MAKING EU SOFT LAW LEGALLY BINDING. CHALLENGES FOR THE LEGISLATIVE PRACTICE IN THE CZECH REPUBLIC[1]

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Abstract: *Soft law norms are a phenomenon that is gaining enormous importance within EU legislation, both qualitatively and quantitatively. Despite the theoretically undisputed characteristics of soft law acts – their non-binding or non-enforceable character, they constitute a lasting challenge for a national legislature in the process of implementation of EU law. This is due to the "graduated normativity" od certain soft law acts which made legally binding on an ad hoc basis, by referring to them in legally binding (hard law) EU acts. There are several ways to manage the implementation of such acts into national law. Ideally, a successful implementation process requires the synergy of the EU and national legislature, which starts in the process of EU act negotiation.*

Keywords: *Soft law, Implementation, Recommendation, Guideline, Legal Bindingness, Legislation*

INTRODUCTION

As in other legal systems, soft law constitutes a not insignificant part of the EU legal order. It can take different forms and can be addressed to different actors at both the EU and national level. While issues related to the possible judicial review of EU soft law have received considerable attention in academic literature, the complex relationship between EU soft law and national legislation has been somewhat neglected.

This paper deals with the question of how specific soft law norms which are referred to in legally binding EU legislation should be properly implemented in national law. In the context of EU law-making, soft law has traditionally been understood as a tool that allows for a relatively quick and flexible response to new political, economic, and legal challenges. However, in situations when EU hard law explicitly refers to soft law, soft law may become indispensable and therefore practically binding in application, at least in order to preserve legal certainty.

Focusing on the legislative practice in the Czech Republic, the authors want to systematically identify the various cases in which EU soft law is rendered legally binding and to address the matter of how the national legislature can deal with this challenge. Are we witnessing a shift in the traditional understanding of soft law as a non-binding instrument? And is this shift also duly reflected in the legislative process?

As a disclaimer, the authors recognize that the endemic proliferation of various soft law documents raises serious concerns about the democratic legitimacy of law-making and the maintenance of institutional balance within the EU. In this article, however, this issue is only marginally addressed, as such concerns do not play a major role in practice for the

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governmental bodies involved in lawmaking. When drafting national legislation, the competent authorities are called upon to act in compliance with the requirements of EU law. With this in mind, the authors focus on the question of how the obligations arising from the combination of EU hard and soft law can best be implemented by legislative means. Democratic policy concerns play only a subordinate role in this area and the clarification of such concerns is the responsibility of the competent political bodies.

I. ON THE CONCEPT OF EU SOFT LAW

Relevant studies show that, in the past decades, soft law has grown significantly in importance in many areas of EU policy. While soft law was rarely encountered in European law before 1968, soft law acts began to appear more frequently with the formation of the internal market, especially in the form of Commission communications. The 1980 Commission Communication concerning the consequences of the famous Cassis de Dijon judgment[2] may serve as an example from this early period. The 1985 White Paper on the completion of the internal market already envisaged a significant development of soft law within the Community legal order. Soft law was meant to serve as "a guide for public authorities regarding their obligations, as well as for Community citizens regarding the rights which they enjoy". The Commission envisaged that "given the practical shortcomings of piecemeal proceedings", it would take "more systematic action", by issuing general communications setting out the legal situation particularly in regard to fundamental market freedoms or in relation to a particular type of barrier.[3] The number of soft law acts increased considerably, particularly after the Maastricht Treaty, which introduced the so-called second and third pillar areas of the EU. In the post-Lisbon period, a new approach can be observed, which consciously incorporates complex soft law as part of the formal regulatory mechanisms at EU level.[4]

Neither in legal theory nor in legal practice is there a consensus on the exact definition of soft law. What can be agreed upon, however, is that it is a part of the EU legal order which lacks legal binding force and therefore lacks also enforceability. The aim of a recommendation is to guide the actions of EU bodies and institutions, Member States and private actors in a non-legally binding manner. Generally speaking, soft law acts can set the framework for future legislative activities or specify the obligations laid down in legal acts. Soft law acts include not only both types of non-binding acts of secondary law listed in Article 288 Treaty on the Functioning of the European Union (TFEU), i.e., recommendations and opinions, but also other forms of non-enforceable, but by their nature normative acts that are not explicitly named in the Treaties.

The Government's "Methodical Instructions for the Organisation of Work when Meeting the Legislative Obligations Ensuing from the Membership of the Czech Republic in the

[2] Commission Communication concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon') [1980] OJ C 256/2.
[3] Commission, 'Completing the Internal Market' (White Paper) COM (1985) 310, para 155.
[4] STEFAN, O. a kol. EU Soft Law in the EU Legal Order: A Literature Review. In: *efsolaw.eu* [online]. 2019 [2023-10-13]. Available at: <https://www.efsolaw.eu/publications/related-publications/EU-Soft-law-in-the-EU-Legal-Order_-A-Literature-Review/index.html>.

European Union" (Methodical Instructions) use the term "legally non-binding acts of secondary law" or "recommendations and other legally non-binding acts of secondary law".[5] Article 23 of the Methodical Instructions divides EU soft law into "recommendations or other legally non-binding rules of secondary law which supplement or construe the binding acts of secondary law implemented in these implementing acts" and "other recommendations or other non-binding acts of secondary law". According to Article 23(2) of the Methodical Instructions, the acts of secondary law which lay a duty upon the Czech Republic to exert every effort to attain a certain objective (e.g., resolutions, the conclusions of the European Council, guidelines, etc.) shall be implemented in such a way that this objective can be obtained to the greatest extent given the possibilities of the Czech Republic.

However, this categorisation no longer accurately reflects the current state of EU soft law. As stated in their Commentary to the Methodical Instructions by M. Whelanová, R. Zbíral, and J. Grinc, the term "guidelines" within the meaning of Article 23 of the Methodical Instructions originally referred primarily to Commission documents, e.g., so-called regular reports or communications, which contained an assessment of progress in the relevant area, accompanied by a recommendation on how the Member State concerned should proceed in a particular harmonised area of EU actions. However, nowadays the term guidelines more often covers those communications which interpret legally binding EU acts. These documents are most often called communications, notices or guidelines.[6]

At the same time, most EU soft law acts are currently issued not by the EU institutions listed in Article 13 of the Treaty on European Union (TEU), but by EU agencies such as the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), the European Insurance and Occupational Pensions Authority (EIOPA), the European Medicines Agency (EMA), the Agency for the Cooperation of Energy Regulators (ACER), and the European Food Safety Authority (EFSA).

The question of whether it is necessary to take into account Community and subsequently EU soft law when drafting national implementing legislation is therefore closely related to the nature and purpose of the specific acts. Over the past 20 years, academic literature has examined whether, or to what extent, the principle of loyal cooperation, in particular, implies an obligation for Member States to implement soft law instruments intended to influence national administrative practice (e.g., recommendations) or which accompany or supplement non-legally binding EC legal acts (e.g., communications, guidelines) as a guidance instrument for interpretation.[7] Contemporary literature takes

[5] Příloha k usnesení vlády ze dne 12. 10. 2005 č. 1304, o Metodických pokynech pro zajišťování prací při plnění legislativních závazků vyplývajících z členství České republiky v Evropské unii, v platném znění. The English translation of the Methodical Instructions is available at the website of the Government's Office. In: *Government of the Czech Republic* [online]. [2023-11-29]. Available at: <https://vlada.gov.cz/en/jednani-vlady/kompatibilita-s-pravem-es/department-for-compatibility-17519/>.

[6] WHELANOVÁ, M., ZBÍRAL, R., GRINC, J. *Praktická příručka pro implementaci práva Evropské unie do českého právního řádu – Komentář s příklady k vybraným článkům Metodických pokynů pro zajišťování prací při plnění legislativních závazků vyplývajících z členství České republiky v Evropské unii.* Brno: Masarykova univerzita, 2022, pp. 153–168.

[7] SEHEN, L. *Soft Law in European Community Law*. Oxford: Hart Publishing, 2004, pp. 321–331.

a similar view when it presents soft law as an auxiliary tool for national legislatures that increases legal certainty in the interpretation of a legally binding act.[8] However, more and more often, we can identify a reflection of the concept of what can be called "graduated normativity", which depends on the context in which the soft law act was adopted and on its interdependence with a particular hard law act.[9]

It can be summarised that the very notion of EU soft law covers different acts that affect national legislation to varying degrees. It is therefore appropriate to attempt to categorise those acts which are most relevant in terms of national legislative and implementation practice.

II. ON THE CATEGORISATION OF EU SOFT LAW

In general terms, soft law acts can influence national and European legislation in several ways, for example by assisting the competent authorities in interpreting the provisions of directives and regulations, or by serving as a basis for the adoption of national legislation.[10] Looking in more detail at the relationship between EU hard law and EU soft law, various authors highlight three major functions that soft law can perform.[11] First, soft law fulfils a pre-legislative function in the sense that a particular soft law act can facilitate and speed up the preparation and subsequent adoption of a legally binding act. Second, a so-called para-legislative function can be observed in cases where a particular legally non-binding act serves as a temporary or permanent substitute for a legally binding act. This is the case, for example, in situations where the adoption of a binding act is considered unnecessary or politically impossible or when there is a lack of Union competence to legislate. Especially this para-legislative function of EU soft law is particularly problematic from the perspective of legitimacy. The third category of EU soft law includes those acts which supplement already adopted legally binding acts, e.g., in the form of technical guidelines. In such cases, academic literature refers to the post-legislative (or post-law) function of soft law.

Acts falling within the third category of EU soft law can be binding on the institution issuing them if they create legitimate expectations on the part of the addressees. As an example, P. Hubková cites acts in which the competent authority specifies how it intends to proceed in its future decision-making practice and how it will exercise the discretionary power provided for in a legally binding act. According to P. Hubková, a distinction can be made between two sub-categories of so-called post-legislative soft law. In the first case, these are purely interpretative acts which are adopted in order to provide guidance in the interpretation and application of legally binding acts. The second sub-category contains

[8] E.g., WEISS, W. Reconsidering the Legal Effect of EU Soft Law in National Implementation: Bindingness in an Individual Rights Perspective – Forthcoming. In: Petra L. Láncos – Napoleon Xanthoulis- Luis Arroyo Jiménez (eds.). *The legal effects of EU soft law: theory, language and sectoral insights*. Cheltenham: Edward Elgar Publishing Limited, 2023, pp. 33–52.

[9] PETERS, A. Typology, Utility and Legitimacy of European Soft Law. In: Astrid Epiney – Marcel Haag – Andreas Heinemann (eds.). *Festschrift für Roland Bieber*. Baden-Baden: Nomos, 2007, pp. 405–410.

[10] ANDONE, C., GRECO, S. Evading the Burden of Proof in European Union Soft Law Instruments: The Case of Commission Recommendations. *International journal for the semiotics of law*. 2018, Vol. 31, No. 1, pp. 79–99.

[11] SENDEN, L. A. J. *Soft law in European Community Law*. Oxford: Hart Publishing, 2004.

implementing acts which go beyond mere interpretation when they specify the rules laid down in legally binding acts.[12] In some cases, the explicit authorisation to issue such acts is contained directly in the relevant hard law acts.[13] Therefore, we may say that EU soft law acts which are directly referred to in EU legislative acts constitute a special category and are of considerable importance in terms of the national implementation of Union law.

Furthermore, academic literature also addresses the problem of soft law enforcement. According to F. Tepran, there are a number of mechanisms by which obliged entities can be forced to fulfil their obligations. In this regard, F. Terpan noted that law enforcement can be defined as a transition from mere monitoring to the application of enforcement instruments, including judicial control and the imposition of sanctions. The ideal example of a hard law norm is a precisely formulated legal obligation, the non-compliance with which is associated with strict enforcement. At the other end of the continuum, this model finds a soft law rule combined with approach based on a very mild or even no enforcement.[14]

After analysing various legal phenomena that lie between these almost ideal forms of hard law and soft law, Terpan identifies various combinations of hard and soft obligations and hard and soft enforcement. Ultimately, he concluded that "soft law does not necessarily lack coercive enforcement, but when a strong enforcement mechanism has been set up in combination with soft obligation, soft law comes very close to hard law".[15] According to Terpan, such a soft law/hard law ambiguity can be identified, for example, in the area of competition law, where the Commission sets out general criteria for state aid to be considered permissible. Although formally these criteria are only soft law, in practice they define conditions for national state aid policies leaving little room for deviation by the Member States.[16]

Closely related to the issue of enforceability of certain categories of EU soft law is also the question of whether, or to what extent, EU soft law acts should be subject to judicial review by the CJEU. This question concerns in particular those EU acts which, although legally non-binding, sometimes have not only the ambition but also the potential to influence the actions of EU institutions, national authorities, and private entities.

While the CJEU's settled case law does not allow direct actions for annulment of EU soft law acts under Article 263 TFEU, in 2021 the Court considered the validity of non-legally binding acts in two preliminary ruling procedures. In the cases C-501/18 *BT v Balgarska Narodna Banka* and C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution*, the Court dealt with the question of the validity of recommendatory acts issued by the European Banking Authority's (EBA). The CJEU's approach of separating the issue of validity from the question of the legal effects of these

[12] HUBKOVÁ, P. Unijní soft law a jeho soudní přezkum: případ obecných pokynů a doporučení vydávaných Evropskými orgány dohledu. Brno: Masarykova Univerzita, 2021, p. 28.
[13] HUBKOVÁ, P., ibidem.
[14] TERPAN, F. Soft law in the European Union the changing nature of EU Law. *European Law Journal*. 2015, Vol. 21, No. 1, pp. 68–96.
[15] TERPAN, F. *Soft law in the European Union the changing nature of EU Law.* pp. 76–77.
[16] TERPAN, F. *Soft law in the European Union the changing nature of EU Law.* p. 85.

acts has been interpreted in such a way that the argument of the invalidity of EU soft law can also be asserted before national courts.[17]

It is noteworthy that the question of to what extent national courts should take into account EU soft law norms has not yet been answered satisfactorily, although it has arisen repeatedly in a number of Member States. In such cases, the 1989 judgment of the CJEU in the case C-322/88 *Grimaldi* still serves as the main guide. The competent Belgian court dealt with a claim by an Italian worker for compensation for occupational disease. Since Mr Grimaldi's specific illness was not included in the list of occupational diseases provided by Belgian legislation, he tried to base his claim on a Commission's recommendation of 1962, which in its annex listed Mr Grimaldi's illness as an occupational disease. In view of that conflict between the national legislation and Community soft law, the Belgian court referred a question to the CJEU for a preliminary ruling, asking whether the list of occupational diseases as contained in the Commission's recommendation had direct effect and whether Mr Grimaldi could rely on it in the proceedings before the national court.

After confirming that it had jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community without exception, i.e., not only of legally binding but also of non-binding acts, including recommendations and opinions, the CJEU concluded, on the merits, that soft law acts cannot create judicially enforceable individual rights. The CJEU added, however, that soft law acts cannot be regarded as having no legal effect. According to the CJEU, national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions. These conclusions from the *Grimaldi* case have been repeatedly confirmed by the Court of Justice in its subsequent case law.[18]

It was rightly pointed out that the CJEU case law has not yet reliably clarified what exactly it means to take EU soft law "into consideration".[19] The relatively vague Grimaldi doctrine was adopted into the Czech Government's Methodical Instructions, which state in Article 23(1) that in the implementing acts "consideration is given" to recommendations or other legally non-binding acts of secondary law which supplement or construe the binding acts of secondary law implemented in these implementing acts.

On this issue, the authors of the above-quoted Commentary to the Methodical Instructions observe that the requirement to "give consideration" to such a soft law act for the legislature does not imply the need to implement its entire content into national law in a consistent manner. The legislature should rather proceed with the implementation of a legally binding act in the knowledge of the existence of a complementary or interpretative act and, as far as possible, in accordance with it. The primary reason for such approach appears to be that the interpretation in accordance with a particular soft law norm

[17] See e.g., GENTILE, G. To be or not to be (legally binding)? Judicial review of EU soft law after BT and Fédération Bancaire Française. *Revista de Derecho Comunitario Europeo.* 2021, Vol. 70, pp. 981–1005.

[18] See e.g., judgment of the Court (Second Chamber) 3 September 2014, Case C-410/13 Baltlanta, ECLI:EU:C:2014:2134, para 64, or Judgment of the Court (Second Chamber) of 7 July 2022, Case C 24/21 PH, ECLI:EU:C:2022:526, para. 51.

[19] HUBKOVÁ, P. *Unijní soft law a jeho soudní přezkum: případ obecných pokynů a doporučení vydávaných Evropskými orgány dohledu.* p. 21.

may play a significant role in any infringement or other proceedings in which the question arises whether the Member State has correctly implemented a legally binding secondary law act.[20]

III. EXAMPLES OF THE IMPLEMENTATION OF SOFT LAW ACTS WHICH ARE CONNECTED TO HARD-LAW ACTS

Focusing on the typology of soft law outlined above, the key categories in terms of legislative implementation appear to be the so-called post-law categories, i.e., interpretative soft law acts, which provide guidance in the interpretation and application of legally binding EU rules, and implementing soft law acts, which specify the rules laid down in a legally binding Union act.

III.1 INTERPRETATIVE SOFT LAW ACTS

Interpretative soft law acts are primarily acts which are referred to in the hard law act or which are issued on the basis of an authorisation provided for in a hard law act. Legally binding acts may confer the power to issue soft law to EU agencies[21] and the Commission.[22]

In the light of the *Grimaldi* case and subsequent CJEU case law, the role of soft law acts is crucial in the interpretation of the normative text of a legally binding act. However, the soft law act in question must also be reflected in the context of legislative implementation. Generally speaking, legislative activities may be understood as the anticipated interpretation of a normative text. Moreover, interpretative acts often contain a combination of interpretative guidelines and supplementary guidance both for the normative implementation of the binding act and for its application in practice. Such guidance has a major impact on the actions of Member States' authorities aiming to comply with their obligations under EU law and, where appropriate, on the development of the corresponding national policies.[23]

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[20] WHELANOVÁ, M., ZBÍRAL, R., GRINC, J. *Praktická příručka pro implementaci práva Evropské unie do českého právního řádu - Komentář s příklady k vybraným článkům Metodických pokynů pro zajišťování prací při plnění legislativních závazků vyplývajících z členství České republiky v Evropské unii.* p. 161.

[21] For example, Article 61(3) of Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing a European Electronic Communications Code provides that: "By 21 December 2020, BEREC shall publish guidelines to foster a consistent application of this paragraph, by setting out the relevant criteria for determining: (a) the first concentration or distribution point; (b) the point, beyond the first concentration or distribution point, capable of hosting a sufficient number of end-user connections to enable an efficient undertaking to overcome the significant replicability barriers identified; (c) which network deployments can be considered to be new; (d) which projects can be considered to be small; and (e) which economic or physical barriers to replication are high and non-transitory".

[22] For example, Article 12 of Directive (EU) 2019/904 of the European Parliament and of the Council of 5 June 2019 on the limitation of the environmental impact of certain plastic products provides that "In order to determine whether a food container is to be considered as a single-use plastic product for the purposes of this Directive, in addition to the criteria listed in the Annex as regards food containers, its tendency to become litter, due to its volume or size, in particular single-serve portions, shall play a decisive role. By 3 July 2020, the Commission shall publish guidelines, in consultation with Member States, including examples of what is to be considered a single-use plastic product for the purposes of this Directive, as appropriate."

[23] WHELANOVÁ, M., ZBÍRAL, R., GRINC, J. *Praktická příručka pro implementaci práva Evropské unie do českého právního řádu – Komentář s příklady k vybraným článkům Metodických pokynů pro zajišťování prací při plnění legislativních závazků vyplývajících z členství České republiky v Evropské unii.* p. 162.

So how should the legislature proceed if such a provision referring to a soft law norm appears in the text of a legally binding provision of EU law? First of all, it should be avoided that, in the course of transposing a directive or adapting a legal system to a regulation, a provision is enshrined in national law that is in direct conflict with a soft law instrument. It must therefore be ensured that the wording of such a provision does not preclude an interpretation in line with the soft law act in question.[24]

From the perspective of national legislation, it would be ideal if the text of the soft law act was already known at the time of drafting the national transposition provisions. However, as this is not usually the case,[25] it is up to the drafter of the legislation concerned to anticipate the text of the legally binding act. This is naturally easier in cases where the Member States formally participate in the drafting of the text of the soft law act. Otherwise, the specific soft law act can be the subject of informal consultations between the competent national body and the relevant EU institution or agency.

The answer to the question of how to transpose the text of an interpretative soft law act, whether anticipated or already published, into the legal order of a Member State will consequently differ depending on whether the original hard law act is a directive or a regulation. Whereas in the case of a regulation the space for considering interpretative soft law is limited because it is prohibited to transpose a regulation into national law,[26] the relative freedom related to the implementation of Directives makes it easier for a Member State to convert a non-binding soft law act into binding national law where appropriate.

III.2 IMPLEMENTING SOFT LAW ACTS

The second type of soft law acts, i.e., implementing acts, can commonly be found in certain sector-specific regulations, typically in areas of financial law or energy law. This refers to a situation where a hard law act empowers a European Union institution or agency to issue soft law acts. However, it would be wrong to assume that it is at the discretion of the addresses whether they take such soft law into consideration or not. Not only national authorities in their administrative practice, but also private persons, are obliged to take such acts into account. Why? Because the enabling act of hard law generally provides that the soft law act must be taken into consideration by all persons to whom it is addressed.

The most typical examples of such an approach are acts that authorise a regulatory agency to issue soft law acts, usually referred to as recommendations or guidelines.[27] Thus,

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[24] Ibidem., p. 164.

[25] See e.g., Commission notice — Commission guidelines on single-use plastic products in accordance with Directive (EU) 2019/904 of the European Parliament and of the Council on the reduction of the impact of certain plastic products on the environment (OJ C 216, 7.6.2021, pp. 1–46). As the implementation deadline for a substantial part of the Directive expired on 3 July 2021, the possibility for a Member State to react to this soft law text in the process of implementation was very limited.

[26] Judgment of the Court of 10 October 1973, Fratelli Variola, Case 34-73, ECLI:EU:C:1973:101 and Judgment of the Court (Fifth Chamber) of 29 October 1998, *Commission of the European Communities v Hellenic Republic*, Case C-185/96, ECLI:EU:C:1998:516.

[27] E.g., in this respect the very illustrative example of Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, which provides that "the Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union

in the case of these soft law acts, it is possible to identify a primary obligation, under penalty, to deal with the soft law act that does not arise from the soft law act itself but from the hard law act in question.

The mechanism whereby a legally binding act merely imposes an obligation to materially address and comply with the soft law act or to explain why with the recommendations contained in the soft law act has not been complied with is simply referred to as a "comply-or-explain" obligation.[28] In the process of national implementation, a distinction must be made as to whether a regulation or a directive provides for such an arrangement. In the case of a regulation, we have to further distinguish whether the obligation to comply-or-explain is imposed on the State (or its body) or on an individual. If it is the State, it is usually necessary, to implement such an obligation in the national legal order, on the basis of the principle that state powers may be exercised only in cases and within the limits provided for by law and only in the manner prescribed by law. In the latter case, the obligation is imposed on the individual by a directly applicable regulation, and it is not necessary to transpose it into national law, but it is usually necessary to enshrine the supervisory and sanctioning powers of the competent national authorities in the law.[29] It should be noted that possible sanctions can only be imposed for non-compliance with the comply-or-explain obligation, not for non-compliance with the soft law act itself.

law, issue guidelines and recommendations addressed to competent authorities or financial institutions. (…) The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations. Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons." As another example, Article 42 of Regulation (EU) 2019/943 of the European Parliament and of the Council of 5 June 2019 on the internal market for electricity (recast) provides that "regional coordination centres shall issue coordinated actions to the transmission system operators in respect of the tasks referred to in points (a) and (b) of Article 37(1). Transmission system operators shall implement the coordinated actions except where the implementation of the coordinated actions would result in a violation of the operational security limits defined by each transmission system operator in accordance with the system operation guideline adopted on the basis of Article 18(5) of Regulation (EC) No 714/2009. Where a transmission system operator decides not to implement a coordinated action for the reasons set out in this paragraph, it shall transparently report the detailed reasons to the regional coordination centre and the transmission system operators of the system operation region without undue delay.".

[28] See e.g., HUBKOVÁ, P. Limiting or Empowering? Soft Rulemaking of the European Supervisory Authorities and Its Impact on National Administrative Authorities. Forthcoming in: *Revue de la Faculté de droit de l'Université de Liège*. 2023, Vol. 2, pp. 247–266.

[29] Czech Act on Banks, No 21/1992 Sb., serves as an national implementing act for the aforementioned Regulation (EU) No 1093/2010. Implementing the obligation imposed on the authorities of the State, Section 25 para. 5 provides that "the activities of banks, including branches thereof carrying on activities within the territory of another country, shall be subject to banking supervision by the Czech National Bank, including on-site examinations. The activities of branches of foreign banks shall be subject to supervision by the supervisory authority of the home country of the foreign bank and to the extent stipulated by law for the banking supervision exercised by the Czech National Bank, including on-site inspections." Subsequently, implementing the supervisory power over the obligations of individuals that arise directly from the EU Regulation or the related soft law acts, Section 26 para. 1 of the same Act provides that "where the Czech National Bank identifies any shortcomings in the activities of an entity subject to its supervision resulting from breaches of or non-compliance with its duties or the requirements laid down in this Act, its implementing regulation, a decision issued pursuant to this Act, a provision of a general nature issued under this Act, the act regulating building savings schemes, the directly applicable legislative act of the European Union governing prudential requirements or a European Commission regulation or decision, the Czech National Bank may impose remedial measures commensurate with the nature and gravity of the violation in order to eliminate the shortcomings identified".

In terms of recent developments, we can observe several trends that have led to an increase of cases in which EU institutions and agencies have been empowered to issue soft law acts as well as of cases in which those soft law acts have been rendered legally binding. These trends include, in particular, the strengthening of the European Union's role in dealing with situations that have, at least politically, the parameters of a crisis, such as the banking, energy, or cyber crises. While the standard solution would be the adoption of a robust regulatory framework in the very specific sectors in question, the European Union tends to favour solutions that include flexible elements of global governance, i.e., soft law standard-setting by specialised institutions that are better placed to react quickly and expertly, involving stakeholders from the business and non-profit sectors. Indeed, this is because such standard-setting is not subject to time-consuming discussions in the relevant political bodies.[30]

A complementary trend is the use of what could be called, with some exaggeration, a "comply-or-explain-and-comply" mechanism, i.e., a procedure whereby a legally binding EU act gives an EU agency the right to issue a general non-binding soft law act that provides for a comply-or-explain mode. However, if the Agency is not satisfied with the explanation, it can take a legally binding individual decision against the explaining entity which makes the recommendation individually binding.[31] In these cases, it is questionable to what extent soft law can still be regarded as a non-binding instrument.

III.3 CASE STUDY: COMMISSION RECOMMENDATION 2003/361/EC

Although it is the "comply-or-explain" type of implementation acts that have so far caused the greatest difficulties in terms of the doctrinal approach to soft law, we have recently observed another phenomenon in the law of the European Union that seems to challenge traditional ideas about the role of soft law.[32] This refers to cases where a legally binding EU act, be it a directive or a regulation, refers in its normative text to a soft law act in such a way that it cannot be derogated from. This means that the soft law act becomes, in practice, legally binding.

Perhaps the most flagrant example of how this type of EU soft law becomes binding can be found in the legally binding EU acts that refer to the Commission Recommendation concerning the definition of micro, small, and medium-sized enterprises.[33] The aim of this Recommendation is to improve the position of these enterprises in the internal market which can be achieved in two different ways. Firstly, by ensuring that Member States' active support measures, in particular of financial nature, are targeted only at those busi-

[30] See e.g., ALBERTI, J. Challenging the Evolution of the EMU: The Justiciability of Soft Law Measures Enacted by the ECB against the Financial Crisis before the European Courts. Online. *Yearbook of European law*. 2018, Vol. 37, pp. 626–649.

[31] See e.g., Art. 42 of Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011.

[32] See in particular the above-mentioned recent case law C-501/18 *BT v Balgarska Narodna Banka*, ECLI:EU:C:2020:729, and C-911/19 *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de resolution*, ECLI:EU:C:2021:294.

[33] Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422).

nesses that really need them. The second approach, which is more important in terms of national implementation, is to exempt micro, small, and medium-sized enterprises from rules primarily targeting large enterprises. Given the growing importance of detailed sectoral rules, for example in areas related to digitalisation or electronic communications, the EU legislature has been making use of the above-mentioned Recommendation to differentiate the level of obligations imposed on legal persons on the basis of their real market relevance.

Therefore, legally binding EU acts refer to the Recommendation, either by stipulating that a particular term is to be understood in accordance with the definition contained in Recommendation 2003/361/EC[34] or by directly defining the personal scope of application by excluding certain categories of undertakings listed in Recommendation 2003/361/EC.[35]

Such inclusion of a recommendation into the legally binding normative text of a directive or regulation means that it is made binding. This is not only a doctrinal problem, as the soft law act in question effectively changes its nature, but also a problem of practical implementation, as the competent national authorities face the question of how to deal with such a recommendation.

One could question whether such a change in the nature of a previously non-binding legal act is really unprecedented in EU law, considering that Article 6(1) of the TEU not only makes the Charter of Fundamental Rights of the European Union, which was originally adopted as a non-binding declaration in 2000, legally binding, but even places it on a par with EU law of the highest legal force (primary law). However, the situation concerning Commission Recommendation 2003/361/EC (or some of its provisions) is significantly different, as in this case soft law only becomes binding in the context of a specific legislative act. The original form of a legally non-binding recommendation (and its theoretically non-binding nature) is preserved. Thus, an EU soft law act is made binding only ad hoc for the purpose of implementing a specific legally binding EU act.

One of the most significant problems with making soft law acts binding is the absence of an official translation of the act in question. Soft law acts, especially those issued by EU agencies, are generally not published in all official EU languages. Older soft law acts issued

[34] E.g., Article 1 of Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain, which provides that "the annual turnover of the suppliers and buyers referred to in points (a) to (e) of the first subparagraph shall be understood in accordance with the relevant parts of the Annex to Commission Recommendation 2003/361/EC and in particular Articles 3, 4 and 6 thereof, including the definitions of 'autonomous enterprise', 'partner enterprise' and 'linked enterprise', and other issues relating to the annual turnover."

[35] Article 19 para 1 of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) provides that "this Section, with the exception of Article 24(3) thereof, shall not apply to providers of online platforms that qualify as micro or small enterprises as defined in Recommendation 2003/361/EC." Article 2 para 1 of Directive (EU) 2022/2555 of the European Parliament and of the Council of 14 December 2022 on measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972, and repealing Directive (EU) 2016/1148 (NIS 2 Directive) defines the scope of the Directive as follows: "This Directive applies to public or private entities of a type referred to in Annex I or II which qualify as medium-sized enterprises under Article 2 of the Annex to Recommendation 2003/361/EC, or exceed the ceilings for medium-sized enterprises provided for in paragraph 1 of that Article, and which provide their services or carry out their activities within the Union."

by the Commission before 2004 were not always translated into Czech language after the Czech Republic's accession to the EU. This problem is particularly acute in the case of Recommendation 2003/361/EC, which was only published in eleven official languages. Unlike legally binding acts, translations of the Recommendation into other official languages were not published in the Official Journal after the EU enlargement.

The problem caused by the lack of publication is both of a legal and practical nature. The binding character of a soft law act that has not been translated is a conflict with the case-law of the CJEU, which concluded in Skoma-Lux that EU law precludes obligations contained in EU legislation that has not been published in the Official Journal in the language of a Member State, from being imposed on individuals in that State, even if those individuals had the opportunity to become acquainted with that legal provisions by other means.[36]

Although national legislation aimed at implementing those legally binding EU acts, which render soft law provisions legally binding ad hoc, refers to these norms in different ways,[37] e.g., by reformulating or translating the relevant soft law act, the Czech Republic considers that the official translation of such a soft law act must be published in the Official Journal. This was agreed by the Legislative Council of the Government at its meeting on 17 June 2021.

It is true that the Commission has published a translation of the Recommendation in all official languages in an annex to the 2020 User guide to the SME definition.[38] However, this document has only informative value. While the Guide may serve as a basis for the transposition of the text of the Recommendation into national legislation, it cannot have any legal effects vis-à-vis natural and legal persons.[39] Following informal consultations with the EU institutions, the Czech Republic formally requested the publication of the Recommendation in the Czech language in a letter to the Legal Service of the European Commission dated 4 February 2022. In its reply, the Legal Service of the European Commission said that the matter would be referred to the competent Directorate General.

[36] Judgment of the Court (Grand Chamber) of 11 December 2007, Case C-161/06 Skoma-Lux, ECLI:EU:C:2007:525.

[37] See § 3 of Act No 395/2009 Sb., on significant market power and unfair commercial practices in the sale of agricultural and food products, which provides that "The annual turnover referred to in § 3 is the annual turnover for the last completed accounting period of 12 months. The calculation of the annual turnover of a customer or supplier shall be based on the annual turnover of an enterprise, an autonomous enterprise, a partner enterprise and a linked enterprise in accordance with Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises.", § 2(2)(r) of Act No 374/2015 Sb., on recovery procedures and crisis resolution in the financial market, which transposes into Czech law the Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council and which copies the recommendation directly without specific reference to it by providing that "a very small, small and medium-sized enterprise of an entrepreneur whose annual turnover does not exceed an amount equivalent to 50000000 EUR", or § 5(3)(j) of Act No 406/2000 Sb., on energy management, which refers to Recommendation 2003/361/EU in a footnote.

[38] Ref. Ares(2020)4670215 - 08/09/2020.

[39] As stated by the Court in paragraph 48 of the Skoma-Lux decision: "However, although Community legislation is indeed available on the internet and individuals are using this means more and more frequently to acquaint themselves with it, making the legislation available by such means does not equate to a valid publication in the *Official Journal of the European Union* in the absence of any rules in that regard in Community law.".

Further informal consultations with EU institutions followed, in which the Permanent Representation of the Czech Republic to the EU in Brussels was also involved. Subsequently, in October 2022, the Permanent Representation of the Czech Republic received a letter from the Minister for Legislation and the President of the Legislative Council of the Government addressed to the Commissioner for the Internal Market with a request to ensure the publication of the Czech version of Commission Recommendation 2003/361/EC. However, the publication was not achieved before the procedure for transposing Directive (EU) 2019/633 was completed. The Czech version of Recommendation 2003/361/EC has therefore only been published at the national level by means of a notice in the Collection of Laws.[40] National implementing legislation may therefore at least refer to this national translation.[41]

The issue of publishing the Czech version of the Recommendation was also repeatedly raised at the meeting of the European Commission's working group "EU Law Network". The request of the Czech Republic to publish the missing language versions of Commission Recommendation 2003/361/EC in the Official Journal is widely supported by other Member States. At the meeting of the Working Group on 24 May 2023, the European Commission reaffirmed its commitment to accelerate work on the publication. Unfortunately, we have to note that the Czech version of Commission Recommendation 2003/361/EC has not yet been published in the Official Journal of the European Union (as of November 2023).

CONCLUSION

In this article we have drawn attention to a phenomenon of growing importance that can significantly complicate the process of implementing EU obligations into national law and legal practice. This refers to cases where the increasing number of EU soft law acts are so closely intertwined with legally binding EU acts that the correct transposition of a directive into national law or the correct adaptation of the national legal order to a regulation requires the incorporation of the content of EU soft law into the normative text of a national legal act.

The first part of the article defined the different types of EU soft law. Their specific impact on national legislation varies widely. The Government's Methodical Instructions for the Organisation of Work when Meeting the Legislative Obligations Ensuing from the

[40] Notification No 7/2023 Sb., of 11 January 2023 on a publication of the Czech version of Commission Recommendation 2003/361/EC concerning the definition of micro, small and medium-sized enterprises, by the Ministry of Industry and Trade.

[41] Art. II(3) of Act No 359/2022 Sb., amending Act No 395/2009 Sb., on significant market power and unfair commercial practices in the sale of agricultural and food products and its abuse, as amended, provides that "if the Czech version of Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises has not been published in the Official Journal of the European Union by the date of entry into force of this Act, the Ministry of Industry and Trade shall publish it in the Collection of Laws. If the Czech version of the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises is published in the Official Journal of the European Union after the entry into force of this Act, the Ministry of Industry and Trade shall publish a notification about it in the Collection of Laws."

Membership of the Czech Republic in the European Union divide EU soft law into "recommendations or other legally non-binding acts of secondary law which supplement or construe the binding acts of secondary law provisions" and "other recommendations and other non-binding acts of secondary law". Since this division can no longer fully and precisely capture the current development of EU soft law, in the second part of the article, we have focused on the categorisation of those acts that are most relevant in terms of national legislative and implementation practice. The second part introduces the different categories of EU soft law and highlights the importance of so-called post-law acts, which can be divided into interpretative acts providing some guidance in interpreting binding EU law and implementing acts specifying the rules laid down in a legally binding EU act.

The third part deals with specific cases in which soft law acts are rendered binding by means of references in legally binding EU acts. We have highlighted the challenges that national authorities have to deal with when implementing such commitments. The main focus was dedicated to the implementation of Commission Recommendation 2003/361/EC. The implementation of this Recommendation, which is incorporated into hard law acts, is problematic on the one hand because it is increasingly used to define the personal scope of an EU legally binding act and, on the other hand, the absence of a duly published official translation of this Recommendation may create a conflict with the conclusions of the Court of Justice made in the case of Skoma-Lux.