investment package for growth and cohesion (SIP).⁵ Issued in an area with little EU competences it works through setting guidelines and issuing Member State specific recommendations that are integrated into the Europe 2020 strategy. Thus this soft-law instrument is a coordinative instrument like the much studied OMCs. Soft steering includes implementation and monitoring by stressing the need to 1) strengthen synergies across sectors and 2) evidence based policy development and innovation.

Substantially, the Commission Recommendation deals with child-friendly social investment. The instrument seeks reduction of poverty in society as a whole by ensuring that the next generation does not suffer from disadvantage and social exclusion. To this aim the document provides guidance to Member States on how to tackle child poverty and promote children’s well-being, as well as to set up a common European framework. Action is based on three pillars: 1) access to adequate resources to reduce income poverty and material deprivation (“supporting parents’ participation in the labour market and making sure that their work pays; providing for adequate living standards through a combination of child and family benefits, which should be redistributive across income groups but avoid inactivity traps and stigmatisation”); 2) access to affordable quality services to increase children’s life chances and improve their development (“improving access to affordable early childhood education and care services to reduce inequality at a young age; improving education systems’ impact on equal opportunities by ensuring all children receive inclusive high-quality education; improving the responsiveness of health systems to address the needs of disadvantaged children; providing children with a safe, adequate housing and living environment; enhancing family support and the quality of alternative care settings”); and 3) children’s right to participate (“supporting the participation of all children in play, recreation, sport and cultural activities - informal learning opportunities outside the school context; putting in place mechanisms that promote children’s participation in decision-making that affects their lives”).

The instrument makes for an interesting case to study as it There are a number of other soft law instruments addressing investments in children. The European Parliament published a Written Declaration on Investing in Children (European Parliament 2015b) calling for specific indicators on children at risk of poverty to support evidence-based policy-making. And it urges Member States to use EU funding to support

⁵ The package contains a number of other soft law instruments, too, such as a Follow-up on the implementation by Member States of the 2008 European Commission Recommendation on Active Inclusion of People Excluded from the Labour Market, but also ties the different soft Social Investment instruments to the European Social Fund.

implementation. The Commission, in turn, seeks to strengthen implementation through the European Structural and Investment Funds (ESF and ERDF), by providing operational and financial support through EU-level NGOs (e.g. Eurochild, the Confederation of Family Organisations in Europe [COFACE], the European Anti-Poverty Network [EAPN] and the Platform for International Cooperation on Undocumented Migrants [PICUM] and by creating a special web site (<http://ec.europa.eu/social/main.jsp?catId=1246&langId=en>). Critics, however, argue that “the Commissions political priorities changed and the key entrepreneurs that had been active for the materialisation of the SIP were no longer centre stage. The continued presence of former influential entrepreneurs in the EU policy arena, although in different roles, may enable integration of EU SI into new EU social policy initiatives” (De la Porte & Natali 2018: 828).

presents least likely conditions to show effect at the national level. The recommendation is formulated in a very soft manner, there is no direct linkage to hard instruments and in (some) member states the investment approach is contested.

2.3 Recommendation on Strengthening the principle of equal pay between men and women through transparency (2014/124/EU)

Equal pay is a very ‘old’ EU social policy. The principle of equal pay had been enshrined in the Rome Treaty already. Starting in 1976 with the famous Defrenne case (C-43/75) a number of CJEU judgements have subsequently developed the notion of pay as well as comparators. Today, a number of EU hard and soft law instruments exist. The equal pay directive (2006/54/EC) provides that for the same work or for work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. The directive is complemented by a number of soft law instruments: a Communication from the Commission of 18 July 2007 ‘Tackling the pay gap between women and men’, a European Pact for Gender Equality as well as EP resolutions on equal pay adopted on 18 November 2008 and 24 May 2012. While the directive – as a recast – has a relatively good implementation record, it showed little effect to de facto improve equal pay (Article 4), not least since correct transposition is not sufficient here.⁶ Little later the Transparency Recommendation 2014/124/EU was adopted on 7 March 2014. It makes direct reference to the directive in paragraph 6 of its preamble. An interview partner explained that the motivation for the recommendation resulted from the lack of change and the stagnation in terms of gender pay gap (European Commission 2013; interviews D15, European Parliament 2015).

The recommendation to strengthen equal pay through transparency encourages Member States to adopt specific measures that help reaching the goal of equal pay. To this aim Member States are asked to choose among a list of suggested measures those most appropriate for their specific circumstances and at least one. The measures are entitlements/ rights of employees to request pay information, company reporting, pay audits, equal pay collective bargaining. The recommendation also incentivizes member states to take up CJEU case law to improve definitions of work of equal value that

6 In 2013 a Commission Report stressed implementation deficits. Importantly, this concerned the lack of transparency concerning wage classification systems to allow for more precise monitoring.



considers objective criteria such as education, professional and training requirements, data collection on the gender pay gap and to endow national equality bodies with rights to access relevant information and audits.

This instrument is interesting for being closely tied to a hard law instrument. As linkage to hard law was a selection criterion for soft law instruments in the other policy fields studied within SoLaR this will allow to gather cross-sectoral insights. Also, and rather interesting for a soft law instrument, Member States had been requested to notify the Commission of the measures taken until December 2015 (European Commission 2017). This could have provided an additional trigger for national actors to start implementation.

3 Cross-cutting aspects

This section draws on the six social policy reports written by the respective country experts. Each of the country reports was tasked to carry out three tasks: 1) examining the status of the selected soft law measures, i.e. whether the measures have been incorporated into binding national law, into national soft law or whether they took no effect at all; 2) conducting a case-law analysis with respect to the soft law measures selected, both with respect to their justiciability and the legal effects they have possibly been endowed with, and 3) conducting interviews with judges and civil servants on their perceptions of EU soft law. Due to difficulties some country teams encountered in convincing potential interviewees to share time and expertise (Netherlands and Italy) the depth of analysis on this third aspect differs across the country reports which we reflect in the discussion of the cross-cutting results.

All countries have **public procurement** regimes in place that are strongly influenced by EU law. At the national level soft law was used widely by ministries to provide guidance for public entities and bidders or contract holder. Social criteria were allowed to differing degrees in the existing national regimes. This can be explained by different national traditions and interests. Changes in the EU level regime seem to have mattered also, which were taken up at different speed in the national context. In Germany, CJEU case law (cf. above Ruffert and Post-Regio) had a great impact at the turn of the decade. In other countries social criteria moved onto the agenda with the 2014 directives only.

In this situation our country reports show that the majority of the countries made use of EU soft law at the national level: Finland, Germany, Italy, the Netherlands and Slovenia. They mostly did so through national soft instruments. However, sometimes it is difficult to trace a causal link to the EU Buying Social Guide. In Slovenia the Ministry for Public Administration responsible for public procurement presents the Buying Social Guide on its web page and interviews confirm that it is well known and used at the level of public administration. In the Netherlands the Ministry of Internal Affairs published a legal leaflet on buying social that explicitly refers to the EU Guide on Buying Social and Dutch Public Procurement Expertise Centre (Pianoo), a body directly linked to government presents the EU soft law instrument on its webpage. From 2015-17 Finland public procurement legislation underwent an extensive reform, including the publication of an English language Guide to Socially Responsible Public



Procurement and a Handbook of Government Procurements that mentions the EU's Buying Social in the list of further reading. Interviewees stressed that the EU Buying Social Guide was very influential in these reforms and served as an inspiration. In Italy the Ministry of Environment adopted a Guide for the integration of social aspects in public tenders via a decree in June 2012. In the UK the Public Contracts (Social Value) Act 2012, and the Procurement Reform (Scotland) Act 2014 follow the approach of the Buying Social Guide, but it remains unclear from the country report whether this is inspired by soft EU law or follows similar policy change at the national level enacted with the Local Government Act 1999. In Germany and France guidance documents on social criteria were published by national actors in temporal proximity to the publication of the EU Buying Social Guide. Yet, interview material indicates that national actors were not doing so in reaction to EU soft law, but rather following more general developments towards sustainable and social procurement. Finally, developments in France are more difficult to categorize as guidance documents seem to have been adopted on social criteria. Yet, national administrative courts declared these guidance documents non-binding.

Classical welfare state policies provide social transfers. More recently social policy has taken an investive turn. This is true for family policies in many of the countries we studied. Consequently, the EU Recommendation **Investing in Children** was widely known among our interviewees. Specific effects, however, are visible in three country reports only: soft law in France and Italy, as well as in hard legislation in Finland. One possible explanation is dispersed responsibility. Social investment in children is typically a shared responsibility of different ministries and most countries lack an integrated or comprehensive policy on child poverty, let alone investing in children. What is more, competences frequently stretch across levels of government, not only in federal Germany, but also in Italy, the Netherlands and even in centralized France. Yet, further research is needed to clarify whether dispersion of responsibility makes it more difficult to trace effect or whether it also limits the effects of EU soft law.

In substantial terms we see the Recommendation taking effect regarding two areas. On the one hand investive spending policies are influenced. On the other hand, the soft law instrument seems to have been advocated to improve children rights (frequently in connection with the UN Children's Rights Convention of the early 1990s). Regarding investive spending policies, in Finland a new law on fees in early childhood education implements the spirit of the recommendation for access to services and prevent child poverty (2017). In Italy, guidance documents for the regions that aim at the reduction of social exclusion of poor children and families mention the EU Recommendation. Factual implementation however is hindered by fragmentation of action between municipalities and regions that are autonomous in the allocation of social service spending. The French report draws a parallel between the EU level soft law instrument and a 2016 state action plan to fight poverty. Regarding the improvement of children's rights, in Finland an Ombudsman for Children exist who became an advocate for implementing the Recommendation. A similar role is played by the National Observatory on Childhood and Adolescence in Italy. More generally, interviews indicate that ombudspersons and agencies act as facilitator for soft law implementation, as these institutions can raise awareness for EU soft law related to individual rights. Country reports do not provide evidence for effects in Germany, the Netherlands or (partially) Slovenia. In Slovenia the low level of material deprivation

and social exclusion of children relatively to other EU member states is mentioned, however EU policies in this area are reported to have been already mainstreamed into key policies and strategic documents (for instance, the Programme for Children and Youth and the National Programme of Social Protection), despite the fact that the Commission Recommendation 2013/112/EU is not referred to explicitly. The Netherlands is an active reformer with the Childrens' Ombudsman regularly issuing reports and an extra budget to combat poverty among children has been introduced in 2017. Yet, none of these measures make explicit reference to the Recommendation. Germany, in turn, is a case of clear-cut opposition to the EU soft law instrument. Here social policy for children has traditionally put emphasis on the family. Social investment, in turn, targets individual children. This produced tension already during the negotiation of the instrument at EU level. And it created opposition through the backdoor when it came to implementation at the national level.

Equal pay has been a long-lasting topic in EU social policy. The recommendation on **Pay Transparency** took effect at the national level in all countries studied (European Commission 2017, p. 2). It did so mostly in form of hard legislation. This is a surprising result that can be linked to a number of supportive factors. First, problem pressure is high. There is a persistent gender pay gap in all countries studied. It ranges from little more than 5% in Italy and below 8% in Slovenia to a high of almost 22% in Germany and 21% in UK, with Finland (17%), France (16%) and the Netherlands (15%) situated somewhere between.⁷ Secondly, it emerges from the country reports that the close connection to the 2006 EU directive proved helpful. Thirdly, requirements to report implementation to the EU level (European Commission 2017) provide additional incentives.

Turning to specific effects, in Germany the *Entgelttransparenzgesetz* (2017) is influenced by the EU Recommendation. It is important to note that the origin of the Law is national, but that the EU soft law was influential in its controversial negotiation process. Similar, the UK improved its Equality Act in 2016 to include the obligation of employers with 250 or more staff to regularly provide a written report on the gender equality situation in their company or organisation, including details on pay. In Italy equal opportunities are regulated in a decree. This decree is complemented with an act on the companies with public participation that explicitly refers to the EU recommendations. Recent reforms of the *Code du Travail* in France takes the wording of the Recommendation as blueprint to alter penalties and to formulate clear obligations for corporations. These changes were followed up with an administrative regulation in form of a decree that turns an obligation of conduct to an obligation of result. In the Netherlands legislation on equal pay of men and women existed prior to the Recommendation, but since new legislative initiatives have been launched that refer to EU hard law in the area and display core ideas from the recommendation e.g. regarding annual publication of pay differences. Similarly, the Commission Report mentions Finland to have legislation on pay transparency and to have adopted new measures or improved existing ones on the basis of the recommendation (European Commission 2017, p. 2). Interviews confirmed this assessment with officials arguing that the Ministry used the opportunity provided in by the EU soft law to review the

⁷ Numbers for unadjusted gender pay gap, 2016 (difference between average gross hourly earnings of male and female employees as % of male gross earnings), source: https://ec.europa.eu/eurostat/statistics-explained/index.php/Gender_pay_gap_statistics

national legal system. Further reforms have been under way at the time of completing this study. In January 2019 the Ministry of Social Affairs and Health set up a tripartite working group with representatives from labour unions and employer organisations, to discuss pay transparency (*Kolmikantainen työryhmä palkka-avoimuuden vahvistamiseksi*). The group directly refers to the Commission recommendation, and despite substantial internal debate, makes a number of suggestions for legislation that would harden out the EU recommendation. Due to the resignation of the Government in March 2019 at the time of writing this report it was unclear whether legislation will take place. Yet, in the meantime soft effects became visible at the level of Collective Agreement for State Civil Servants and Employees Under Contract (*Valtion virka- ja työehtot 2018-2020*).

	No tangible effect	Soft instrument	legislation	Usage by courts
“Buying Social A Guide to Taking Account of Social Considerations in Public Procurement» (2010)	F, (UK)	FIN, GER, NL, SI	I	-
Recommendation Investing in Children: Breaking the Cycle of Disadvantage (2013/112/EU)	GER, NL, SI, UK	F, I	FIN	-
Recommendation Strengthening the Principle of Equal Pay Between Men and Women Through Transparency (2014/124/EU)	SI	FIN	F, (FIN), GER, (NL), UK	-

Table 1: Effects of social policy EU soft law instruments in selected member states, brackets () indicate that the classification of the respective country remains preliminary on the basis of the empirical material available

Table 1 summarizes the results from our analysis. Based on documentary analysis, expert interviews and systematic case law in the relevant national data based we can summarize the findings as follows.

Most importantly, there does not seem to be a coherent pattern. This lack of pattern might result from differences in the depth of investigation due to availability of material and interview partners across countries. Or it might be influenced by the exploratory nature of our study that intentionally picked three soft law instruments that differ in many regards and hence render systematic implementation patterns at the national level rather unlikely. In particular the very soft Recommendation



Investing in Children: Breaking the Cycle of Disadvantage (2013/112/EU) in combination with the dispersion across ministries and level of government makes it difficult to see where soft law is used or whether the lack of clear responsibility for ‘what comes from Brussels’ impedes usage. Nevertheless, our material allows do draw conclusion on the following aspects:

First, effects take place exclusively in the administrative arena. Officials working in ministries and other public authorities used the three soft law instruments selected for our explorative study. Yet, for none of the instruments did our searches bring to light case law citations or usage by courts.

Interview material underlines this point. In Slovenia, EU law in general was described as being read and perceived in detail among administrative actors, without differentiating strongly between hard and soft law. Awareness of the instruments studied was high and administrative actors understand soft law as a tool that allows a de-formalization of procedures and gives “a direction on how to think in the legal framework, which is set by binding regulations.” (cf. national report Slovenia) Nevertheless, this does not translate into usage by the judiciary as courts are very much focused on hard law (one explanation could be that a lot of soft law policies have already been transferred into hard law). In Finland, soft law is widely used in general, yet interviewees described social policy to differ. Social policies are typically spending policies and as such are dealt with by administrations. Consequently, EU instruments in this area, including soft instruments, are likely to take effect with the administration, too. Interviewees in the judiciary underlined that soft law guidance, if used at all, is referred to in those parts of judgements where all relevant norms (binding or not) are described and where the issue is introduced and elaborated for the first time.

Secondly, while all instruments were used at least once, the recommendation on transparency in pay seems to be used most widely. All but one country in our sample refer to the instrument. They do so by taking EU soft law up in hard legislation. What is more, the instrument was frequently referred to by interviewees in France, Slovenia, Finland and Germany. The Buying Social Guide follows suit. However, here the picture is more heterogeneous. Many member states react to EU soft law in form of national soft law. In this context interviewees on the one hand frequently mentioned the necessity to leverage complex and formal hard law, and on the other they stressed a lack of legal certainty, precision and clarity. Finally, the Recommendation Investing in Children remains least tangible in national law. At a very preliminary basis this points at a (potential) link between the type of soft law instrument adopted at the EU level and the implementation at national level. The literature has pointed at instruments that can be considered pre-law (Senden 2004: 110), instruments that are supplementing or interpreting hard law (Terpan 2015) and soft law that is a (temporary) alternative to legislation (e.g. Moumoutzis & Zartaloudis 2015; Prosser 2015). Both the degree of implementation and the insights gained from interview material indicate that instruments that are supplementing or interpreting hard law (Recommendation on Equal Pay & Buying Social Guide) take more effect at the national level. Within this group we see further differences, with the Buying Social Guide as an instrument type that does not figure in the treaties taking less effect than the equal pay recommendation that does refer to an official treaty base. Soft law that can be characterised as an alternative to hard law (recommendation on investing in children), in turn, saw least effect.

This argument is further supported by interviewees mentioning other soft EU social



policy instruments as influential, e.g. the Interpretative Communication on Directive 2003/88/EC of the Council and the European Parliament concerning certain aspects of the organisation of working time (2017/C165/01). This is an interesting instrument. The 2003/88/EC directive on working time has been one of the most controversial social policy directives already at the stage of its negotiation. The CJEU delivered a number of controversial rulings e.g. on the definition of working time and rest periods (e.g. C-303/98, SIMAP, EU:C:2000:528 or recently C-55/18, EU:C:2019:402). Revision of the directive has been pending for more than a decade due to persistent political conflict. Here, soft law seems to be an escape route to address implementation problems despite a lack of formal consensus – and in this case, administrative actors happily use the clarifications.

Thirdly, some differences between countries are visible. Given the limited number of instruments we studied as well as the within-country differences across instruments they should not be over-interpreted. Finland and Italy seem to make use of EU soft law instruments more frequently. Slovenia, in turn, is reported to have mainstreamed EU soft law policies into hard law without making specific reference that would signal usage at the national level. France and Germany are situated in the middle, being generally reluctant but less so in areas that are ex-ante more strongly EU influenced. Here soft law seems to be perceived less as an intrusion as the national legal logic has already been influenced by the EU anyway.

Legal culture reflected in interviews seems to resonate well with these differences. Interviewees in Finland showed openness to national soft law. Yet, when it comes to EU soft law they stressed its declaratory nature rather than being a source of law that contained legally binding information. Interviewees from the judiciary in France (Court de Cassation) admitted that they rarely use EU hard law, and entirely neglected EU soft law. In France more generally, soft law was considered as potentially useful, providing information and guidance for judicial or administrative interpretation - but without legal value.

Finally, social policy is characterized by being a well-established area of national politics and policy. All countries have social policy in place and consider it an inherently national policy realm with little interest to have EU policies intervene and give advice what to do. Where any policy change produces winners and losers and is subject to ideological positions, even EU soft law might alter carefully crafted national compromises. Thus, implementation bears the potential for conflict. This was visible in a number of cases, e.g. recommendation for childcare in Germany or equal pay transparency in Finland. This last cross cutting observation merits further investigation, as - at least in the area of social policy - it sits uneasily with the common belief that soft law is an efficiency increasing a-political instrument.

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