

2016

## Effects of European Soft Law at National Administrative Courts

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### Recommended Citation

Andras Kovacs , Tihamer Toth & Anna Forgacs *Effects of European Soft Law at National Administrative Courts*, 14 Loy. U. Chi. Int'l L. Rev. 1 (2016).

Available at: <https://lawcommons.luc.edu/lucilr/vol14/iss1/2>

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# EFFECTS OF EUROPEAN SOFT LAW AT NATIONAL ADMINISTRATIVE COURTS

Andras Kovacs, Tihamer Toth, Anna Forgacs\*

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## Introduction

The aim of this article is to analyze the extent to which soft law issued by the European Union (“EU”) Commission is ‘hardened’ in administrative court procedures at a Member State level, whether national courts recognize the legal effects of soft law, and whether national courts can properly deal with the coexistence of

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soft and hard law.<sup>1</sup> References to EU soft law instruments at national level are most common in administrative law cases, especially in cases involving competition law, regulated markets, environmental law, and consumer protection law.<sup>2</sup> Most of our professional experience with EU soft law derives from Hungarian administrative law jurisprudence, however, we will examine similar cases from other EU Member States for comparison.

The first part of the study provides a brief overview of the definition, classification and legal effect of various EU soft law instruments, while the second part explores whether formal and informal soft law instruments produce different legal and practical effects through an examination of telecommunication regulatory cases and experience gained in EU competition law enforcement. We will observe the extent to which law enforcers and judges can deviate from soft law norms. These sector specific insights will lead us to conclude that EU soft law is practically treated as binding law before national administrative courts.

Finally, we suggest that the constitutional problems arising from this hardened role of EU soft law in national administrative courts could be cured by extending and improving the preliminary ruling procedure.

## 1. The Definition and the Legal Nature of Soft Law

### 1.1. Hard and Soft Law

When law enforcers, especially judges in the courts of EU Member States, come to decide cases, they are accustomed to considering various legal document involving: (hard) law, soft law, and sometimes other official policy documents that do not even reach the level of soft law. Obviously, these documents may vary in their impact on the decision they make. Whilst trying to avoid the delicate issue of defining hard law, we will focus on the role which soft law plays in judicial procedures involving the review of administrative decisions at a national level.

Soft law has its origins in international law, where it can have two meanings.<sup>3</sup> On the one hand, in a formalistic way, soft law is not a source of international law, although regulated individuals follow it as if it was law. On the other hand, it is acknowledged as a source of law, but without normative content; meaning that neither rights nor obligations may be conferred by it.<sup>4</sup>

For the purposes of this paper, we will focus on the distinctive features between hard and soft law from the perspective of national judicial decisions. In referring to soft law, we mean non-binding legal norms that usually cannot be

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<sup>1</sup> See OANA A. STEFAN, *SOFT LAW IN COURT: COMPETITION LAW, STATE AID AND THE COURT OF JUSTICE OF THE EUROPEAN UNION* 242 (2013), for further research topics and recommendation.

<sup>2</sup> See, for example, *id.* at 162-65, 275-324, these fields of administrative law are largely determined by EU substantive rules; additionally, in some of these fields, the Commission has strong competences in law enforcement (e.g. competition law).

<sup>3</sup> Laszlo Blutman, *In the Trap of a Legal Metaphor: International Soft Law*, 59 INT'L & COMP. L.Q. 605, 606 (2010) (starting our inquiry with recalling international legal principles is reasonable, since EU law, although it had evolved into a separate legal order, has its origins in international law).

<sup>4</sup> *Id.*; LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW CASES AND MATERIALS* 34 (4th ed. 2001).

enforced through judicial proceedings. This does not mean, however, that they do not have a role in judicial proceedings.<sup>5</sup> This interpretation is also supported by EU law, since Article 263 of the Treaty on the Functioning of the European Union (TFEU) explicitly excludes non-binding legal acts (recommendations and opinions) under Article 288 from the scope of the European Court of Justice's (ECJ) authority.<sup>6</sup>

## 1.2. The Formal Classification of EU Soft Law Instruments

### 1.2.1. Official Soft Laws: Recommendations and Opinions

An obvious method of classifying EU soft law instruments is to inquire whether the given document was adopted in a form recognized by the TFEU itself. Accordingly, an act that was not adopted through an officially recognized procedure cannot become an official source of law.

Article 288 of the TFEU mentions recommendations and opinions as legal acts of the EU. These are adopted in a regulated procedure by certain institutions based on the delegation of authority in the TFEU. Their soft law nature derives from the fact that according to the TFEU, they shall have no binding force. In this article we will focus on recommendations, as the application of this type of official soft law is prevalent both in the ECJ's and the national courts' jurisprudence. By contrast, opinions possess features of individualized documents relating to a specific legislative, accession or other decision, thus their legal effect on third parties is not obvious.<sup>7</sup>

### 1.2.2. Unofficial Soft Laws

The various types of annual reports, published legislative agendas, white books, green books, or guidelines to the interpretation of hard law provisions, notices, communications, etc. all constitute documents that are not official legal acts under the TFEU, yet they may have normative content. Since their creation is not regulated, their title is somewhat arbitrary, even though EU institutions

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<sup>5</sup> See *infra* Section 2.2.2, for example, in competition law procedures soft law documents read in conjunction with legal principles may even create rights for third parties that courts should protect.

<sup>6</sup> See, e.g., Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 32 (1993); Linda Senden, *Soft Post-Legislative Rulemaking: A Time for More Stringent Control*, 19 EUR. L. J. 57, 57 (2013) (noting that although soft law has no legally binding force, it nonetheless may produce practical effects); Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 23, 30 (Dinah Shelton ed., 2003) (arguing as an element of the definition of soft law that soft laws are based solely upon voluntary adherence, or rely upon non-judicial means of enforcement); STEFAN, *supra* note 1, at 242-43.

<sup>7</sup> See *Commission Opinion on the Application for Accession to the European Union by the Republic of Croatia*, COM (2011) 667 final (Oct. 12, 2011); see also *Commission Opinion of 30.9.2011 on the Requests for the Amendment of the Statute of the Court of Justice of the European Union, Presented by the Court*, COM (2011) 596 final (Sep. 30, 2011); *Commission Opinion on the Request from the United Kingdom to Accept Regulation (EC) No. 593/2008 of the European Parliament and the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)*, COM (2008) 730 final (Nov. 7, 2008).

publishing them try to title them to match their content. In the following, we will refer to these as communications.

Building on Senden's approach,<sup>8</sup> communications may be classified into four groups based on their legal effect. There are communications that are explicitly binding and confer rights and obligations, others interpret hard law (interpretative communications), other documents restrict the discretionary powers of law enforcement held by EU or Member State authorities (decisional communication), and there are some which do not contain any general rule of conduct, thus they cannot possess any legal force. For the purposes of this article, we will focus on interpretative and decisional communications.

### 1.3. Exploring the Legal Nature of Soft Law

#### 1.3.1. *Is Soft Law Legitimized by Courts?*

The key to understanding the existence and legal impact of soft law lies in the stance that courts take in relation to soft law as legal instruments. Should courts disregard them as no-law, simple policy documents issued by over-activist authorities, they would either disappear or become limited in their scope, regulating only inter-institutional relations within an authority. The ECJ elaborated its views on the legal effects of soft law in the *Grimaldi v. Fonds des Maladies Professionnelles* case.<sup>9</sup> The ECJ acknowledged that recommendations are not intended to produce binding effects even with regards to the person to whom they are addressed; consequently, they cannot create rights upon which individuals may rely before national courts.<sup>10</sup> However, national courts are *bound to take recommendations into consideration* (emphasis added by authors) in order to decide disputes submitted to them, in particular where they cast light on the *interpretation* of national measures adopted to implement them or where they are *designed to supplement* binding community provisions.<sup>11</sup> This still valid definition of “no binding effect” is regarded as the essence of soft law, under which “non-binding” means, for a national judge, that the given legal rules are not enforceable in the courts.<sup>12</sup> Two possible judicial, constitutional law approaches could evolve towards soft law, based on this lack of binding effect.

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<sup>8</sup> Senden, *supra* note 6, at 57-75; Linda Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?*, 9.1 ELECTRONIC J. COMP. L. 1, 23-24 (2005); *see also* Várnay Ernő & Tihamér Tóth, *Közlemények az Unió Jogban [Communications in the Law of the EU]*, 4 ÁLLAM ÉS JOGTUDOMÁNY [JOURNAL OF THE HUNGARIAN ACADEMY OF SCIENCES] 417, 417-18 (2009).

<sup>9</sup> Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, 1989 E.C.R. 4407 (noting that although the judgment is about recommendations, the legal literature interprets it generally for the legal effect of soft law); *see also* PAUL CRAIG & GRAINNE DE BURCA, *EU LAW: TEXT, CASES, AND MATERIALS* 210 (2nd ed. 1998); JOEL RIDEAU, *DROIT INSTITUTIONNEL DE L'UNION ET DES COMMUNAUTÉS EUROPÉENNES* 162-66 (La Librairie générale de droit et de jurisprudence ed., 4th ed. 2002); *Joined Cases 253/78 & 1/79-3/79, Procureur de la République v. Giry*, 1980 E.C.R. 2329 (noting that, related to comfort letters, the ECJ had reached a decision even before the *Grimaldi* case, stating that national courts must take them into account); *Case C-99/79, SA Lancome v. Etos BV*, 1980 E.C.R. 2513; *see also* STEFAN, *supra* note 1, at 162.

<sup>10</sup> *Grimaldi*, 1989 E.C.R. ¶ 16

<sup>11</sup> *Grimaldi*, 1989 E.C.R. ¶ 18.

<sup>12</sup> *See infra* Section 2.2.4, also cannot create obligations, as will be seen later.

On the one hand, the jurisprudence of the Hungarian Constitutional Court provides an example of a cautious approach to soft law. In a matter involving circulars and guidelines of various authorities, the Court ruled that the existence of such documents, which are not regulated as sources of law in the Act on Legislation, was in violation of the Constitution.<sup>13</sup> However, the Court did not annul the documents, even though it made clear that they cannot have any legal effect. While this interpretation resulted from an overly strict application of the principle of separation of legislative and executive powers,<sup>14</sup> it paradoxically led to a weakening of the separation of these state functions. If these documents are not public and accessible to the affected individuals,<sup>15</sup> then the authority not only fails to fulfil its duty to provide information, but also creates a situation endangering the rule of law and legal certainty. Legal certainty is increased whenever the decision-making authority provides information on its decision-making practice(s) and on the conduct it expects undertakings and other persons to follow.<sup>16</sup>

On the other hand, under the current approach of the ECJ, the phrase “*bound to take into consideration*” is in need of some further explanation. It means that in the course of law enforcement, a recommendation or a communication must be taken into consideration, regardless of whether the underlying hard law rule mandates this or not.<sup>17</sup> This legal effect of soft law, probably not limited to formal soft laws like recommendations,<sup>18</sup> could be described as a vertical indirect effect, the same as is attributable to directly effective rules in an unimplemented directive. Individuals may rely on soft law provisions that limit the EU Commission’s discretionary powers, for example, in the context of competition law, where significant reductions of fines are afforded to leniency applicants or companies that prefer to settle their case with the European competition authority. Just as with

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<sup>13</sup> See, e.g., Alkotmánybíróság (AB) [Constitutional Court] Mar. 24, 2009, AK, III.27 35/2009 (Hung.) (finding unconstitutional 8001/2004 IHM guideline on principles that the authority must use when determining the relevant market and SMP service providers and their obligations<sup>1/2</sup>); Alkotmánybíróság (AB) [Constitutional Court] Mar. 24, 2009, AK, III.27 35/2009 (Hung.) (discussing the normative nature of the circular published by National Police Force on how to apply wheel clamps); Alkotmánybíróság (AB) [Constitutional Court] Apr. 16, 2007, AK, IV.19 23/2007 (Hung.) (discussing the guidelines of the National Tax Authority on certain tax reliefs); Alkotmánybíróság (AB) [Constitutional Court] October 5, 1993, AK, X.7 52/1993 (Hung.) (discussing generally non-binding norms).

<sup>14</sup> This approach is understandable in light of historical experiences in Hungary, as during the communist regime the doctrine of separation of powers was completely ignored.

<sup>15</sup> In this context we will not deal with the cases where only references to such documents are prohibited, or where such documents are not accessible even though references can be made to them.

<sup>16</sup> Case C-98/78, *Racke v. Hauptzollamt Mainz*, 1979 E.C.R. 69 (providing an example of the principle of legitimate expectations in the context of EU law); see also *Joined Cases C-205/82 through C-215/82, Deutsche Milchkontor GmbH v. Germany*, 1983 E.C.R. 2633; Case C-24/95, *Land Rheinland-Pfalz v. Alcan Deutschland GmbH*, 1997 E.C.R. I-1607. In the Hungarian context this principle is detailed in the hard law provisions of the 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól [Act CXL of 2004 on the General Rules of Administrative Proceedings and Services] (Hung.).

<sup>17</sup> These delegations can be phrased in various ways. The study does not differentiate between ‘take into account’ or ‘take the utmost account of,’ although it may show some distinctions in legal effect based on hard law. However, this could be the subject of a separate analysis.

<sup>18</sup> CRAIG & DE BÚRCA, *supra* note 9, at 210; RIDEAU, *supra* note 9, at 162-66.

directives, third parties can rely on these soft rules against the EU authorities, but not in private (horizontal) disputes.

The ECJ stated that as far as informal soft law acts (communications) are concerned, an action for annulment is not available in cases where the adopted legal measure is not intended to have legal effect on third parties.<sup>19</sup> The same applies to recommendations under Article 263 of the TFEU.<sup>20</sup> However, when a communication is binding or aims to create an obligation not existing in EU hard law, then, based on a functional approach, it should be the subject of an annulment procedure.<sup>21</sup> This means that if the wording of the document implies binding force, then regardless of the form thereof, it can be subject to an action for annulment available for hard law acts.<sup>22</sup>

More than one conclusion can be drawn from this practice. First, no obligations on third parties should ever be created by soft law. Second, even if a national judge were to conclude that the soft law at hand included a provision with such binding effect, the national judge could not disregard this provision as long as the European Court of Justice has not annulled it. This derives from the logical necessity that, if a soft law document can be the subject of an action for annulment, then there must be an implied acknowledgment of its binding effect, as otherwise an annulment would not be necessary. The same conclusion can be drawn from a recent preliminary ruling procedure in the field of the regulation of electronic telecommunications.<sup>23</sup>

Thus, the question of whether soft laws are enforceable as law by national courts depends on the effectiveness of the procedure leading to their potential annulment. The efficiency with which national judges can refer soft law documents for preliminary rulings challenging their validity or clarifying their interpretation is of crucial importance. This is also true in cases where the binding soft law norm is not in conflict with any hard law rules.

It is worth noting that in *Grimaldi v. Fonds des Maladies Professionnelles*, the ECJ held that a hard law rule may be substituted with a soft law rule.<sup>24</sup> Thus it

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<sup>19</sup> Case C-301/03, *Italy v. Comm'n*, 2005 E.C.R. I-10217, ¶¶ 19, 24.

<sup>20</sup> See GRIMALDI E ASSOCIATI, COMMENTS OF GRIMALDI E ASSOCIATI ON THE DG COMPETITION BEST PRACTICES FOR ANTI-TRUST PROCEEDINGS, SUBMISSION OF ECONOMIC EVIDENCE AND GUIDANCE ON THE ROLE OF THE HEARING OFFICERS 4 (2010), [http://ec.europa.eu/competition/consultations/2010\\_best\\_practices/grimaldi\\_associati\\_en.pdf](http://ec.europa.eu/competition/consultations/2010_best_practices/grimaldi_associati_en.pdf).

<sup>21</sup> Case C-22/70, *Comm'n v. Council*, 1971 E.C.R. 263, ¶ 42; Case C-366/88 *France v. Comm'n*, 1990 E.C.R. I-03571, ¶ 8; Case C-303/90, *France v. Comm'n*, 1991 E.C.R. I-05315, ¶ 24; Case C-325/91, *France v. Comm'n*, 1993 E.C.R. I-03283, ¶¶ 14, 22-23, 31 (showing that it also cannot create obligations, substituting binding rights); Case C-57/95, *France v. Comm'n*, 1997 E.C.R. I-01627, ¶ 23 (addressing interpretative communications); Case C-27/04, *Comm'n v. Council*, 2004 E.C.R. I-06649, ¶ 44; see also *Joined Cases C-189/02 P, C-202/02 P, C205/02 P to C208/02 P & C213/02 P, Dansk Rørindustri v. Comm'n*, 2005 E.C.R. I-05425.

<sup>22</sup> *France v. Comm'n*, 1991 E.C.R. ¶¶ 25-26.

<sup>23</sup> See Case C-28/15, *Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM)*, 2016 ECLI:EU:C:2016:692, ¶¶ 39-42, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=183366&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=315159>.

<sup>24</sup> Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, 1989 E.C.R. 4407, ¶ 19.

can be concluded that where a soft law creates or clarifies an existing right in relation to the authority issuing such soft law, the soft law is not in violation of hard law, whereas any soft law which creates obligations on the part of individuals would be unlawful.

### 1.3.2. *To Deviate or Not to Deviate: That is the Question*

According to the settled case law of the ECJ, the Commission can be bound by its published communication or other types of soft law instruments.<sup>25</sup> This *self-binding effect* is in line with general legal principles of non-discrimination, legal certainty, and protection of legitimate expectations. Yet, unlike with hard law, deviation from published soft law is allowed, if it is well reasoned and does not contradict any of the above mentioned legal principles.<sup>26</sup> This line of reasoning by the ECJ makes soft law documents binding through general legal principles.

The binding nature of soft law on national authorities is a more delicate question. Given the carefully balanced share of sovereign powers between national and EU institutions, even if legal certainty and the unity of the single market would demand that national authorities follow the path of the EU Commission, it is far from obvious that national authorities are bound to do so. Without the special legal powers of the Commission, this would not work in practice.

Recommendations issued within the framework of telecommunications regulations aim to bind not only the issuing institution, but also national authorities applying those regulations. Just as the Commission can deviate from its own soft laws, national authorities can also deviate from such recommendations if they have good reasons to do so.<sup>27</sup> This rule is also valid when soft law does not expressly allow for any deviation.<sup>28</sup>

EU competition law communications interpreting TFEU Articles 101 and 102 often include a provision along the line that “[a]lthough not binding on them, this Notice is also intended to give guidance to the courts and competition authorities

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<sup>25</sup> See Francis Snyder, *Soft Law and Institutional Practice in the European Community*, in *THE CONSTRUCTION OF EUROPE: ESSAYS IN HONOUR OF EMILE NÖEL 197, 199-201* (Stephen Martin ed., 1994) (stating that this is called regulation by publication in the jurisprudence).

<sup>26</sup> See Case C-167/04, *JCB Servs. v. Comm’n*, 2006 E.C.R. I-08935, ¶ 207 (referring to Joined Cases C-189/02 P, C-202/02 P, C205/02 P to C208/02 P & C213/02 P, *Dansk Rørindustri v. Comm’n* 2005 E.C.R. I-05425); see also Case T-210/01, *Gen. Electric v. Comm’n*, 2005 E.C.R. II-05575, ¶ 516 (noting that it cannot deviate from rules binding itself); Case C-397/03, *Archer Daniels Midland Co. v. Comm’n*, 2006 E.C.R. I-04429 (analyzing the Lizin cartel case on the conditions of deviation); Case C-112/77, *August Topfer & Co. GmbH v. Comm’n*, 1978 E.C.R. 1019 (analyzing legitimate expectations); Case T-15/02, *BASF v. Comm’n*, 2006 E.C.R. II-00497; Joined Cases T-71/03, T-74/03, T-87/03, T-91/03, *Tokai Carbon v. Comm’n*, 2005 E.C.R. II-00010; Case T-279/02, *Degussa v. Comm’n*, 2006 E.C.R. II-00897; Case T-52/02, *Société nouvelle des couleurs zinciques SA v. Comm’n*, 2005 E.C.R. II-05005; see generally Case C-3/06, *Groupe Danone v. Comm’n*, 2007 E.C.R. I-1331 (discussing the conditions of deviation); STEFAN, *supra* note 2, at 21-27 (providing a comprehensive analysis, including principles of non-retroactivity, rights of defense, human rights and transparency, the conflict of which may lead to the deviation from soft law documents).

<sup>27</sup> Case C-207/01, *Altair Chimica SpA v. ENEL Distribuzione SpA*, 2003 E.C.R. I-08875.

<sup>28</sup> *Archer Daniels*, 2006 E.C.R. at 4481-83 (analyzing the Lizin cartel case on the conditions of deviation); Joined Cases C-80/81-83/81 & C-182/82-185/82, *Adam v. Comm’n*, 1984 E.C.R. 3411, ¶ 22; Joined Cases C-181/86 to 184/86, *Sergio Del Plato v. Comm’n*, 1987 E.C.R. 4991, ¶ 10; Case C-171/00 P, *Liberos v. Comm’n*, 2002 I-00451, ¶ 35; see also STEFAN, *supra* note 2, at 139.



of the Member States in their application of Article 101 of the Treaty.”<sup>29</sup> These soft law instruments are well-structured, detailed, and lengthy documents<sup>30</sup> that often rely on the case law of the EU Courts and are subsequently finalised following a public consultation. In practice, it is hard not to take them seriously. This ‘not binding, but guiding’ wording of communications can be understood to reflect a *soft binding effect*. The Commission finds it important to expressly mention national law enforcers as targets of the communication and makes it clear that the Commission is in a position to guide them through the maze of EU competition rules. Certainly, the Commission cannot avoid mentioning that the communication is not binding on them, which is nothing new as long as we understand ‘binding’ in its traditional hard law sense: an absolute prohibition on deviation from the rule.<sup>31</sup> According to our understanding, soft law instruments have a soft binding effect: law enforcers should do their best to follow them, but can exceptionally deviate from them as long as such deviation is explained in the decision and does not infringe general principles of EU law.

Apparently, the ECJ gives a wider margin of appreciation to national courts. The Court held in *Expedia Inc. v. Autorité de la Concurrence and Others*, responding to the French Court of Cassation, that national authorities are not bound to apply EU soft law instruments, and they have complete discretion to take the thresholds mentioned in the *de minimis* notice into consideration.<sup>32</sup> The Court rightly referred to the wording of the notice and that it was published not in the L, but the C series of the Official Journal. However, the Court should have acknowledged the importance of the general principles of EU law in the same way as it does for any member of the European Competition Network. Otherwise the coherent application of EU competition law would be endangered.<sup>33</sup>

The difference between hard law and soft law becomes evident when either the issuing authority or a third party contravenes the rules established therein. Any conduct infringing hard law will be regarded as unlawful behavior with legal consequences as prescribed by law. On the other hand, soft law cannot formally

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<sup>29</sup> See, e.g., Communication from the Commission (EC) Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 291) 1, 1-2 (noting generally that the communication is without prejudice to any interpretation that may be given by the Court of Justice of the European Union).

<sup>30</sup> See Commission Notice (EC) Guidelines on the Application of the Specific Rules Set Out in Articles 169, 170 and 171 of the CMO Regulation for the Olive Oil, Beef and Veal and Arable Crops Sectors, 2015 O.J. (C 431) 1, for the latest agricultural guidelines, which occupy 37 pages in the Official Journal.

<sup>31</sup> See, e.g., Communication from the Commission (EC) Notice on Agreements of Minor Importance Which Do Not Appreciably Restrict Competition Under Article 101(1) of the Treaty on the Functioning of the European Union, 2014 O.J. (C 291) 2, 5. (“Although not binding on them, this Notice is also intended to give guidance to the courts and competition authorities of the Member States in their application of Article 101 of the Treaty.”)

<sup>32</sup> Case C-226/11, *Expedia Inc. v. Autorité de la Concurrence and Others*, 2012 E.C.R. I, ¶¶ 30-31.

<sup>33</sup> *Id.* ¶ 39 (arguing that, although national courts are not obliged to apply soft law, they should nevertheless consider the Commission’s assessment and give reasons for any divergence); see also Oana A. Stefan, *Relying on EU Soft Law Before National Competition Authorities: Hope for the Best, Expect the Worst*, 7 COMPETITION POL’Y INT’L ANTITRUST CHRONICLE (2013), <https://www.competitionpolicyinternational.com/relying-on-eu-soft-law-before-national-competition-authorities-hope-for-the-best-expect-the-worst/>.

be infringed. It will be the underlying hard law provision, as interpreted by a communication, or a general legal principle the infringement of which could be argued by a plaintiff. The issuing authority can be held liable for not respecting its own rules, but even this could diverge from its soft law if it gives explanation to that effect and does not infringe general legal principles, like the protection of legitimate expectations. Nevertheless, if the national authority always relies on a soft law rule in its decisions, then undertakings will also be practically bound by the soft law. Soft law norms can have practical binding force.

## 2. The Application of EU Soft Law in National Administrative Courts

In this section we will show that theoretical distinctions between hard and soft laws are not always significant for national judges in the context of the judicial review of administrative decisions. In fact, both soft and hard EU laws are considered to be practically binding rules.<sup>34</sup> Before looking at our telecommunications and competition law examples, it should be recognized that soft laws use various terms to persuade national law enforcers to follow the path laid down by the EU Commission.

The strongly worded recommendation in the field of telecommunications regulation expects regulators to “take the utmost account of” the soft provisions, which comes close to a clear obligation, especially if we take into consideration that the Commission can effectively challenge deviating national decisions. Soft laws in competition law apply less intrusive language.

### 2.1. Telecommunications

#### 2.1.1. *Regulatory Institutions in Europe*

Companies providing telecommunications services are regulated by national authorities (“NRAs”) implementing hard and soft rules with EU origins. Together with the Commission they form the Body of European Regulators for Electronic Communications (“BEREC”).<sup>35</sup> This procedural control mechanism strengthens the application of soft law as a binding rule. It is interesting to note that, controversially, the stronger obligation (“take the utmost account of”) is linked to the soft law published by BEREC, the institutional status and demo-

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<sup>34</sup> This conclusion is based on the fact that the Grimaldi case only mandates national courts to take soft law into account, but the ECJ has not stated that this would be applicable to itself, which is also connected to the different levels of law enforcement. See Senden, *supra* note 6, at 361-99 (reaching the same conclusion based on several judgments of the ECJ). While this conclusion is highly probable, it is not accepted unequivocally. See, e.g., STEFAN, *supra* note 1, at 161-65. See STEFAN, *supra* note 1, at 20-21 (critiquing Senden’s conclusions, and stating that if a recommendation is binding for the courts, it cannot be soft and binding under Article 263 TFEU); Snyder, *supra* note 6, at 217. In our study, we aim to prove this proposition by analyzing not only the term “take into account” but also the logical analysis of ECJ case law.

<sup>35</sup> Commission Regulation 1211/2009 of Dec. 18, 2009, Establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office, 2009 O.J. (L 337) 1, 1 (noting that in order for the opinions or common positions of BEREC to have legal effect, they require wording different from a Commission soft law document).

cratic legitimacy of which is far more disputed than that of the Commission.<sup>36</sup> One might presume that the use of the stricter language is a direct result of the agency compensating for its secondary legal status, and that agency aims thereby to emphasize that the soft law published by BEREC should be taken into consideration regardless of its legal status. However, if there is a substantial difference between these terms used in hard law, then it is a worrying trend that lower institutional status triggers more stringent obligations.

The similar differences in the wording of hard law delegations would provide an interesting subject of study, however, they fall outside the scope of the present paper. One of the reasons for this is that the implementation of the provisions of the Framework directive into Hungarian law was carried out through a direct reference. The national law states that the NRA has to take the Commission recommendations based on Section 1, Article 19 of the Framework directive into account, while the related guidelines must be taken the utmost account of [Eht. 24.§ (2)], along with the common positions, recommendations and best practices of BEREC [Eht. 24.§ (3)].<sup>37</sup> Such differentiation may be difficult to justify with the text of the directive. As such, we will presume in the following that the national judge has to “take these into account,” regardless of the specific wording.

### *2.1.2. The Scope of Regulation: the Process of Identifying Significant Market Players*

Under the current regulatory framework applicable to the info-communications markets,<sup>38</sup> the NRAs impose obligations on service providers with significant market power (“SMP”), based on the Commission’s recommendation<sup>39</sup> for determining the relevant markets. The rationale for this is that competition is not effective in circumstances where there is a service provider with significant market power, and that ineffective competition ought to be cured by specific obliga-

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<sup>36</sup> See Anna Forgács, *The Regulatory Powers of Agencies in the United States and the European Union*, 3 EUR. NETWORKS L. & REG. Q. 11, 11-24 (2015); László Szegedi, *Challenges of Direct European Supervision of Financial Markets*, 4 PUB. FIN. Q. 347, 347-57 (2012).

<sup>37</sup> 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.) §24 [hereinafter: Eht].

<sup>38</sup> The most important directive in the regulatory framework is Directive 2009/140/EC, of the European Parliament and of the Council of 25 November 2009 Amending Directives 2002/21/EC on a Common Regulatory Framework for Electronic Communications Networks and Services, 2002/19/EC on Access to, and Interconnection of, Electronic Communications Networks and Associated Facilities, and 2002/20/EC on the Authorisation of Electronic Communications Networks and Services, 2009 O.J. (L 337) 37 [hereinafter Framework Directive].

<sup>39</sup> Commission Recommendation of Feb. 11, 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 O.J. (L 114) 45; Commission Recommendation of Oct. 9, 2014 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communications Networks and Services, 2014 O.J. (L 295) 79 (has yet to be applied).

tions determined by the NRA.<sup>40</sup> Since this rule was enacted in a directive, national judges do not apply the directive itself, but rather the national law implements it.<sup>41</sup> The obligation prescribed by the NRAs may involve mandating the cost orientation of prices under Article 13 of the Access Directive.<sup>42</sup> To achieve this aim, the NRA can determine the cost accounting methodology, and can supervise the cost orientation by using its own cost accounting method. If the NRA finds that prices are not cost-oriented, it can intervene and change the prices accordingly. The NRA reviews the SMP classification and the accompanying obligation every three years. The NRA either adopts a decision addressed to the SMP service provider, or if the SMP status is no longer justified, terminates the status and the obligation.<sup>43</sup> It follows that this “individualized regulation” has a three-year regulatory cycle, and the legality of each cycle may be reviewed by national courts separately.<sup>44</sup>

According to the Framework Directive, NRAs are required to take “the utmost account” of the recommendation and the guidelines published under the scope of the directive.<sup>45</sup> If an NRA chooses not to follow a recommendation, it shall inform the Commission explaining the reasoning for its position.<sup>46</sup> Under the notification procedure of Article 7, the Commission has a form of veto power, as regards to the definition of the relevant market. Procedural rules like these, which confer powers on the Commission, make the application of these originally soft rules practically mandatory for national authorities.

According to the Commission’s recommendation, an NRA is allowed to derogate from the markets listed therein.<sup>47</sup> In order to do so, they must follow a certain procedure. The same option is now codified in the mandatory regulation.<sup>48</sup> The NRA can determine relevant markets in need of regulation beyond

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<sup>40</sup> It is a so-called asymmetric regulation, under which the SMP company has additional obligations compared to competitors, in order to counter-balance the distortions of competition caused by the significant market power. See Framework Directive, *supra* note 37, at art. 16 ¶ 4; see also Ralf Dewenter & Justus Haucap, *The Effects of Regulating Mobile Termination Rates for Asymmetric Networks*, 20 EUR. J.L. & ECON. 185, 186 (2005); Martin Peitz, *Asymmetric Access Price Regulation in Telecommunications Markets*, 49 EUR. ECON. REV. 341, 342 (2005).

<sup>41</sup> 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.).

<sup>42</sup> Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

<sup>43</sup> Article 7 of the Access Directive and 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.). §§62-65.

<sup>44</sup> 2003. évi C. törvény az elektronikus hírközlésről (Act C of 2003 on Electronic Communications) (Hung.). §65.

<sup>45</sup> Council Directive 2002/21, arts. 15, 16, 19, 2002 O.J. (L 108) 33, 44-46 (EC).

<sup>46</sup> Council Directive 2002/21, art. 19, 2002 O.J. (L 108) 33, 46 (EC).

<sup>47</sup> Commission Recommendation of Feb. 11, 2003 on Relevant Product and Service Markets Within the Electronic Communications Sector Susceptible to Ex Ante Regulation in Accordance with Directive 2002/21/EC of the European Parliament and of the Council on a Common Regulatory Framework for Electronic Communication Networks and Services, 2003 O.J. (L 114) 45, Preamble (19).

<sup>48</sup> 16/2004 (IV. 24.) (Ministerial Decree No. 16/2004 (IV. 24.) on the Hungarian Information and Telecommunication Ministry) (Hung.).

those identified in the annex of the regulation.<sup>49</sup> This makes clear that the legal effects of a non-binding recommendation can be identical to those of hard law allowing derogation.

This is also in line with our hypothesis that the real difference between hard and soft laws depends to a greater extent on the content rather than the formalities. The real dividing line is between imperative rules and rules allowing for derogations. However, we must keep in mind that the above-mentioned authorization of derogation is 'one-sided', in the sense that it only allows the NRA to derogate from the rules. It is not clear to what extent interested third parties can make a claim before the authority or a reviewing court in order to challenge a non-deviation.

As far as administrative courts in Hungary are concerned, they can not only annul, but also amend the NRA's individual decisions, which can be of practical significance to ensure the continuity of regulation.<sup>50</sup> This is, however, a difficult choice for the judge when he or she intends to make use of the derogation option expressly provided for in the recommendation. It is not clear whether the court can itself amend the NRA's decision with the result of derogating from the recommendation, or whether it should rather annul and remand the decision to the NRA to provide an opportunity for the Commission to exercise its special control powers. It is also open to question whether in a new procedure, if the Commission did not agree with the reasoning of the court, the final decision ought to be taken by the court or the NRA. It can be argued that the Commission's decision in individual cases binds national courts, but in this special procedural setting, it is not clear whether this should be the case. If, nonetheless, the national courts are thus bound, then the question whether national judicial review procedures are basically ineffective arises.

It may be noted that the competences of the Commission and the national courts are clearly concurring, since there are more and more EU law provisions that give competence to the Commission, or sometimes even to national authorities over national courts. Article 16 of Council Regulation (EC) No 1/2003 states that, "when national courts rule on agreements, decisions or practices under Article 81 or Article 82 of the Treaty which are already the subject of a Commission decision, they cannot make decisions which run counter to the decision adopted by the Commission. They must also avoid making decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings." Then, from the EU context, this type of regulation is transferred into national law, and the national court will be bound by the decision of the national competition authority (see for example Article 88/B(6a) of the Hungarian competition act), which for a national judge would be the same as if the Commission's decision would bound the ECJ. It is easy to see that this is a challenge to the rule of law, although a detailed discussion of this issue is beyond the scope of this paper.

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<sup>49</sup> *ibid.* § 2 Section 3.

<sup>50</sup> Eht. § 46.

2.1.3. *A Dutch Case Study of the 2009/396/EC Recommendation*

In order to demonstrate the practically binding nature of EU recommendations in an EU Member State, we would like to elaborate first on a Dutch telecommunication case, which reached the ECJ, and then on a recent administrative law case before the Curia, the Supreme Court in Hungary. Naturally, the scope and depth of judicial review differs in legal systems, which shall be taken into account in these case studies as well. Before turning to the particulars of the cases themselves, the main features of the regulatory framework should be introduced.

The EU Commission's Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU<sup>51</sup> established a common approach for NRAs to set termination rates on fixed and mobile termination markets. Points 1 and 2 of the recommendation states that "when imposing price control and cost-accounting obligations in accordance with [the Access Directive] on the operators designated by National Regulatory Authorities (NRAs) as having significant market power on the markets for wholesale voice call termination on individual public telephone networks (. . .) as a result of a market analysis carried out in accordance with Article 16 of [the Framework Directive], NRAs should set termination rates based on the costs incurred by an efficient operator. This implies that they would also be symmetric. In doing so, NRAs should proceed in the way set out below. It is recommended that the evaluation of efficient costs is based on current cost and the use of a bottom-up modeling approach using long-run incremental costs (LRIC) as the relevant cost methodology."<sup>52</sup>

Judge Heico Kerkmeester analyzed a recent Dutch case – referred to preliminary ruling – related to the recommendation.<sup>53</sup> The question in that case was whether the cost-oriented price is required to be achieved through a pure BU-LRIC model (involving only incremental costs) or a plus BU-LRIC model (also reflecting a mark-up for non-incremental fixed costs).<sup>54</sup> Only the issue of reasonableness plays a role here, namely the fact that a plus BU-LRIC model is closer to cost-oriented prices based on the economics literature. Even though the service providers claimed during the judicial procedure that the recommendation is in violation of Article 13 of the directive, the judge who referred the case to the ECJ did not accept this claim and instead only referred the question of whether, in circumstances where the plus BU-LRIC price is enough to achieve a cost-oriented price, the pure BU-LRIC method resulting in a lower price is applicable.

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<sup>51</sup> Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67.

<sup>52</sup> Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67 and Case C-28/15, Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM), 2016 ECLI:EU:C:2016:692, 13.

<sup>53</sup> See Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=8370](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370).

<sup>54</sup> The BU-LRIC model at issue is the model of a hypothetical, efficient operator's costs. In a general economic approach, the cost-oriented price is the equilibrium price on the competitive market at which the price is equal to the average cost and marginal cost. Of course, this is only a model and a rough simplification in case of multi-product companies or cost sub-additives.

In this regard the judge made national law references.<sup>55</sup> This case fundamentally differs from the later Hungarian example, because both models reflected cost oriented prices, thus compatibility of the recommendation with hard law was not an issue.<sup>56</sup> The Advocate General's Opinion issued in the case also emphasizes that the validity of the recommendation was not challenged in the case.<sup>57</sup>

According to the Dutch judicial practice, the reasonableness of a decision is evaluated based on the technical standards and the principle of the best possible approximation. So the method applied by the regulator can be held unreasonable, and thus unlawful if the undertakings concerned can prove the existence of a better method than the one used by the NRA.

The predecessor of the Dutch NRA ("OPTA") used the plus BU-LRIC model already in 2005 and adopted a 5.6 cents per minute mobile termination rate, which was amended to 7 cent per minute in 2007 based on a successful claim by the service providers.<sup>58</sup> In 2008, the NRA once more adopted a 7 cents per minute tariff, which was appealed by the operator, UPC.<sup>59</sup> As a result, the Trade and Industrial Appeals Tribunal (CBB)<sup>60</sup> reverted to a 5.6 cents per minute tariff, stating that this was the only possibility based on a plus BU-LRIC model. Following this, in 2009, the recommendation was adopted promoting the use of the pure BU-LRIC model, thus in 2010 the NRA determined the tariff at 1.2 cents per minute. This court overruled this decision in 2011, using the plus BU-LRIC model and fixing the tariff at 2.4 cents per minute.<sup>61</sup>

Reaching this decision, the court disregarded the recommendation, stating that it is not binding, without referring the case to a preliminary ruling procedure.<sup>62</sup> Thereafter, the new NRA ("ACM") determined the tariff at 1.019 cents per minute, applying the pure BU-LRIC model based on the recommendation.<sup>63</sup> Acting upon the request of mobile service providers, the Dutch court set 1.861 cents per minute as a temporary arrangement and in the main procedure the CBB referred questions for a preliminary ruling to the ECJ. The first referred question related

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<sup>55</sup> Kerkmeester, *supra* note 53.

<sup>56</sup> See Case C-28/15, *Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM)*, 2016 ECLI:EU:C:2016:692, ¶¶ 27-28, 73, 78 (admitting that more than one cost-orientated models are feasible).

<sup>57</sup> *Koninklijke KPN NV*, 2016 ECLI:EU:C:2016:310 at 39,65 (emphasizing that if a recommendation is in violation of hard law, then a national judge could only reach a decision which goes against the recommendation in circumstances where such recommendation is annulled, thus deviation is not an option available to a national judge; additionally, it also suggests that this issue could be raised in relation to this particular recommendation).

<sup>58</sup> See Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, [http://ec.europa.eu/information\\_society/newsroom/infocentre/document.cfm?doc\\_id=8370](http://ec.europa.eu/information_society/newsroom/infocentre/document.cfm?doc_id=8370).

<sup>59</sup> *Id.*

<sup>60</sup> The College van Beroep voor het bedrijfsleven (Trade and Industrial Appeals Tribunal) is a specialised appeal court for administrative law cases in trade, industry, competition and telecommunications law. *Special Tribunals*, DE RECHTSpraak, <https://www.rechtspraak.nl/English/Judicial-system/Pages/Special-Tribunals.aspx>.

<sup>61</sup> See Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, [http://ec.europa.eu/information\\_society/newsroom/infocentre/document.cfm?doc\\_id=8370](http://ec.europa.eu/information_society/newsroom/infocentre/document.cfm?doc_id=8370).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

to the deviation options of national courts.<sup>64</sup> The second question sought clarification as to the reasons on which a deviation may be justified: whether a deviation from the pure BU-LRIC method is allowed based on the principles of proportionality, appropriateness, and on its practical effects, in the light of the policy objectives and regulatory principles laid down in Article 8 of the Framework Directive.

The Advocate General's Opinion acknowledges that a national judge can, after giving appropriate reasons, deviate from a recommendation, since it is not binding.<sup>65</sup> In this respect, the proportionality and reasonableness of the price regulation must be examined, but the judge must be exceptionally cautious and can only deviate from the recommendation based on serious reasons. This exceptional character of a deviation is emphasized several times in the Opinion.<sup>66</sup> Additionally, the Advocate General's Opinion stated that in the relevant case there seemed to be no circumstances deriving from either EU or national law that could justify such a deviation.<sup>67</sup> The Opinion suggests that the right to effective appeal under Article 4 of the Framework Directive is fulfilled if the national court examines the option of deviation.<sup>68</sup> However, the court is not allowed to substitute the evaluation given by the national authority with its own. Thus, deviation from the recommendation cannot be a general trend, only an exceptional and special instance. The limits of deviation are the requirement of cautiousness and the requirement of giving serious reasons. These limits run in parallel with the limited review powers of national judges in administrative cases, which precludes national judges from overriding administrative decisions within the margins of discretion, unless they are clearly unreasonable.<sup>69</sup> This "weak judicial control" hardens recommendations and soft law at national level in general and makes them practically binding. This is especially true if we consider how firmly Advocate General Mengozzi argues that there are no special circumstances in the Dutch case justifying such a deviation.<sup>70</sup>

The Court in deciding the *Koninklijke KPN NV v. Autoriteit Consument en Markt (ACM)* case mostly accepted the arguments of the Advocate General and concluded that "a national court may depart from Recommendation 2009/396. (. . .) Nevertheless, according to the Court's settled case-law, even if recommen-

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<sup>64</sup> Koninklijke KPN NV, 2016 ECLI:EU:C:2016:692 at 27 ("Must Article 4(1) of the Framework Directive, read in conjunction with Articles 8 and 13 of the Access Directive, be interpreted as meaning that, in principle, in a dispute concerning the lawfulness of a cost-oriented scale of charges imposed by the national regulatory authority (NRA) in the wholesale call termination market, a national court is permitted to make a ruling which does not accord with the European Commission Recommendation of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (2009/396/EC), in which pure BULRIC is recommended as the appropriate price regulation measure for call termination markets, if, in that national court's view, this is required on the basis of the facts in the case brought before it and/or on the basis of considerations of national or supranational law?").

<sup>65</sup> Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 53, 64, 66.

<sup>66</sup> Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 53, 64, 66.

<sup>67</sup> *Id.* at 72.

<sup>68</sup> *Id.* at 48.

<sup>69</sup> See *infra* Section 2.2.4, for a discussion on Hungarian judges.

<sup>70</sup> Koninklijke KPN NV, 2016 ECLI:EU:C:2016:310 at 72.



dations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them.”<sup>71</sup> For the reasons of such a deviation, the Court stated that a national court may only depart from the recommendation, if it is “required on grounds related to the facts of the individual case, in particular the specific characteristics of the market of the Member State in question.”<sup>72</sup>

This case shows how uncertain national judicial practice is regarding the legal consequences of recommendations and other soft law norms, i.e. to what extent deviation from a recommendation is an option. The application of the plus BU-LRIC model is not explicitly forbidden by the recommendation, but it is subject to certain conditions which were not met in the given case.<sup>73</sup> The Dutch court basically accepted that the requirement to ensure the unity of the internal market is a principle which justifies the application of the recommendation. However, it also pointed out that this effect on the internal market was minimal (the percentage of international calls was 7-9% and they were mostly made to Germany, which operated with similar tariffs).<sup>74</sup>

#### 2.1.4. A Hungarian Case Study of the 2009/396/EC Recommendation

The following Hungarian case study shows another example for the work of the same recommendation, which is followed by a hypothetical analysis in line with the above mentioned Dutch case and with the results of the Hungarian case.

Initially, based on a BU-LRIC model, the Hungarian NRA provided the same cost-oriented target price for all three mobile operators present on the Hungarian market, but with a three-year phased deployment period. This meant that, at the beginning of the regulatory cycle, the then largest operator had the lowest fees, and the highest fees were being charged by the smallest operator, which was also the last operator to have entered the market. These fees should have steadily converged until they became symmetric by the third year.

In an industry where the fixed (constant) costs are high, the marginal costs are tending towards zero, the unit cost (which, in the case of mobile termination rates, would be the per minute cost) will necessarily be volume and traffic dependent. This is the situation in the telecommunications sector and it means that in reality each operator’s cost-oriented price is different. The unit cost of an operator with a 20% market share is necessarily higher than another operator’s with a 40% market share. It is impossible not to notice that convergence to symmetric prices is a genuine possibility. However, this possibility can only occur if we assume during an ex-ante examination that the development of the operator’s market shares tends towards equalization. So by the time the fees become sym-

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<sup>71</sup> Koninklijke KPN NV, 2016 ECLI:EU:C:2016:692 at 39-40.

<sup>72</sup> *Id.* at 42.

<sup>73</sup> See Commission Recommendation of 7 May 2009, *supra* note 51, at 70 (noting that the tariff cannot exceed the average of the tariffs determined by the NRAs using the pure BU-LRIC method, a requirement which was not fulfilled here).

<sup>74</sup> See Heico Kerkmeester, *The National Judges Position Towards Mobile Termination Rates*, [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?doc\\_id=8370](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=8370).

metrical, the operator's market share and turnover will be very much the same. This was the crux of the argument against the symmetric charges by Vodafone, the smallest Hungarian operator.

In 2006, the NRA issued its SMP decision for the second regulatory cycle, which required the gradual introduction of prices approved by the public authorities based on the BU-LRIC model.<sup>75</sup> The decision was challenged in court by all three entities to whom it was addressed. During the judicial review of the decision, the expert opinion supported the lawfulness of the NRA's decision. The court appointed expert explained that the trend towards market share equalization rests on a sound theory and, therefore, the setting of converging prices on the basis of a symmetric target price was plausible.<sup>76</sup> In the judgment, however, the court emphasized its concern that the authority had set the prices for three years even though the SMP decision was required to be reviewed and renewed every two years.<sup>77</sup> Consequently, the authority should not have set new lower symmetric prices for the third year in its decision; this ought to have been the subject of another decision. The court mandated the NRA to re-examine, prior to adopting a new decision, whether its assumption was correct and whether the symmetric prices are justified by converging market shares. The court held that the regulatory decision was lawful for the reason that the companies of different sizes were obliged to use different prices converging to cost-oriented prices in the next two years, and it was premature to examine whether the standardized cost-oriented price would be applicable in the third year.<sup>78</sup>

The 2009/396/EC Recommendation applicable at that time specified a four-year transitional period rule for the NRAs. Principally, the rates were required to be symmetric by the 1st of January 2014.<sup>79</sup> Recital 17 of the recommendation states: "[i]n the mobile market it can be expected to take three to four years after entry to reach a market share of between 15-20%, thereby approaching the level of minimum efficient scale."<sup>80</sup> In other words, this means that differences in economies of scale are not relevant if the market share is above 15-20%. This might be right, but due to the implementation of Article 13 of the Access Direc-

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<sup>75</sup> National Infocommunications Authority decision No. DH-9549-54/2006. and No. DH-664-33/2005.

<sup>76</sup> Fővárosi Közigazgatási és Munkügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

<sup>77</sup> Fővárosi Közigazgatási és Munkügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

<sup>78</sup> Fővárosi Közigazgatási és Munkügyi Bíróság [Metropolitan Administrative and Labor Court] 17 April 2008 7.K.34.969/2006/96. (Hung.)

<sup>79</sup> Although the wording of the recommendation is not this strict, the imposition of certain conditions relating to deviations from the prescribed date of 1 January 2014, can be seen as binding. Commission Recommendation (EC) No. 2009/396 of 7 May 2009, §§ 17, 22, 2009 O.J. (L 124) 67 ("[a]ny such outcome resulting from alternative methodologies should not exceed the average of the termination rates set by NRAs implementing the recommended cost methodology.").

<sup>80</sup> Commission Recommendation on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU (EC) No. 2009/396 of 7 May 2009, 2009 O.J. (L 124) 67.

tive,<sup>81</sup> Hungarian law implementing the Directive obliged the operator to apply a cost-oriented price and not a price modeled on an efficient scale.

It follows from the recommendation that in the absence of a converging trend in market shares, the unit cost of an operator with a 20% market share will be constantly higher than that of an operator with a 40% market share. So, the price prescribed for operators in line with the recommendation would not comply with the newly articulated cost-orientation obligation.

### 2.1.5. *National Law, and National Judgment Conflicting with EU Soft Law?*

The Hungarian case study set out above raises a number of questions. First, the new recommendation is not in line with the prior national court judgment, which raises the question whether a recommendation published subsequent to a decision of a national court can have an effect on such decision, in a manner similar to a subsequently published binding legal norm. This question can be also phrased as whether a new recommendation can override national law, or at least a judgment of a national court. To answer this question, we need to consider the legal nature of EU soft law.

A recommendation, which is a kind of implementing measure relating to a hard law provision, should generally be taken into account by national law enforcers. Thus national law mandating the recommendation to be disregarded must be in violation of Article 288 of the TFEU. The ECJ does not seem to differentiate between binding and non-binding legal acts, when it asserts the primacy of EU law over national law. A recommendation as an EU legal act may override a national court judgment that is based directly on national law. Thus, a subsequently published recommendation exhibits the same features as hard laws do. This seems to be a strong argument for treating recommendations as binding norms at national level.

Stefan argues<sup>82</sup> that soft law is not binding on national authorities and noting that a general obligation to enforce soft law is not mandated pursuant to the loyalty clause of Article 4(3) of the TFEU, and Member States are also not bound according to the case law. However, the cases cited to support this argument<sup>83</sup> are related to informal soft law sources, namely communications (guidelines), and the same conclusions cannot be drawn for recommendations as a formal source of law. If an authority does not agree with a recommendation it will have to lobby for its amendment with the Commission, but would still have to apply such recommendation until it is amended, while in the case of a communication, the authority may decide whether or not to apply it.

Contrary to the prevalent views in the legal literature, it could be argued that the loyalty clause of Article 4(3) of the TFEU does create an obligation pursuant to which Member State authorities and courts are to some extent bound by soft

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<sup>81</sup> See, e.g., *Fvárosi Közigazgatási és Munkaügyi Bíróság (BH)* [Metropolitan Administrative and Labor Court] Nov. 20, 2013 Vj/74/2011 (Hung.).

<sup>82</sup> See STEFAN, *supra* note 1, at 175.

<sup>83</sup> Case C-360/09, *Pfleiderer AG v. Bundeskartellamt*, 2011 E.C.R. I-05161; Case C-410/09, *Polska Telefonia Cyfrowa v. Prezes Urzędu Komunikacji Elektronicznej*, 2011 E.C.R. I-03853.

law sources of the EU, at least by recommendations as formal legal sources under Article 288. The loyalty clause is in a *lex generalis-lex specialis* relationship with the more specific provisions of the Treaty, so for example with Articles 288 and 197 of the TFEU related to the duty to respect, follow and implement the legal sources of the EU, in other words to ensure that EU law takes full effect. In this regard, it can be argued that recommendations as formally acknowledged by the TFEU fall into this obligation.<sup>84</sup>

The same, however, could not be said in relation to communications and guidelines as they are not formal sources of EU law and have no legal basis in the Treaties. This seems to be another major distinction between the different types of soft law documents. It has to be noted that in relation to communications the ECJ's practice is controversial.<sup>85</sup>

Even though a recommendation has the potential to prevail over a court judgment reviewing a previous administrative decision, the real problem in the above mentioned example was that the court believed that the recommendation was not in line with the directive as regards the obligation to set cost-oriented prices. So the question was not only whether derogation from the recommendation was possible, but rather whether the recommendation may contain binding rules that could violate Article 13(1) of the Access Directive prescribing the cost-oriented price obligation. In this case, a national court may only disregard the recommendation if the ECJ declares it unlawful in the course of a preliminary ruling procedure.

#### *2.1.6. Re-establishing the Non-binding Nature of Recommendations at National Level*

The most effective solution to avoid acknowledging the binding effect of recommendations on third parties would be if the national courts themselves could set aside the soft law norm with reference to certain legal principles. Courts are accustomed to weighing general legal principles. If the EU Commission (which issued the soft law) and the national regulator can deviate from the soft law norm after giving appropriate reasons, why should judges not be able to act in the same way?

A deviation benefiting the person regulated by the authority and also going beyond the provisions of the soft law act is only possible if the ECJ had annulled that soft law provision. Until then, the soft law rule is applied as a binding norm in practice. In order not to apply them as binding norms, deviations based on legal principles should be allowed, and to this end, national judges should have the opportunity of referring preliminary questions about such derogations to the ECJ.

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<sup>84</sup> Case C-350/93, *Comm'n v Italy*, 1995 E.C.R. I-00699; Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-04135; Case C-94/00, *Roquette Frères SA v. Comm'n*, 2002 E.C.R. I-09011; *see also* MARCUS KLAMERT, *THE PRINCIPLE OF LOYALTY IN EU LAW* (2014).

<sup>85</sup> Case C-311/94, *IJssel-Vliet Combinatie BV v. Minister van Economische Zaken*, 1996 E.C.R. I-05023; Case C-288/96, *Germany v. Comm'n*, 1999 E.C.R. I-08237; STEFAN, *supra* note 1, at 176.

## 2.2. Re-establishing the Non-binding Nature of Recommendations at National Level

### 2.2.1. Types of EU Soft law in Competition Law

The Commission's competition directorate gives the following definition of soft law: "the Commission has adopted various non-regulatory documents, which may take various forms (notices, guidelines, etc). Documents such as these are intended to explain in more detail the policy of the Commission on a number of issues, either relating to the interpretation of substantive antitrust rules or to procedural issues, such as access to the file."<sup>86</sup>

Most of the communications relating to competition law set out the Commission's *explanation* (emphasis by author) of the law. Although it is well known that the final word rests with the EU Courts as to the correct interpretation of the law, due to the special role the Commission plays in the European Competition Network, its interpretation should be considered very seriously by national law enforcers.

Beyond interpretative communications, there are other soft laws that seem to *execute* hard law provisions. In the field of state aid soft law, the Commission approved a number of different instruments (e.g. frameworks, guidelines, communications, and notices) informing Member States and third parties how it intends to exercise its discretion when assessing the compatibility of state aid with the single market. Article 10 of the Regulation implementing the Treaty's state aid provisions calls upon the Commission to publish the reference interest rates it applies when it comes to recovering unlawful state aid.<sup>87</sup> The Commission adopts notices published in the C series of the Official Journal to this end.<sup>88</sup>

Formal soft law is unusual in EU competition law. Under Article 37 TFEU the Commission may adopt *recommendations* to invite Member States to phase out state monopolies of a commercial character.<sup>89</sup> However, it was back in 1988 that the EU Commission last resorted to this instrument to introduce competition in various petroleum product markets in Portugal.<sup>90</sup> In state aid law there is a recommendation defining macro, small and medium-sized enterprises which can have important legal consequences for the authorization of a planned aid mea-

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<sup>86</sup> Antitrust Legislation, EUROPEAN COMMISSION, <http://ec.europa.eu/competition/antitrust/legislation/legislation.html>.

<sup>87</sup> Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 140, 30.4.2004, 1–134.

<sup>88</sup> See Commission Notice on Current State Aid Recovery Interest Rates and Reference/Discount Rates for 27 Member States Applicable as from 1 April 2010, 2010 O.J. (C 85) 11, 11 (EC).

<sup>89</sup> Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, 110.

<sup>90</sup> Commission Recommendation of 22 December 1987 to the Portuguese Republic Concerning the Adjustment of the State Monopoly of a Commercial Character in Petroleum Products vis-à-vis the Other Member States, 1988 O.J. (L 56) 30, 32 (EC).

sure.<sup>91</sup> Article 1 of the recommendation “invites” Member States to comply with the provisions of the recommendation.<sup>92</sup> Who could resist such a friendly invitation? Hungary complied with the adoption of a law on small and medium-sized enterprises in 2004. The closing provisions recall that the legislation was meant to comply with the Commission’s recommendation, just as if it was a directive.<sup>93</sup> This is a good example of how EU soft law can become binding for national courts through transformation into national hard law.

### 2.2.2. *The Subject Matter and Wording of Communications*

The form and the legal title of hard law instruments help to identify their position in the legal hierarchy of laws. It is hard to tell whether the same would be true for soft laws. In *Grimaldi v. Fonds des Maladies Professionnelles*, the Court stressed that the choice of form cannot alter the nature of a measure. It must be ascertained whether the content of a measure is wholly consistent with the form attributed to it.<sup>94</sup> We would argue that it is not the form, but rather the content that is relevant. Yet, the way the Commission’s communication on the interpretation of Article 102 TFEU was published, may suggest that titles and headings can also be of relevance. The final version of the guidelines (the result of years of debating among stakeholders) was labeled as ‘guidance,’ allegedly explaining only the ‘enforcement priorities’ of the EU Commission.<sup>95</sup> However, a careful reading reveals that the text provides a cautious new, ‘more economic’ interpretation of the Treaty’s prohibition of exclusionary abuses. The reason for this was that the Commission wanted to avoid the charge of re-writing old but well established case law focusing on the protection of market structures.

The wording of a communication reflects its binding nature, or the lack thereof. The right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which it is clear that the EU, by giving him precise assurances, has caused him to entertain legitimate expectations.<sup>96</sup> So the precise wording of a communication is of high importance.

As an example, point 76 of the guidelines on regional aid expressly declares that operating aid is generally not allowed in the EU.<sup>97</sup> This seems to be a soft rule because of the phrase ‘generally,’ yet the following provisions make this sentence harder when exceptional circumstances in which operating aid can nevertheless be exempted from the prohibition are expressly enumerated. The more

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<sup>91</sup> Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, 2003 O.J. (L 124) 36 (EC).

<sup>92</sup> *Id.* at Art. 1.

<sup>93</sup> 2004. évi XXXIV. törvény a kis- és középvállalkozásokról, fejlődésük támogatásáról (Act XXXIV of 2003 on the small and medium-sized enterprises) (Hung.) §20.

<sup>94</sup> Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, 1989 E.C.R. 4407, ¶ 14 (citing Case 147/83, *Binderer v. Comm’n*, 1985 E.C.R. 257).

<sup>95</sup> Communication from the Commission — Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) OJ C 45, 24.2.2009, 7–20.

<sup>96</sup> Case T-273/01, *Innova Privat-Akademie GmbH v. Comm’n*, 2003 E.C.R. II-01093, ¶ 26.

<sup>97</sup> Guidelines on regional State aid for 2014-2020. OJ C209, 23.07.2013.

detailed the provisions of a communication, the harder its legal nature will become.

The Commission successfully managed the state aid part of the financial and economic crisis by issuing soft law instruments. This soft regulation allowed a flexible way of regulation at a time when economic conditions were changing dramatically. One of the provisions of the temporary framework adopted in December 2008 declared that the Commission would consider state aid that exceeded the threshold indicated in the *de minimis* regulation compatible with the common market on the basis of Article 87(3)(b) of the Treaty, provided that all of the conditions listed are met (e.g. that the aid would not exceed 500,000 € and that it would be granted in a scheme).<sup>98</sup> This could be seen as a kind of extension to the existing *de minimis* regulation declaring that aid under 200,000 € would not fall under Article 107(1) TFEU. It is true that the legal consequences of a *de minimis* exception and an exemption from the notification obligation are not exactly the same, yet in practice the difference is not that significant.

In EU competition law, there are three soft law instruments that are *expressly addressed to judges* of Member States' courts. There are two co-operation notices, one for antitrust, and another one for state aid matters.<sup>99</sup>

The co-operation notice laying down the principles for in the effective functioning of the European Competition Network enjoys a special status among soft laws.<sup>100</sup> The annex includes a statement signed by competition authorities acknowledging that they will "abide by the principles" of the notice, with special regard to the handling of leniency applications. This could give way to claims even during subsequent court procedures arguing that a national competition authority did not obey the principles of the notice.<sup>101</sup>

The communication targeting national judges is a unique instrument giving guidance to national courts about the quantification of harm caused by infringements of EU antitrust rules. In the communication, the Commission recalls the main existing principles that may help courts and parties deal with this issue, such as the requirement that national rules on quantification should not make it excessively difficult to obtain compensation for the harm suffered.<sup>102</sup> The Commission's short communication is accompanied by a comprehensive Practical Guide drawn up by the Commission's services. The Guide provides an overview of the main methods and techniques available to quantify such harm in practice.

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<sup>98</sup> Communication from the Commission of Jan. 1, 2009, Temporary Community Framework for State Aid Measures to Support Access to Finance in the Current Financial and Economic Crisis, 2009 O.J. (C 16) 1, 5 (EC).

<sup>99</sup> Commission Notice of Apr. 9, 2009, on the Enforcement of State Aid Law by National Courts, 2009 O.J. (C 85) 1 (EC).

<sup>100</sup> Commission Notice of Apr. 27, 2004, on Cooperation Within the Network of Competition Authorities, 2004 O.J. (C 101) 43 (EC).

<sup>101</sup> *National Authorities which have Signed the Statement Regarding the Commission Notice on Cooperation within the Network of Competition Authorities*, EUROPA.EU, [http://ec.europa.eu/competition/antitrust/legislation/list\\_of\\_authorities\\_joint\\_statement.pdf](http://ec.europa.eu/competition/antitrust/legislation/list_of_authorities_joint_statement.pdf).

<sup>102</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 2013 O.J. (C 167, 19).

## Effects of European Soft Law at National Administrative Courts

The strength of these soft law instruments and its soft binding effect is weakened by the fact that the Commission might not be the best placed body to have perfect knowledge in this field. Neither does the Commission's competence cover awarding damages, nor has it developed a practice to investigate and quantify the harm caused by cartels or other anti-competitive practices as a method to impose fines on undertakings.

In contrast, communications covering subject matters where the Commission itself enforces EU law are more persuasive and may use stronger language. This is the case for the leniency, the settlement and the fining guidelines.<sup>103</sup> To put it differently, hard provisions like these limit the discretionary powers of the Commission, thereby creating rights for individuals. In our study we do not focus on these soft law instruments, because they cannot be considered in the context of national court procedures, rather they are applicable exclusively within the framework of Commission procedures.

Those communications which can be applied not only by the EU Commission, but also by national competition authorities tend to have more cautious wording. The Commission provides orientation, but does not bind the hands of other institutions applying EU law. The one exception to this is co-operation notice in which competition authorities were expressly invited to make a declaration that they will abide by its provisions. This is how the Commission can influence law enforcement within the ECN without enjoying hierarchical control powers. To conclude, national courts and, in most cases, national competition authorities are not bound by communications issued by the Commission, which set out its interpretation of substantive antitrust rules. These communications cannot therefore give rise to rights which ought to be protected by national judges.

On the other hand, if a national competition authority takes EU communications seriously by including extensive references to them in its reasoning, the content of these instruments could become subject to litigation before review courts. In an extreme case, one could argue that there would be good grounds for a party challenging national competition authority decision whereupon a non-application of a Commission communication results in a divergent outcome for such party. If a national competition authority comes to be seen as generally adhering to EU guidelines as if they were sources of hard law, a general legitimate expectation as to the automatic application of EU soft law could arise among legal and business stakeholders.<sup>104</sup>

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<sup>103</sup> Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. Official Journal C 210, 1.09.2006, 2-5. Commission notice on immunity from fines and reduction of fines in cartel cases, Official Journal C 144, 23.04.2016, 23-28. Commission notice on the conduct of settlement procedures, Official Journal C 167, 2.7.2008, 1-6.

<sup>104</sup> This argument has not been tested in Hungary yet, since as a rule, the Competition Council follows the Commission's communications.



2.2.3. *EU Communications Applied by the Competition Council of the Hungarian Competition Authority (GVH)*

The overall attitude of the Hungarian Competition Authority, GVH, has always been EU-friendly; the Competition Council had based its decisions on the principles derived from the case law of the EU courts and the soft law documents issued by the EU Commission, even before the country joined the EU. Diverging interpretations of EU and Hungarian competition norms only arose in exceptional circumstances, and were generally attributable to human factors as opposed to conscious resistance.<sup>105</sup>

An overview of the Competition Council's decisions since 2009 shows that the most often cited EU communication is the guidelines interpreting the effect on trade clause of Articles 101 or 102 TFEU.<sup>106</sup> The Competition Council quoted not only those parts of the notice which reproduced the case law of the EU Court, but also the numerical formulas elaborated by the Commission (i.e. the 5% market share and the 40 million Euro turnover threshold) have been followed as law. Várnay and Tóth conclude that this proves that the GVH was prepared to bring its practice in line not only with hard EU laws, but also with the policies of the EU Commission expressed in the form of various soft law documents.<sup>107</sup> The notices on vertical restrictions,<sup>108</sup> on horizontal anti-competitive agreements,<sup>109</sup> the *de minimis* anti-competitive agreements<sup>110</sup> and the definition of the relevant market<sup>111</sup> are also among the soft laws most often mentioned. A seminal case where the Competition Council based its reasoning on a soft law document issued by the EU Commission involved the evaluation of a non-compete clause.<sup>112</sup> The GVH imposed fines on a French-owned Hungarian newspaper distributor company and several other newspaper publishers in 2010. The infringement involved a special market allocation arrangement involving a non-compete clause attached to the privatization of the newspaper distribution business of the Hungarian Post back in 1998. The reasoning relied heavily on the communication on ancillary restraints of March 2005,<sup>113</sup> setting out conditions under which the

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<sup>105</sup> See Tihámér Tóth, *The Reception and Application of EU Competition Rules: An Organic Evolution*, THE LAW OF THE EUROPEAN UNION IN HUNGARY: INSTITUTIONS, PROCESSES & THE LAW 247, 251-52 (Márton Varju & Ernő; Várnay eds. 2014).

<sup>106</sup> Commission Notice of Apr. 27, 2004, Guidelines on the Effect on Trade Concept Contained in Articles 81 and 82 of the Treaty, 2004 O.J. (C 101) 81 (EC).

<sup>107</sup> See Várnay & Tóth, *supra* note 8, at 23.

<sup>108</sup> See, e.g., Fővárosi Ítéltábla (BH) [Metropolitan Court of Appeal] Sept. 19, 2012, Vj-57/2007 (Hung.).

<sup>109</sup> See, e.g., Közigazgatási és Munkügyi Bíróságnak (BH) [Administrative and Labor Court] Nov. 20, 2013, Vj/74/2011 (Hung.).

<sup>110</sup> See, e.g., *id.*

<sup>111</sup> See, e.g., Közigazgatási és Munkügyi Bíróságnak (BH) [Administrative and Labor Court] Dec. 12, 2014, Vj/98/2011 (Hung.).

<sup>112</sup> See, e.g., Fővárosi Ítéltábla (BH) [Budapest Court of Appeal] Nov. 4, 2012, Vj-195/2007/151 (Hung.).

<sup>113</sup> Commission Notice of Mar. 5, 2005 on Restrictions Directly Related and Necessary to Concentrations, 2005 O.J. (C 56) 24, 24-31.

Commission will evaluate a non-compete provision as a natural attribute to an authorized concentration, instead of finding that there was cartel-like behavior. The Competition Council ruled that since the conditions contained therein were not met, the agreement was a naked cartel apt to be sanctioned under EU and Hungarian law.<sup>114</sup>

The soft law document relating to the interpretation of Article 102 TFEU regarding exclusionary abusive practices raises special problems.<sup>115</sup> The publication of the document had been preceded by years of discussions involving all the stakeholders. However, the more economic approach reflected in the document was regarded as a new development in view of the more ordoliberal approach of the EU courts in protecting the structure of the competitive process. In order to minimize the potential conflict, the document was published with an unusual title: Guidance on the EU Commission's enforcement priorities in applying Article 102 TFEU to exclusionary abusive conduct ("the Guidance").<sup>116</sup> Despite its modest heading, the Guidance was much more than a listing of priorities, it provided a detailed explanation of how the Commission intends to interpret Article 102 TFEU for cases commenced after the date of its publication.

The Commission adopted its famous decision in the *Intel v. Comm'n* case<sup>117</sup>, imposing record breaking fines shortly after it had published the Guidance. The reasoning of the decision was hybrid, relying on both established case law and an analysis of the facts of the case in light of the Guidance. The General Court avoided any reference to the Guidance in its judgment, quoting exclusively from previous judgments when describing the requirements of EU law regarding the rebate systems and more generally, the need to prove actual abusive effects. The General Court refused to analyze whether the contested decision was in line with the Guidance.<sup>118</sup> It was argued firstly, that the Guidance was applicable only for cases commenced following its publication, and secondly, that the Guidance set out enforcement priorities which could not have been applied in a procedure where the Commission had already decided that it would initiate an investigation as a matter of priority.<sup>119</sup> In the same vein, Advocate General Kokott refused to follow the Commission's more economic approach in *British Airways v.*

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<sup>114</sup> Commission Notice of Mar. 5, 2005, *supra* note 113, at 115.

<sup>115</sup> Communication from the Commission — Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (Text with EEA relevance) OJ C 45, 24.2.2009, 7–20.

<sup>116</sup> Communication from the Commission of Feb. 24, 2009, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings (EC) 2009 O.J. (C 45) 7; *see also* Press Release IP/08/1877, European Commission, The Antitrust: Consumer Welfare at Heart of Commission Fight Against Abuses by Dominant Undertakings (Dec. 3, 2008).

<sup>117</sup> Case T-286/09, *Intel v. Comm'n*, 2014 EU:T:2014:547 (currently on appeal, the case is pending judgment on a procedural question under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (COMP/C-3/37.990)).

<sup>118</sup> *Intel v. Comm'n*, 2014 EU:T:2014:547 ¶¶ 156-157.

<sup>119</sup> *Id.*

*Comm'n*<sup>120</sup> and relied on the Court's traditional interpretation of Article 102 TFEU.

This is in sharp contrast with the Competition Council's approach taken in its most recent MasterCard decision imposing fines for exclusionary practices in the Hungarian debit card market. The decision making body of the competition authority quoted the Guidance several times as if it was the statement of the law as regards the correct interpretation of Article 102 TFEU.<sup>121</sup>

#### 2.2.4. *The Attitude of Hungarian Judges*

A review of recently published court judgments shows that administrative courts have had no problem with the application of EU competition law communications so far. It seems that parties have accepted them as a useful framework for the legal evaluation of the cases at hand. For example, the Municipal Court's judgment in the above mentioned newspaper distribution cartel case mentions the Commission's ancillary restraint notice several times, despite stating that it was not of relevance for deciding the case.<sup>122</sup> This is interesting if we consider that the GVH's decision did include references to the ancillary restraints notice. One reason for this could be that the notice was issued in 2005, whereas the facts of the case dated back several years.<sup>123</sup> The appellate review court did not even mention the EU communication in its judgment upholding the decision of the Municipal Court.<sup>124</sup>

We would expect that cases decided based on the communication on exclusionary abuses<sup>125</sup> would be subject to some debate. This soft law sought to summarize the law on exclusionary abuses in the light of the mainstream, more economic approach which is not always reflected in the Court's jurisprudence. An interesting case could develop from the most recent Competition Council decision finding an infringement by MasterCard in relation to the setting of its multilateral interchange fees.<sup>126</sup> This is a negative decision imposing HUF 80 million in fines, so a court review, involving legal arguments challenging the Council's reliance on the communication, is to be expected. In addition to mentioning the communications on the effect on trade between Member States and the definition of the relevant market, the MasterCard decision includes more than thirty references to the Commission's priority guidance.<sup>127</sup> As a matter of fact, the Council quotes this as the "Dominance Communication," disregarding the special nature of this soft law instrument, which is also reflected in its title. The whole legal analysis of the Council is based on this soft law instrument, with

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<sup>120</sup> Case C-95/04 P, *British Airways v. Comm'n*, 2007 E.C.R. I-2377, 2383-86.

<sup>121</sup> Vj/46/2012, decision of January 11, 2016.

<sup>122</sup> Fővárosi Ítélfábla (BH) [Metropolitan Court of Appeal] Sept. 19, 2012, Vj-57/2007 (Hung.).

<sup>123</sup> Commission Notice of Mar. 5, 2005, *supra* note 113, at 15.

<sup>124</sup> *Id.*

<sup>125</sup> Communication from the Commission of Fed. 24, 2009, *supra* note 80, at 7-20.

<sup>126</sup> Közigazgatási és Munkaügyi Bíróságnak (BH) [Administrative and Labor Court] Jan. 11, 2016, Vj/46/2012 (Hung.).

<sup>127</sup> Vj/46/2012, decision of January 11, 2016.

some additional references to the case law of the EU courts,<sup>128</sup> including opinions of advocate generals, although previous GVH decisions are not even mentioned. This is perhaps the best example to show that national quasi-judicial bodies, like the Competition Council of the GVH, take EU soft law as seriously as the case law of the European courts or other hard law sources.

In theory, even if a national competition authority follows these communications, it seems that national courts can simply disregard them without an obligation to turn to the ECJ for a preliminary ruling. This could be a difference between formal soft law acts, like a recommendation, and other types of soft law that are formally not mentioned in the Treaties. In practice, however, the legality of EU competition law communications have not been challenged by parties before Hungarian courts yet. As a rule, administrative judges are accustomed to conducting a review of competition law cases, largely deferring to the position of the competition authority.<sup>129</sup> An administrative decision based on EU or national soft law used to reinforce applicable margins of discretion, would only be held unlawful if the conclusions were unlawful, unreasonable or logically wrong. So the authority always possesses a degree of discretion that is not capable of judicial review procedures.

Due to this weak judicial control, soft law that has only soft binding force at the level of a given authority hardens at court level, as it usually falls outside the scope of judicial control, unless there is a relevant violation of a hard law provision. In the post-Menarini world<sup>130</sup> this may gradually change to meet the expectations of the European Court of Human Rights. Still, administrative judges may feel more comfortable agreeing with the reasoning given by an expert or an independent competition authority in cases raising complex economic and policy issues. What makes a national judge more equipped than the highly competent EU Commission to determine what an exclusionary abuse is, or when trade between Member States is significantly affected?

The process of the hardening of EU soft law cannot be observed in civil law litigation where the plaintiff is seeking compensation for damages caused by anti-competitive conduct. Hungarian civil law courts deciding damages or contractual claims rarely, if ever, apply EU competition rules. If they cannot avoid making reference to competition rules, then they would rely on domestic ones. Since EU competition rules are not routinely enforced by civil law judges, we cannot evaluate their approach to EU soft law either.

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<sup>128</sup> See, e.g., Case C-23/14, *Post Danmark A/S v. Konkurrencerådet*, 2015 E.C.R. 651 (EC); Case C-382/12, *MasterCard v. Comm'n*, 2014 E.C.R. 2201 (EC).

<sup>129</sup> Maciej Barnatt, *Transatlantic Perspective on Judicial Deference in Administrative Law*, 22 COLUM. J. EUR. L. 275 (2016) (providing excellent comparison of judicial deference in administrative law, including competition law).

<sup>130</sup> A. Menarini Diagnostics S.R.L. v. Italy, App. No. 43509/08, Eur. Ct. H.R. (2011), <http://hudoc.echr.coe.int/eng?i=002-385>.

### 3. Conclusions

In *Grimaldi v. Fonds des Maladies Professionnelles*, the Court acknowledged that recommendations can have *legal effects*.<sup>131</sup> The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them. This is the case especially (i) where they help interpret national measures adopted in order to implement EU soft law or (ii) where they are designed to supplement binding Community provisions. This is because, unlike Article 263 of the TFEU, which excludes review by the Court of acts like recommendations, Article 267 confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of *all acts* of the institutions of the Community without exception. However, we should bear in mind that in the context of the Court's ruling "bound to consider a recommendation" does not mean that soft law should be enforced in the same way as hard law.

The obligation to consider does not include an absolute obligation of adherence, nevertheless, in practice; national judges tend to defer to the EU Commission's interpretation of EU law published in soft law form. This is due to three reasons. First, traditional administrative judicial control does not make deviation from the Commission's position an easy option. Second, national judges often lack expertise in technical fields of EU law. Lastly, interpretation of EU law may require policy decisions to be made, which does not naturally fit judges.

Despite these difficulties we submit that Grimaldi's "bound to take into consideration" language should not prohibit a national judge from departing from Commission soft laws. However, a clear explanation should be put forward, considering any potential conflict with legal principles like the protection of legitimate expectations.

Nonetheless, under the traditional model of administrative judicial review, this is currently not the case, especially not in the telecommunications sector. As we have shown, based on the soft binding effect of soft law, only national regulators are able to deviate from EU soft law documents, but not national courts. If the authority deviates from the soft law, then, if such deviation resulted in an unlawful, unreasonable, or logically wrongful use of discretion, the court may override this decision based on the principle of legitimate expectations. However, unless a clear violation of legality is presented, a court may not override the position taken by the national authority simply because the authority's decision is contrary on EU soft law. If the authority applied the soft law document, then the principle of legitimate expectations dictates that the courts should not challenge EU soft law indirectly, through quashing the national administrative decision. A rare exception might be when the EU soft law is in violation of an EU hard law provision, but then it would be the ECJ's task to decide on the validity of the soft law act in the form of a preliminary ruling.

It is also likely that the national court's attitude may be different depending upon the nature of the legal field involved, as well as the competence and the expertise of the Commission. In *Grimaldi v. Fonds des Maladies Professionnel-*

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<sup>131</sup> Case C-322/88, *Grimaldi v. Fonds des maladies professionnelles*, 1989 E.C.R. 4407.

les, the measures in question were “true recommendations,” that is to say measures which, even as regards the persons they addressed, were not intended to produce *binding effects*.<sup>132</sup> This was because they related to social policy, belonging to the realm of Member State sovereignty. There was neither clear EU competence, nor Commission expertise gained through law enforcement. On the other hand, the EU Commission can be regarded as an experienced enforcer of competition rules in the EU. Why would a judge believe that he or she knows better, especially if the soft law instrument had been discussed with national competition authorities, and they reflect a complex, coherent interpretation of vaguely worded provisions of EU hard law?

We agree with the conclusion drawn by Ștefan that “soft law is seen by the European Courts as a particular type of norm, complementary to (hard) laws and part of the broader normative framework they consider when judging cases submitted to their jurisdiction.”<sup>133</sup> Interpretative communications may have legal consequences even if they lack general binding force. Depending upon the circumstances, they may limit not only the discretionary powers of the Commission, but also national competition authorities, especially if the latter establish a practice of following EU communications as if they were law. Administrative courts, in turn, should protect legitimate expectations and check whether national authorities have adhered to those EU soft law instruments that were meant to generate legitimate expectations.

Beyond the general principles of EU law, the naturally limited depth of administrative judicial review, and the division of the executive branch and the judiciary, there is another driving force making national judges welcoming of, or at least tolerant towards, the application of EU soft law. Most national competition agencies, just like the GVH, also issue such communications under national law. If their content and wording gives rise to the protection of legitimate expectations, then courts will get accustomed to acknowledging the legal value of these national communications. In a system of parallel application of EU and national competition laws it is highly unlikely that the courts would differentiate between cases involving questions relating to adherence to an EU or a national communication. This is even truer in cases where national authorities enforce both EU and domestic competition rules. This evolving practice under domestic law also contributes to the ‘hardening’ of EU soft laws.

So where lies the difference between soft law and hard law from the perspective of a national judge? First, even though their binding effect is not absolute, if the authority relies on EU soft law in its decision then deviation at the level of the courts is only a rare option. Second, soft law should not create new obligations for undertakings subject to substantive EU rules.<sup>134</sup> Similarly, the legal principle prohibiting the introduction of stricter new rules with retrospective effect on third

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<sup>132</sup> Case C-322/88, Grimaldi v. Fonds des maladies professionnelles, 1989 E.C.R. 4407.

<sup>133</sup> Oana A. Ștefan, *European Competition Soft Law in European Courts: A Matter of Hard Principles?*, 14 EUR. L. J. 753, 767 (2008).

<sup>134</sup> See e.g., Commission Directive 2006/111 of 16 November 2006 on the Transparency of Financial Relations Between Member States and Public Undertakings as well as on Financial Transparency Within Certain Undertakings, 2006 O.J. (L 318) 17.

parties is not applicable to soft law instruments. Nevertheless, the effect of some EU competition law communications with potentially hard provisions is restricted to new cases, i.e. where the Commission has not issued a statement of objections yet.

The possibility for deviation by authorities and the legal review of such arbitrary deviation from a soft law instrument is perhaps the most significant difference of soft law when compared to hard law norms. The option not to follow the soft law in exceptional circumstances softens their binding effect. The authority, and under even stricter conditions, the review court can decide not to follow the soft law instrument. For the telecommunications sector a special procedure is foreseen with the Commission enjoying veto powers over the decision of a national regulator. For competition law, law enforcers are expected to explain why their different approach does not contravene general principles of EU law (e.g. legal certainty and the protection of legitimate expectations). Co-operation between the EU Commission and national competition authorities applying EU law makes deviation from EU soft law fairly unlikely, even if a deviation benefiting individuals would not endanger the applicability of legal principles.

Our paper endeavored to prove that, despite the Treaty's and the ECJ's statement that they are non-binding norms, soft laws are often considered by national courts the same way as hard laws. Within soft law, a distinction can be made between formal acts like a recommendation and informal soft laws like a communication. If courts would find that a recommendation is in conflict with EU hard law since it creates a new obligation, they should refer the act to the ECJ for a preliminary ruling, to get a ruling on its validity. However, the Dutch telecommunications example showed that there is a fine line between genuine soft law content and the creation of new obligations, thus it would be reasonable if the ECJ could also be asked to interpret the content of soft law documents as well. On the other hand, interpretative competition law communications – within the above mentioned limits of judicial review – can simply be disregarded were the judges disagree with their content. We do not believe that this distinction between two different types of soft laws is warranted. Even if recommendations are expressly mentioned in the founding treaties, their legal effects should not be different from that of informal soft laws.

Such a hardening of soft law at national level creates the same conflicts between the Commission and national courts as the ones that exist between the Commission and the European Parliament or the Council at EU level.<sup>135</sup> In order to make legal control of soft laws issued by the Commission a reality, the preliminary ruling procedure should be made more effective. A way to achieve this would be if the ECJ, based on Articles 263 and 288 of the TFEU, would allow preliminary questions of interpretations for recommendations and for other soft law documents, thus it would encourage referrals for the annulment of norms binding third parties. Otherwise the legal effects of soft law will continue to differ at EU and national levels.

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<sup>135</sup> See Resolution 2007/2028, of the European Parliament of 4 September 2007 on Institutional and Legal Implications of the Use of “Soft Law” Instruments, 2007/2028 (INI).