

Title: **Soft Law Implementation in the EU Multilevel System: Legitimacy and Governance Efficiency Revisited**

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Soft law implementation in the EU multilevel system: legitimacy and governance efficiency revisited

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1 Introduction¹

Boosted by the Commission White Paper (2001) and the 2010 Lisbon Strategy, EU soft law is present in nearly all areas of EU policy today. Soft law captures a range of different instruments such as recommendations, guidelines or communications that do not entail jurisdictional control, but produce important legal and practical effects. Empirical research estimates that in the early 2000s soft law instruments accounted for about 12% of the EU's directory of legislation in force (Bogdandy, Arndt, and Bast, 2004) – and to this add many soft instruments that are not classified officially. Authors suggest that since, the number of soft acts has further increased (Korkea-aho, 2015; Terpan, 2015). This increase in numbers is frequently explained with the need to integrate expertise from informal bodies or to ease decision taking by adopting non-binding instruments. Yet, we know relatively little about the effects EU soft law takes at the national level.

As soft instruments are by nature non-binding, there is no need for member states to implement EU soft-law. Hence, concepts of compliance and enforcement that have guided much of EU implementation studies cannot be easily applied to this category of instruments. This does not mean that EU soft law does not create effects at the national level. On the contrary, where we accept that today soft law is an essential tool of EU policy-making, core characteristics of these instruments have to be considered in light of their effects at the national level.

First, most of existing soft law research has focused on its rational and the procedures through which soft law is issued (e.g. Shaffer and Pollack, 2010). One of the reasons why policy-making is easier through soft-law instruments is that the decision-taking process is lighter. Given that soft law is typically adopted outside the legislative process the literature critically discussed its alleged lack of legitimacy. Arthur Benz (2007) has highlighted the problems that flow from governance by multiple, non-legislative actors for accountability. He argues that while in principle soft governance has much potential in the dynamic and fluid EU multilevel system, legitimacy and accountability depend on the respective governance modes and the conditions under which they operate at lower levels of governance. Therefore, the potential lack of legitimacy of EU soft law is inherently linked to questions of implementation at the national level (Benz, 2007). Where EU policy instruments render everyone better off we may assume legitimacy to be assured via the output of EU policies. However, where soft law effects public policies that have distributional consequences, where it constrains individual freedoms or where

¹ I wish to thank Jorg Broschek, Andreas Hofmann and Michèle Knodt for exchange and comments, Tobias Hübler for excellent research assistance and the interviewees for freely sharing their time and expertise with me.

some groups of actors perceive their interests violated a lack of input legitimacy bears much harder (Pauwelyn, Wessel, and Wouters, 2014, pp. 745–746). Also, scholars have stressed that soft norms are likely to challenge principles of non-discrimination and uniform rights and standards (Dawson, 2011). Insights on the effects soft law takes at the national level and on the conflictuality of the implementation process promise to help a better understanding of the legitimacy question that is frequently raised for soft-law.

Secondly, soft law is frequently praised for being more flexible than hard law and improving problem-solving capacities. From this perspective a rather high degree of effectiveness in EU policy-making is best explained by the continuous change in patterns of interaction. Arthur Benz provides a compelling theoretical modularization of such interaction modes. He explains that rather than steering top-down as governments do with hard legislation, actors may coordinate their action via mutual adjustment, negotiation or joint decision making in networks (Benz and Dose, 2010, pp. 253–256). On this basis we can theorize that depending on the problem at hand, the institutional setting and the actors involved, societal problems can be addressed particularly efficiently by soft law. This can be the case where soft instruments work through mutually beneficial learning or competition (Benz, 2007), thick consensus (Pauwelyn et al., 2014, p. 755) or deliberation (Korkea-aho, 2015). Others have pointed to the benefits that may arise from activating a wider range of actors as they can all veil about application of rules (Falkner, Treib, Hartlapp, and Leiber, 2005, p. 39). It remains an open question whether in the EU multilevel system such flexibility is an added value or whether the uncertainty surrounding EU soft law in national settings endangers principles of legal certainty and transparency and negatively affects effective problem-solving.

This chapter argues that the starting point for addressing claims about governance efficiency and legitimacy concerns that are associated with EU soft law, is a better understanding whether and how EU soft-law is implemented at the national level. If soft law does not take effect at all there is little need to discuss legitimacy and effectiveness. However, where soft law is implemented it may produce soft effects such as guidelines or administrative practices or it can harden out at the national level by taking the form of national legislation or court rulings. Exploring the processes that lead to either soft usage or hardening out at the national level provides first evidence on the claims as efficiency gains are typically associated with soft governance. Where we observe hardening out, in contrast, distributional consequences are more likely and should be visible in diverging actor interests and conflict. Certainly, this juxtaposition is oversimplified as we cannot rule out that soft law has distributional consequences, while hard law might increase efficiency, too. However, the existing literature strongly postulates distinct effects and it thus seems warranted to empirically probe the plausibility of these existing claims. Therefore, this chapter raises three connected questions: Does EU soft law take effect at the national level? Does EU soft law have a potential for effectiveness gains of governance in the EU multilevel system? Does hardening out potentially blur responsibilities and renders accountability in the EU multilevel system more difficult, therewith producing democratic credential losses?

To address these questions the next section (2) develops a conceptual frame for the systematic analysis of soft law effects. Next the empirical basis of the argument is introduced (section 3).

We then turn to the implementation of a selected number of soft law instruments in the areas of financial market regulation, environmental and social policy to explore empirically the question whether soft law takes effect at the national level and if it does so in form of soft implementation or hardening (4). In doing so the chapter does not aim at understanding soft law implementation in every detail, but to discuss if and how soft law implementation contributes to efficient governance of complexity or raises questions of accountability and legitimacy in the EU multilevel system (5).

2 Studying EU soft law

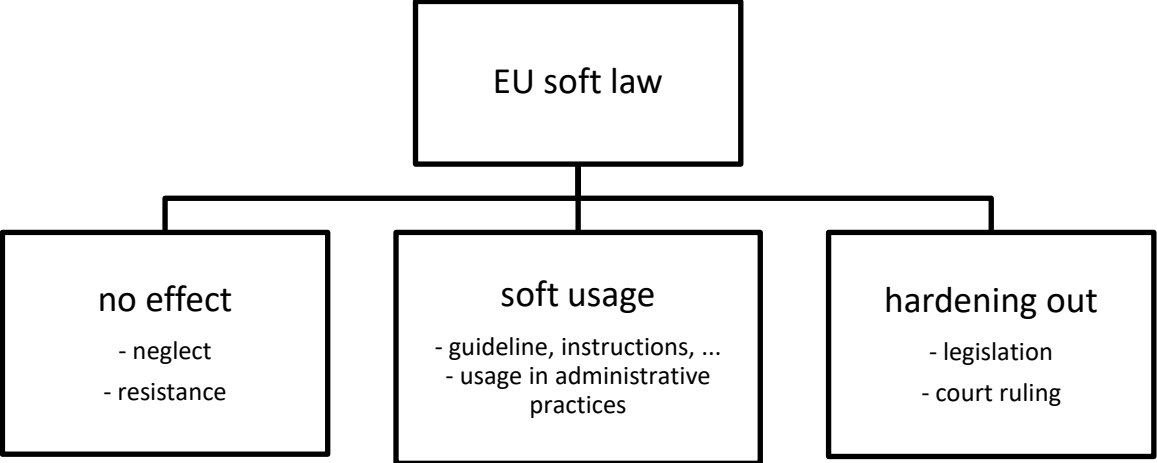
What is soft law? Soft law covers a wide range of non-legally binding instruments, such as recommendations, opinion, codes of conduct, communications, notices, guides and resolutions. Their nature is typically conceived in contrast to hard law. Hard law arises from the treaties, regulations and the Community method and typically takes the form of regulations or directives (Article 288 TFEU). In contrast, soft law typically has no legal basis in the treaties (only recommendations are recognized in primary law). Senden (2004) defines soft law as ‘rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects’. While this definitions remain vague as to what exactly ‘rules of conduct’ are, it is important in highlighting that effect can go beyond a legally binding force.

Legal scholars trace back EU soft law to 1962 when the European Commission issued the ‘Christmas notices’, a notice on exclusive dealing contracts with commercial agents (OJ 139/2921) and a notice on patent licensing agreements (OJ 139/2922) (Senden and Prechal, 2001, p. 181). Prominent soft law documents include the Commission Communication on the Cassis de Dijon judgment (OJ C 256/2) and the 1985 White Paper of the Commission on completing the internal market that stressed the importance of soft law to reach this goal (COM[1985]310 para 155). In political science EU soft law gained prominence with the study of the Open Method of Coordination. Formalized in the Amsterdam Treaty coordination of national employment policies had already developed incrementally as a follow-up to the European Council of Essen (1994). Subsequently the OMC was extended to additional fields of social policy such as pension reform, social inclusion and education and more recently integrated into the European Semester (Bekker, 2014). Typically research in this strand stresses the potential of soft governance instruments and processes for more efficient and effective solving of societal problems (Sabel and Zeitlin, 2008).

Turning to the effects of soft law, studies are largely limited to descriptive accounts. Frequently, soft law implementation is analyzed as a byproduct of hard law implementation. Hard EU legislation is accompanied or followed by soft steering instruments that detail implementation requirements or provide guidance on how to effectively reach the goals of hard law. Taking the example of social policy Falkner et al. (2005, pp. 178–200) find that take up of non-binding standards in national legislation characterizes over half of the implementation processes. Others have considered the question if and how courts take up EU soft law. CJEU case law (Grimaldi C-322/88) urged national judges to ‘take into consideration’ (n138, para 18) soft law whenever clarify the meaning of Community or national law. Case studies have traced the effects of EU

soft law for courts e.g. for the social Protocol attached to the Maastricht Treaty or the (formerly soft) Charter of Fundamental Rights (e.g. Morano-Foadi and Andreadakis, 2011). What emerges from these cases studies is that soft law can have substantial effects at the national level.

I conceptualize the effects of EU soft law as threefold: either no effect, soft effect or hard effect at the national level. EU soft-law does take *no effect* where neither hard nor soft instruments are adopted or altered at the national level. Actors do not refer to the instrument in their discourses and practices. Analytically I differentiate two situations: neglect and resistance. Actors might not be aware that the EU instrument exists. By its very nature, soft law typically lacks deadlines for transpositions that would incentivize action at the national level. This differs from situations where awareness is given but actors decide against implementation. They may resist effect because of opposition to form or substance of the soft instrument.



Graph 1: Implementation of EU soft law in the EU multilevel system

Where EU soft law takes effect at the national level it can do so in different forms (Terpan, 2015). *Soft usage* become visible where EU soft law is implemented via national guidelines, circulars, administrative orders or other non-binding instruments. The implementing instrument remains non-binding and effect may unfold through soft mechanisms such as guidance, stimulation of learning or coordination. Besides, soft effects can comprise enduring alteration of administrative practices or reference to EU soft law when taking decisions or carrying out policies. In principle, such soft usage is not limited to public actors and can entail NGOs or companies, too. However, here effects will be more difficult to trace and are likely to have a narrower scope. *Hardening out* of EU soft law during implementation would occur from an institutional change whereby the member state formally adapts to EU soft law (e.g. EU guidelines included in a national piece of legislation); or where the soft norm is referred to by national judges in court rulings. In this case the substance of the EU instrument is poured into a new form, soft law hardens out at the national level.

With this conceptualization at hand we can discuss soft versus hard effects across the EU multilevel system and questions of governance efficiency and legitimacy. The governance literature would lead us to expect that governance efficiency stems from arrangements other than top down steering. From this perspective governance efficiency results from flexibility, from the inclusion of a broad range of actors concerned and from choice of interaction modi best suited to a situation at hand (Benz and Dose, 2010). Where implementation takes the form of hard law or binding rulings the extra potential of soft governance could be easily absorbed. Soft usage should be in a better position to ensure governance efficiency than hardening out. Next, I argue, that a lack of (input) legitimacy becomes a concern where implementation creates winners and losers. Soft implementation is less likely to create such losers as here implementation remains voluntary and is not enforced. Actors can make use of soft law subject to their interests. They are likely to do so only if they feel that they win from implementation. Where the soft instrument imposes a burden they might simply opt out of implementation. Thus, a legitimacy lack should bear less heavily. Hardening out, in contrast bears a greater potential to create winners and losers. Here, I expect implementation to be characterized by discussion about diverging interests and conflict.

3 Case selection and data

To explore if and how EU soft law is implemented, I focus on one member state, Germany. This allows to explore effects for a range of different decision-making and interest constellations while keeping important factors of the national political system constant. I look at different policy areas (financial market regulation, environmental and social policy) and different types of EU soft law instruments. The instruments chosen are not necessarily representative for the respective three policy fields. Yet, they are fairly typical of the EU's use of soft law in the fields – not least because they span different types of EU soft law instruments and range from very broad and programmatic guidelines to very concrete interpretation manuals.

The empirics are part of a broader project that studies implementation of EU soft law in seven member states. Case studies are based on documentary analysis of EU and national level instruments as well as 15 interviews that have been conducted from December 2017 to April 2018 with experts in Germany.² They work in federal and state ministries, subordinate agencies and local administrative units or courts and have been actively involved in the implementation of EU soft law. Semi-structured interviews were carried out face-to-face or on the phone and took between 20 and 60min. Most of them were transcribed and – together with primary and secondary literature - serve as the main basis of the following analysis. In addition, we conducted a systematic keyword search of Court rulings in supreme (ordinary and administrative) jurisdictions to find out whether the soft law instruments of interest had been referred to at the national level.

Tracing the effect of different EU soft law instruments in three policy fields the chapter does not adopt an explicit causal design. Rather it seeks to explore possible effects on the basis of

² To assure anonymity they are referred to as interviews D1, D2 etc.

concrete empirical cases, the instruments and reforms initiated as well as actors interests and conflicts. Necessarily this does not allow to understand soft law implementation in every detail, but it is a good basis to study the implications soft law implementation might have regarding governance effectiveness and legitimacy in the EU multilevel system.

4 Empirics

4.1 Financial Market Regulation³

With the economic and financial crises and subsequent deepening of integration financial markets have become an important area of EU regulation (Möllers, 2010). In 2011 the European Securities and Market Authority (ESMA) was founded and delegated competences to assess market risks, establish common rules for financial markets and the supervision of their institutions. The ESMA frequently issues soft guidelines to accompany hard rules and to regulate technical questions of the common financial market. I study four of these guidelines on Enforcement of Financial Information [ESMA/2014/1293], Exemption for Market Making Activities and Primary Market Operations [ESMA/2013/74, accompanying the Short Selling Regulation], Complaints Handling [ESMA/EBA/2014/43, accompanying the MiFID) and Remuneration Policies and Practices [ESMA/2013/606, accompanying the MiFID].

As guidelines the four instruments do not represent an absolute implementation requirement, not least since ESMA lacks enforcement powers vis-à-vis market participants. Yet, unlike soft law in other policy fields, ESMA guidelines require notification of implementation – or, in case member states resist implementation, an explanation why they do not follow EU soft law. On the one hand this “comply-or-explain-mechanism” increases pressure for implementation. Interviewees compared the situation of explaining non-compliance with “being in the pillory” (D2, also D1 and D3). On the other hand notification *de facto* turns EU soft law into a requirement market participants have to fulfill vis-à-vis the national authorities (Becker, 2014, 151-8), because it establishes a clear national reference points.

In this context it is not surprising that all four ESMA guidelines took effect at the national level (Table 1). The Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) issued circulars and information sheets implementing the ESMA guidelines on Enforcement of Financial Information, Short Selling and Complaints Handling. Such soft instruments had been part and parcel of the BaFin steering-tool box long before the ESMA started to issue EU soft law. When the guidelines on Short Selling and Remuneration were adopted in 2013 the government also altered existing national legislation.⁴ Given that the national legislator had regulated these issues earlier, the comply-or-explain

³ This section is based on the SoLaR country report “The use of EU soft law by national courts and administration in the field of EU financial market regulation law” by Miriam Hartlapp and Angela Schwerdtfeger.

⁴ Adjustment of Verordnung zur Konkretisierung von Art, Umfang und Form der Mitteilungen und Benachrichtigungen (Leerverkaufs-Anzeigeverordnung) and of Remuneration Ordinance for Institutions (Institutsvergütungsverordnung) & German Banking Act (Kreditwesengesetz).

mechanism *de facto* required hardening out of EU soft law at the national level. Covering banking only their scope was narrower and variable remuneration had to take qualitative criteria and customer interests into account (D3). National courts have so far not referred to the four guidelines in their rulings. In sum, implementation takes the form of soft usage with some hardening out.

	Soft usage	Hardening out
ESMA guidelines: Enforcement of Financial Information [ESMA/2014/1293]	circulare	
ESMA guidelines: Exemption for Market Making Activities and Primary Market Operations [ESMA/2013/74]	incorporation into information sheet	via legislation
ESMA guidelines: Complaints Handling [ESMA/EBA/2014/43] (part of MiFID II)	Circulaire	
ESMA guidelines: Remuneration Policies and Practices (MiFID) [ESMA/2013/606]		via legislation

Table 1: Effects of financial market regulation EU soft law instruments in Germany

The experts involved in regulation at the national level argued that the soft usage of ESMA guidelines helped to “breath the necessary life” into hard law and to “concretize, e.g. what information needs to be given” to create a transparent EU financial market (D1). Others argued that both soft usage and hardening out assure “convergence in financial market practices” and “concretizes abstract legal norms” (D3) while at the same avoiding a race to the bottom (D2). On this basis I conclude that EU soft law is considered to contribute to governance efficiency independent of hard or soft effects at the national level.

Turning to the question of legitimacy, despite clear costs for market actors to report and to follow more detailed rules, conflict seems to have been contained at the national level. “EU guidelines are integrated, 1:1 usually” (D3, also D2). Interviewees pointed at debates that had taken place when formulating the guidelines. They concerned the fit between pre-existing national institutions, e.g. a two stages enforcement information system, out-of-court resolution bodies and complaints handling via national banks and respective soft EU standards on a single staged enforcement information system or general rules for complaint handling across retail, professional and market counterparts. Given the ample debate and exchange of pros and cons already at the stage of formulating EU soft law, most actors did not perceive soft usage or hardening out to raise questions of legitimacy. A lack of legitimacy was, however, subject to legal debate in courts. I identified three court decisions⁵ that critically discuss the lack of

⁵ Higher Regional Court Frankfurt WpÜG 1/08, WpÜG 3/08 (22.1.2009), Federal Administrative Court, judgment 7 C 6/10 (24.5.2011) and Federal Court of Justice 5 StR 532/16 (10.1.2017).

legitimacy of non-legally binding ESMA guidelines – however, not the ones selected for this study. In essence, it is argued that despite the fact that EU soft law is not a legal norm, it can concretize relevant information for norm interpretation. Thus, while the concrete implementation – even when hardening out – did not raise legitimacy concerns among the actors involved, the judiciary seems to plea for implementing EU soft law softly.

4.2 Social Policy

Soft law in EU social policy spans a wide range of instruments. To account for this variation I picked instruments that accompany hard legislation - *Buying Social. A Guide to Taking Account of Social Considerations in Public Procurement* (European Commission 2010) and a Commission Recommendation on Transparency in Equal Pay (2014/124/EU) – as well as an instrument that is characteristic for soft steering in areas where member states have transferred little competences to the EU level: the Commission Recommendations on Investing in Children (2013/112/EU).

Public Procurement had first been regulated at the EU level in the 1970s and was frequently revised since. There are a number of soft law instruments in the area. Interestingly, the *Buying Social Guide* marks the beginning of a shift in the EU public procurement regime. For much of the integration process the EU rules stipulated that contracts can be awarded only to the bidders with the lowest price. The Guide is the first – albeit non-binding – EU policy instrument that explicitly called for consideration of social criteria.

In Germany the national Association of Cities and Towns, together with the Federal Ministry for Social Affairs and the Federal Ministry for Development issued a guideline „Considering social criteria in public procurement”. This guide takes up similar questions as the EU soft law instrument. Yet, published in January 2010 it predates the EU soft law instrument. Thus, rather than a direct implementation of the soft EU instrument, the national Guide was motivated by the wish to put a policy shift into practice. Policy makers remember that they had wanted to push public actors in smaller cities and at the communal level (D14) to implement this policy shift.⁶

The Recommendation on Investing in Children is part of the EU social investment package for growth and cohesion. Issued in an area with little community competences it works through setting guidelines and Member State specific recommendations. Yet, no direct effects of the EU soft law instrument can be traced – neither in soft nor on hard form (D11 and D12). Interviewees accord this to an active decision not to implement the soft EU instrument. First, the Commission Regulation is very vague and of general nature. Second, and more specifically, the Commission Recommendation marks “a shift in the EU policy” from a focus on families to children. The Commission had turned from an alliance for families – much closer to the German approach –

⁶ The national instrument is more outspoken on addressing remuneration (in relation to collective agreements and statutory minimum wage), a possible effect of the CJEU Ruffert ruling (C-346/06).

towards investing in children. Germany, in turn, felt disappointed and took the decision for non-implementation (D12).

EU soft law on Transparency in Equal Pay (2014/124/EU) is also a Commission Recommendation. Yet, unlike the purely coordinating Recommendation on Investing in Children, it is connected to a piece of hard law, the equal treatment directive 2006/54/EC. Implementation took place via the pay transparency law (Entgelttransparenzgesetz, 30.6.2017). Yet, the decision to legislate on pay predates the EU instruments. It goes back to the coalition agreement between SPD and CDU signed in fall 2013. Legislative negotiations proved lengthy since involved resorts were headed by different coalition partners. Within this struggle definitions about ‘work of equal value’ and ‘assessment criteria for comparing different jobs’ were taken directly from the EU soft law instrument. An interviewee stated, that in the legislative process the EU soft instrument provided “legitimation and argumentative support” and without the Recommendation the national law would have looked differently (D15). The law is accompanied by two guides. One addressing employees (July 2017) and one addressing employers as well as works councils (August 2017). They define key concepts as outlined in the respective EU soft law, and give practical advice to help implementation. In sum, this is a case where EU soft law hardened out during implementation at the national level. This was possible because it coincided with a national interest and agenda for reform.

Turning to the usage of EU soft law in courts, I did not find direct reference to any of the three soft law instruments explored. Interviewees unanimously argued that the EU soft law instruments had no legal value and could thus not be used by courts. In the wider context of public procurement cases, however, EU soft law sometimes features in judgments related to public procurement decisions (D11, D12 and D15; also Knauff, 2015, p. 194).

	Soft usage	Hardening out
“Buying Social A Guide to Taking Account of Social Considerations in Public Procurement« (2010)	(Guideline)	
Recommendation Investing in Children: Breaking the Cycle of Disadvantage (2013/112/EU)	-	-
Recommendation Strengthening the Principle of Equal Pay Between Men and Women Through Transparency (2014/124/EU)	Guidelines	Via legislation

Table 2: Effects of social policy EU soft law instruments in Germany

Table 2 summarized, that in two of the three cases (in)direct soft effects are visible in form of national guidelines. They clearly aim at improving governance efficiency by addressing concrete implementation problems and providing examples for daily praxis. Interestingly, in public procurement, actors closer to daily implementation in turn were more wary of increased legal uncertainty stemming from substantial differences in hard and soft standards. They stressed that public actors issuing a tender or awarding a contract cannot take the risk to act

based on soft law as this might result in a pending procurement decision or uncertainty (D11, D13 and D14).

As stated above, hardening out may raise questions of legitimacy where it produces winners and losers without legitimizing the related decisions in a political arena. Hardening out of soft EU rules on Equal Pay Transparency was accompanied by a political struggle. In this struggle EU soft law empowered those pushing for equal pay over others carefully watching (potential) increases in economic costs and (perceived) burdens on enterprises. Yet, these ensuing distributional consequences were subject to open debate and partisan conflict. Consequently, hardening out was not perceived to lack legitimacy, rather legitimacy was granted via classical channels in national political processes.

4.3 Environmental Policy⁷

Environmental policy is an area where the EU has been particularly active in regulation. I focus on interpretation guidelines accompanying the Habitats Directive (FFH Directive, 92/43/EEC) and the Water Framework Directive (2000/60/EC). Environmental policy in Germany is largely decentralized, with almost all implementing competences at the Länder level. As such, Länder administrations are familiar with the coordination problems that occur in a federal setting. Nonetheless, implementation of the FFH is characterized by management problems and a capacity lack that brought Germany into conflict over non-compliance with the EU Commission. Shortly after the FFH Directive had passed the legislative process at the EU level, the Federal Agency for Nature Conservation (BfN, *Bundesamt für Naturschutz*) started work on national interpretative guidelines in an attempt to standardize classifications and standards across the German Länder (D5). The BfN published a Habitats handbook, which takes up and bundles EU soft law instruments. An additional soft law instrument is the classification of habitats in the 'Red List Biotopes'. BfN also operates a database (FFH-VP-Info) containing (non-binding) information on Habitats impact assessment procedures. Thus, direct effects in form of soft usage can be traced.

The implementation of the guidance documents on the Water Framework Directive took place via the 'Bund-Länder Working Group Water' (LAWA) comprised of representatives from the Federal Ministry and all state ministries. LAWA provides 'soft law' guidance on the implementation of national water management policies. Following this approach, it translated the EU guidance documents into (non-binding) national guidance documents (D4 and D6). In this case, too, soft usage characterized the implementation.

⁷ This section is based on the SoLaR country report "The use of EU soft law by national courts and administration in the field of EU environmental law" by Andreas Hofmann.

Table 3 shows, that in addition to the soft usage in both cases, hardening out is observable. For both the FFH⁸ and the Water Framework Guidelines,⁹ the Federal Administrative Court has referred in rulings to interpretations offered in the EU guidance documents. Court cases mostly concern permitting processes for large construction projects (airports, motorways, harbors) that entail substantial investments. Where a judicial decision on a permitting decision refers to EU soft law to decide about who wins and who loses, EU soft law has direct distributional consequences. An interviewee in the judiciary gave a number of reasons for such hardening out (D7). Courts typically return very detailed judgments that cite a multitude of different sources, such as academic literature or foreign courts. It is therefore not unusual to refer to sources that are not strictly hard law. The interview partner stressed that, in this context, EU guidance documents are relatively authoritative since they are close to the source of the original legislation. In addition, their level of expertise is substantively helpful. As such, they are difficult to ignore and they set a high bar for arguing against their interpretation. Finally, reference to EU guidance documents potentially signals to the CJEU that the national argument is ‘on the right level’. This can serve to counter suspicion that national courts block the intrusion of EU rules.

	Soft usage	Hardening out
Guidelines on the Waterframework Directive	Guideline (literal translation)	Via court
Guidelines on the Flora, Fauna and Habitats Directive	Guidelines and daily administrative practices In practice EU soft law is frequently referred to in impact assessment procedures	Via court

Table 3: Effects of environmental policy EU soft law instruments in Germany

Turning to actors’ assessment, for both instrument soft usage was perceived as very helpful when putting EU rules into practice. EU soft law implementation was praised for the ability to respond flexible to practical implementation problems (D6 and D5). In an area where the technical and detailed nature of regulation does not lend itself to hard legislation EU soft law seems to provide governance efficiency. Interviewees stressed that scientific guidance on how to devise and carry out management plans is used in daily practice and widely perceived to be helpful (D6). However, they also highlighted that in practice, there is considerable

⁸ BVerwG 9. Senat, 9 A 20/05 on a bypass near the town of Halle (17.1.2007), BVerwG 4. Senat, 4 C 12/07 on the extension of a runway at the airport of Münster/Osnabrück (9.7.2009) and BVerwG 9. Senat, 9 C 6/12 on the construction of a bridge crossing the river Elbe near Dresden (Waldschlösschenbrücke, 6.3.2014).

⁹ BVerwG 7. Senat 7 A 2/15 on Elbe dredging to allow larger freighters to reach the port of Hamburg (2.10.2014 & 9.2.2017), BVerwG 9. Senat, 9 A 18/15 and 19/15 (joint decision) on an Elbe tunnel north of Hamburg (10.11.2016) and BVerwG 7. Senat , 7 CN 1/14, on abolishment of a drinking water protected area (26.11.2015).

heterogeneity in implementation between the Länder (D5). Soft law is an instrument to counter this heterogeneity where federal competences to harmonize implementation through hard law are lacking, but it cannot prevent residual heterogeneity.

5 Discussion

Where EU soft law is increasingly used in EU policy-making it seems important to understand whether there is an empirical foundation to two core claims associated with EU soft law: governance efficiency and lack of legitimacy during implementation. Whether these characteristics should be considered as asset or challenge of EU soft law, it is argued, depends to a large extent on the effects EU soft law takes at the national level. Exploring implementation of EU soft law instruments on nine policy instruments from three policy-areas this chapter explored if EU soft law takes effect at national level, whether it does so in a soft form or by hardening out and how the actors involved in the respective processes consider questions of governance efficiency and a potential lack of legitimacy. Summarizing the results of this exercise three aspects can be highlighted:

First, despite being non-binding, the EU soft law instruments studied showed substantial effect at the national level. I do not claim the instruments to be representative. Yet, what strikingly emerged from the cases studies is that EU soft law is far from being neglected or blocked in implementation. In only one out of nine cases did the EU soft-law instrument show no effect at the national level. Rather than resulting from a lack of awareness, a decision for non-implementation was taken. Future research could explore more systematically in how far this result is influenced by linkage to hard law that might create procedural incentives for implementation.

Secondly, soft implementation co-exists along with hardening out. Out of eight cases where EU soft law took effect, four showed soft as well as hard effects, two showed soft effects only and one was characterized by hardening out exclusively. Soft implementation instruments were issued by administrative actors at lower levels of government as well as by agencies holding expertise in the respective policy area. Hardening out took place where central government actors legislated or altered existing law that coincided with the ambit of the EU soft law instrument. In addition, in environmental policy, the judiciary acted as an agent for hardening out. Overall, soft effects seem to be more important while hardening depends on the specifics of the national policy field, e.g. in form of existing legislation and judicial agency.

Third, evidence suggests that efficiency gains are frequently a main driver of EU soft law implementation. Actors involved in the process did not perceive these efficiency gains to depend on a soft usage only. This might be affected by the frequent co-existence of soft usage and hardening out. Regarding a potential lack of legitimacy different insights emerged from our material. Actors further away from the legislative process, i.e. agencies and subnational layers of the administration, were typically less concerned with a potential lack of legitimacy and stressed efficiency gains. In contrast, where concerns about a lack of legitimacy were voiced, this was by actors closer to the legislative process. Thus, among the implementation conditions not only the interaction mode of actors (Benz, 2007) but also their relative position in the policy process might influence questions of legitimacy and accountability.

Far from constituting ultimate answers to questions of EU soft law implementation, this chapter highlighted the relevance to study implementation beyond compliance and enforcement and to include this later phase of the policy cycle in wider considerations about governance efficiency and legitimacy in the EU multilevel-system.

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