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Judicial Review of Recommendations Based on the Case of *Belgium v Commision*, C-16/16 P, 20th February 2018

Abstract:

In this article I will discuss the recent judgment of European Court of Justice from 2018 treating on the possibility to review recommendations adopted by the EU bodies in a procedure of the action for an annulment (article 263 TFEU). Amount of soft-law that has been created by the EU institutions is increasing, therefore it raises the question whether those acts can be verified or not and how we should interpret or apply them in the Member States. In the case of *Belgium v Commission* the Member State argued that the adopted recommendation enforced some obligations and was in fact a directive. At first glance it might seem senseless, because soft-law is generally understood not to be legally binding, but in this specific case, raised arguments as well as EU case law might pose different conclusions on this matter. In this article I will present my opinions on the arguments of the parties and the judgment of the CJEU itself. What is more, my aim is also to conclude the consequences and effects of adoption of the recommendation and why the judicial review in this matter might be needed.

Key words: recommendations, action for annulment, European Union law, soft-law, European Court of Justice

1. Introduction

European Court of Justice (CJEU) is an important institution of the European Union and its role is becoming increasingly crucial by interpreting the wide variety of the European's organs' laws and enforcing the law or simply annulling EU legal acts[2]. More

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[2] https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en, 19.05.2019.

and more legal acts are being established by the European institutions (just in 2017 almost 253 legislative acts were enacted)[3], what may result in tensions between the Member States. Indeed, European legislation cannot amuse and provide benefits for everyone – it simply cannot be achieved, for instance because of the economic demands and limited resources.

As a result of those actions being taken by the European Union, as was said previously, the European Court of Justice is the institution that tries to upkeep uniform interpretation and allows European citizens to enjoy the same fundamental rights and freedoms in every Member State. Also it prevents governments from limiting our basic rights and making these rights being respected accordingly to e.g. Charter of Fundamental Rights of the European Union[4] or other international acts regarding this matter. Although we, as European citizens, share – to some extent – the same legal systems and legal traditions (democracy, Rule of Law, Rechtsstaat[5]), we simply need one European court to decide whether something is in accordance (lawful) with the EU Treaties or not[6]. Consequently, this is why the judicial review of the CJEU is so important and why additionally the scope of it is so essential when it comes to the rule of law in the European Union.

2. Recommendations themselves

The scope of judicial review provided for the CJEU by the Treaties should be considered with regard of the article 288 TFEU, which states that European institutions may adopt specific legal acts such as: regulations, directives, decisions and recommendations. This article *explicitly* states that recommendations „shall have no binding force", therefore it means that the Member States are not obliged to act accordingly and they can act freely when it comes to the „implementation" of the European recommendations. Because of that they cannot be regarded as the sources of the European Law *par excellance* but instead they should be considered as a part of European law-making process[7]. Indeed, one cannot deny that they can promote and suggest the expected approach from the Member State.

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[3] Legislative Acts (253) – Regulations, Directives, Decisions – https://eur-lex.europa.eu/statistics/2017/legislative-acts-statistics.html, 19.05.2019.

[4] Charter of Fundamental Rights of the European Union, http://www.europarl.europa.eu/charter/pdf/text_en.pdf, 19.05.2019.

[5] Rule of Law is one of the main foundation principles of the EU. It should be regarded as a concept, which contains formal components and substantive ones – L. Pech, *A union founded on the rule of law. Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, European Constitutional Law Review 2010, Volume 6, Issue 3, p. 362–378. To see more about the concepts of Rechtsstaat/Rule of Law see: M. Krygier, *Rule of Law (and Rechtsstaat)* [in:] *International Encyclopedia of the Social & Behavioral Sciences*, J.D. Wright (editor-in-chief), 2nd edition, Vol. 20, Oxford 2015, p. 780–787, https://www.researchgate.net/profile/Martin_Krygier/publication/278412328_Rule_of_Law_and_Rechtsstaat/links/5580e6ec08ae607ddc322eed/Rule-of-Law-and-Rechtsstaat.pdf?origin=publication_detail, 19.05.2019; J. Przedańska, *Abo vo czyli o koncepcjach państwa prawa,* http://repozytorium.uni.wroc.pl/Content/79111/29_Przedanska-J.pdf, 19.05.2019.

[6] H.G. Schermers, *Judicial Protection in the European Communities,* 3rd edition, Leiden 1983, p. 129–130.

[7] D. Lasok, J.W. Bridge, *Law & Institutions of the European Communities*, 4th edition, London 1987, p. 130–131.

As far as judicial review of the recommendation is concerned, article 263 TFEU states that they are excluded and thus they are outside of the judicial review scope of the CJEU. Although the specific wording in this article might pose a suggestion that there is a possibility for another conclusion. When the recommendations are „intended to produce legal effects *vis-à-vis* third parties" they might fulfill the prerequisite needed in order to consider them being admissible before the CJEU.

In the case of *Belgium v. European Commission*, C-16/16 P, CJEU had a challenging issue to solve, regarding the possibility of judicial review of recommendations. This (at first) transparent problem might lead to a different legal effects towards the Member States and, as a result, it may affect the interested companies and also individuals.

CJEU by reviewing the specific legislative acts of the European Bodies and controlling whether they are compatible with EU's Treaties or general principles, definitely contributes to the development of the EU law[8]. This paper will analise this matter because this judgment may be also considered a *de iure* precedent[9] and might determine (or at least be one of the factors) outcome in future cases regarding upcoming objections against contents of recommendations and possibility of the CJEU competences to review it.

3. Background to the case*: Belgium v. Commission*, C-16/16 P, February 2018

On the 14th of July in 2014 European Commission adopted recommendation under the article 292 of The Treaty on the Functioning of the European Union (TFEU)[10] on protection and prevention of individuals from online gambling services and online gambling itself[11]. By proclaiming this act, European Commission responded to challenges and risks of online gambling by encouraging Member States to provide safe gambling environment for consumers, players and minors, while maintaining gambling as a „source of entertainment"[12]. This act points out the importance to create awareness about social and financial risk[13] of gambling and how to possibly prevent it from

[8] *Ibidem*, p. 135–136.

[9] J. Helios, *Sędziokracja w Unii Europejskiej? Uwagi w kontekście* d*ziałalności interpretacyjnej Trybunału Sprawiedliwości Unii Europejskiej* [w:] *Rządy prawa i europejska kultura prawna,* ed. A. Bator, J. Helios, W. Jedlacka, Wrocław 2014, p. 190–194, http://www.repozytorium.uni.wroc.pl/Content/63630/14_Joanna_Helios.pdf, 19.05.2019; G. Mikelsone, *The binding force of the case law of the Court of Justice of The European Union,* Vilnius 2013 p. 484–491, https://www.mruni.eu/upload/iblock/3ef/JUR-13-20-2-06.pdf, 19.05.2019.

[10] Judgment of the Court (Grand Chamber) of 20th February 2018, C-16/16 P – *Kingdom of Belgium v European Commission*, http://curia.europa.eu/juris/liste.jsf?num=C-16/16&language=eng#, 19.05.2019.

[11] 2014/478/EU: Commission Recommendation of 14th July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014H0478, 19.05.2019.

[12] *Ibidem*, p. 1, point 2.

[13] In order to learn more about the risks and prevention of the online gambling, see: Addiction and Lifestyles in Contemporary Europe Reframing Addictions Project (ALICE-RAP) policy paper series: *'Gambling: two sides of the same coin — recreational activity and public health problem*', Dresden 2013, p. 6–14, http://www.alicerap.eu/resources/documents/doc_download/128-policy-paper-2-gambling-two-sides-of-the-same-coin.html, 19.05.2019.

happening. This provision was proclaimed as a resolution (so called „soft-law"), which means that Member States may adopt such rules or not, but if not, they might be under some political pressure to act accordingly, what at the end may result in practical effects[14]. Although it was not legally binding and stated that: „This Recommendation does not interfere with the right of Member States to regulate gambling services" Kingdom of Belgium objected against it and lodged an application before the General Court in order to bring the action seeking an annulment[15] of the aforementioned recommendation, while European Commission raised a plea of an inadmissibility under article 114 (1) of The Rules of Procedure of the General Court[16]. The General Court ruled that the action was dismissed as a result of being inadmissible – in short – because the legality of the genuine recommendations shall not be reviewed by The Court of Justice[17] (because the recommendations had no binding effect). Based on the article 263 TFEU, CJEU *explicite* lacks competence to do so and it is outside the scope of its powers to review it. The Kingdom of Belgium appealed but the Grand Chamber of the CJEU upheld that decision without going to the substance of the case[18]. The question arose: why the decisions of The General Court and CJEU, which might seem straight-forward or even effortless in this matter, are worth debating? I believe that this judgment is a genuine inquiry concerning the scope of the CJEU jurisdiction and its boundaries when it comes to possibility of judicial review of the European Union's recommendations.

3.1. The main arguments raised by the Kingdom of Belgium

A) Adoption of any legal act produces legal effects, which – in opinion of this party – shall justify review of legality in the light of possible infringement of basic principles of the EU. The General Court is to ensure that the fundamental rules of the EU are being obeyed and respected, should not declare the act inadmissible; they should not limit their examination just to the matter of producing legal effects but also they should verify whether the European Commission had competence (substantive legal basis[19]) to adopt a recommendation. By not doing so, they did not respect the principles of conferred competences, loyalty and institutional balance. Any act shall be declared admissible

[14] D. Chalmers, Ch. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law. Text and Materials*, Cambridge 2006, p. 137.

[15] The aim of seeking annulment is to interfere within validity of an act. Its sole purpose might be to get the whole act annulled. At the end of the proceedings „the Court has no other option than to annul or not to annul" – H.G. Schermers, *Judicial Protection in the European Communities*, London 1983, p. 195.

[16] Rules of Procedure of the General Court of 2nd May 1991, https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/tra-doc-en-div-t-0000-2018-201808699-05_00.pdf, 19.05.2019.

[17] Order of The General Court (Second Chamber) 27th October 2015 in Case T-721/14, *Kingdom of Belgium v European Commission*, http://curia.europa.eu/juris/liste.jsf?num=T-721/14&language=en#, 19.05.2019.

[18] Judgment of The Court (Grand Chamber) 20th February 2017, in Case C-16/16 P, http://curia.europa.eu/juris/liste.jsf?num=C-16/16&language=en#, 19.05.2019.

[19] Judgment of the Court (Grand Chamber) of 20th February 2018, C-16/16 P, point 19: „not a substantive legal basis but merely a procedural legal basis, granting not only the Commission but also the Council the power to adopt recommendations".

when it „seeks to have the observance by an EU institution of the fundamental principles of the EU legal order…"[20].

B) The case when recommendation is possibly a hidden directive – which indeed is within jurisdiction and the scope of review of the EU courts.

C) Possible different interpretations of recommendation due to more imperative wording – German and Dutch language versions of the recommendation were written in a (more) imperative way, thus they might suggest that the Commission had intention to produce legal effects and – as a result of it – Member States are obliged to act accordingly.

D) Reference to the *Council v. Commission*[21] case, where the Court **did not question admissibility** of an action for annulment, even though the subject matter of that action related to the European Union's position in the context of **advisory opinion** proceedings, which had **no binding effects**.

3.2. The main argument rose by the European Commission

The contested recommendation is a 'genuine' recommendation and also it does not create any legal effects nor pressures the Member States to act in a certain way. In their opinion, the way of wording is conditional and non-imperative, which confirms discretional possibility to act accordingly within recommendations and their non-binding effects. They also stated that claims of the appellants are connected to merits of the case rather than admissibility, which this procedure concerns. Also there is no possibility to create distinction between different language versions of recommendations based on their meaning – it is a recommendation, which has no legal effects and delimitation on this matter might violate the principle of uniform interpretation of the EU provisions.

4. Findings of the CJEU

A) Regarding different legal versions: CJEU stated that every language version has the same value and there is no possibility for one of the language versions to have primacy over other. This might pose a threat to uniformed application of the EU law. Also, what was pointed out by the CJEU, the recommendation had not been intended to produce legal effects.

B) On the matter of legal effects of contested resolution: CJEU pointed out that recommendation was established in the EU Treaties as an act that has no binding force,

[20] The Kingdom of Belgium made these arguments basing on the judgments of: *Les Verts v Parliament*, 294/83, EU:C:1986:166 and of 22nd May 1990, *Parliament v Council*, C-70/88, EU:C:1990:217.

[21] *Council v Commission*, C-73/14, EU:C:2015:663.

which only may suggest and be an invitation towards reaching a certain legal goal[22]. The article 263 TFEU also expressly states in the first sentence that recommendations are outside the scope of the CJEU and because of that the General Court rightly considered it to be inadmissible. Nevertheless, they emphasized that „any provisions adopted by the institutions, whatever their form, which are intended to have binding legal effects are regarded as 'challengeable acts' for the purposes of Article 263 TFEU" mentioning the so-called „AETR" judgment[23], which means that in some cases recommendation is able to be a subject to judicial review of the CJEU. Because of that, CJEU verified whether the act was intended to have legal effects and eventually decided that although some versions may sound in a more imperative way, recommendation basically has not been intended to produce legal effects, which was also confirmed by naming it as a recommendation and the possibility to regulate this hazard and online gambling in a desired way by the Member States[24]. This recommendation, as being described as a genuine recommendation and thus not have been intended to produce legal effects, resulted in the CJEU's approval of the decision taken by the General Court, which considered previously the recommendation to be inadmissible[25]. Consequently, it cannot be a hidden directive but just a suggestion from the EU to act on this matter.

C) Regarding the substantial legal basis to adopt recommendation: the CJEU stated that even the violation of the EU law regarding adopting the recommendation does not make the aforementioned recommendation admissible to being reviewed by the CJEU (apart from being a hidden directive or producing legal effects)[26].

D) Regarding the aforementioned opinion in the so-called „AETR" case: the CJEU noted that the objection there was not against recommendation but against decision of the Commission, which had been intended to produce legal effects. Therefore this argument was invalid because the circumstances of those cases were different. What is more, the CJEU stated that we should distinguish the deliberation of the Council from the recommendation, which are directly excluded in the article 263 TFEU and the outcome of the analysis whether the recommendation produced legal effects was negative. In regard of the article 263 TFEU, the CJUE also said that the mentioned judgments of 23rd April 1986, *Les Verts v. Parliament*, 294/83, EU:C:1986:166, and of 22nd May 1990,

[22] This might be achieved by implementing recommendation in national law or by adopting necessary legal instruments in accordance to the text of recommendation.

[23] Judgment of the Court of 31st March 1971, *Commission of the European Communities v Council of the European Communities*. European Agreement on Road Transport. Case 22-70.ECLI, ECLI:EU:C:1971:32, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61970CJ0022, 19.05.2019.

[24] Judgment of the Court (Grand Chamber) of 20th February 2018, C-16/16 P, point 32, which confirms this possibility for the Member States.

[25] An example of the EU's not „classical" act (regulation, directive, decision) being able to be reviewed under article 263 TFEU (ex. 230) based on the prerequisite of being intended to produce legal effects is a Commission's notice carried on by a letter in a case of *Cimenteries CBR v Commission*, T-25/95 – S. Weatherill, P. Beaumont, *EU LAW*, Oxford 1993, p. 246-248.

[26] Judgment of the Court (Grand Chamber) of 20th February 2018, C-16/16 P, point 28.

Parliament v. Council, C-70/88, EU:C:1990:217 have to be differentiated from this case simply because in those cases no provision *expressis verbis* excluded possibility of reviewing those acts unlike here – because of that the argument raised by The Kingdom of Belgium was dismissed[27].

5. Evaluation of the CJEU's findings from my perspective

A) Regarding different language versions: as far as I am concerned, I have to agree with arguments raised by the CJEU on this matter – one language version of the EU act in general can never be superior to others. Every Member State is considered to be equal and it has to be the same (*mutatis mutandis*) when it comes to languages. Every legal document being adopted by the EU institutions shall be confronted by specialist in the Member States when there are some doubts about its meaning. Additionally, because it is a recommendation – that has no binding force, if the Kingdom of Belgium objects it, they shall not accept any provision that may potentially oblige them to act in a certain way. If there is a pressure coming from the European Commission, they should – regarding their possible omission – replicate by raising a plea of that act being a non-binding recommendation. If an European institution denies the identity of the act being a recommendation – which is highly unlikely to happen – that would absolutely undermine the rule of law in the European Union. This problem also emphasizes the need of accuracy and precision regarding translation of legal matters, which shall be ensured and provided in order to avoid divergences in the future and possible tensions regarding different outcomes as a result of different translations[28].

B) On the matter of legal effects of contested resolution and possible solutions: one cannot deny that the first sentence of the article 263 TFEU directly prohibits recommendations from being reviewed by the CJEU. In the further part of this article there is a possibility for recommendations to be reviewed under the test of „having been intended to produce legal effects", which has been recognized/reaffirmed by the „AETR" judgment. In total, the whole idea of recommendation being admissible revolves around the idea of having been „intended to produce legal effects"[29] or being a „hidden direc-

[27] CJEU additionally pointed out that while action for annulment in this case is not viable, there is no limitation when it comes to the preliminary ruling proceedings regarding any act that had been adopted by the EU's institution. This means that in the future if any national court is concerned about the interpretation of the indicated recommendation, they might benefit from the preliminary ruling's procedure.

[28] J. Szponar-Seroka, *Wielojęzyczność jako wyzwanie w procesie stanowienia i wykładni prawa Unii Europejskiej* [in:] Studenckie Zeszyty Naukowe 2017, Vol. XX, nr 33, p. 94–99, http://journals.umcs.pl/szn/article/viewFile/5156/4201, 19.05.2019.

[29] Although, as have been established previously, the essence of a recommendation is not to produce any legal effects and it is up to the Member States to act accordingly or not, I think the idea of producing legal effects and characteristics of a „genuine" recommendation contradicts each other by definition. Consequently, recommendation is, *per se*, unable of producing legal effects. By producing legal effects it loses its status of recommendation. That is why we should strictly distinguish the ideal recommendation (art. 263 TFEU), which expresses only suggestions/invitations, from „recommendation" that will always contain some debatable provision, that it able to produce legal effects. Maybe instead

tive"[30]. There is no other legal basis under which a recommendation can be reviewed by the CJEU – *tertium non datur*. Basing on those two possibilities, the CJEU may declare act void in general or partly and its judgment is effective *erga omnes*[31]. Obviously, the act also might be declared to be inadmissible in light of neither having been intended to produce legal effects nor being a hidden directive.

I assume that this approach might result in some problems in relation to practical application. It might not be efficient for the protection of the sovereignty of the states, for example in the situation when just one provision is able and has been intended to produce legal effects, The General Court or the CJEU are very unlikely to declare it admissible while deciding which outcome is the most rightful. Argumentation will be based on the „recommendation" name of the act, thus being non-binding. But what if undercover of a suggestion, under the so-called soft-law real obligation and enforcement measures are placed?[32] Or even worse – what if the European institutions imposed indirect sanctions or political pressure over not respecting the recommendation? Obviously, we can transpose this reasoning to almost all cases, but this issue cannot be neglected simply because this is a recommendation. It also highlights the problem of the soft-law being adopted as a substitute for legislative acts „whereas such a situation would bring confusion and insecurity to a field in which clarity and legal certainty should prevail, in the interests of the Member States and of the citizens"[33]. Briefly concluding this reflection, I cannot provide an improvement over those previously mentioned that the CJEU can impose – for this reason I can only suggest the process of verifying recommendations to be more accurate, much more thoughtful in order to be truly verified.

In this case the CJEU ruled that the recommendation adopted by the Commission had not been intended to produce legal effects. Declaring it as a non-binding, while depending mostly on language version, limits greatly possible verification of specific,

we should describe it as an „act been intended to produce legal effects" and able to do so? (Platonic approach to this matter). The CJEU will still be able to review it but this idea – by not naming it „recommendation" anymore – will allow us to ensure that idea of „genuine" recommendation remains strict and unchanged by any exemptions. This will allow to upkeep the correct terminology and prevents it from being spoiled. By approving the probable review of recommendation, the CJEU opened the door for *diffusion*, regarding EU secondary law's status, which – in my opinion – might create further confusion regarding the scope of the CJEU review.

[30] In this scenario the CJEU „shall disregard its actual title and consider it being a regulation, directive or decision" – H.G. Schermers, *Judicial…*, p. 231.

[31] K. Scheuring, *Komentarz do art. 264 Traktatu o Funkcjonowaniu Unii Europejskiej* [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz*, ed. D. Kornobis-Romanowska, J. Łacny, A. Wróbel, vol. III, Warsaw 2012, art. 223–358.

[32] General Advocate also emphasized the possibility of circumvention of the European law in his opinion on this matter – Opinion of Advocate General Bobek delivered on 12th December 2017, Case C-16/16 P, *Kingdom of Belgium v European Commission*, ECLI:EU:C:2017:959, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62016CC0016, 19.05.2019.

[33] European Parliament's Resolution of 4th September 2007 on institutional and legal implications of the use of „soft law" instruments, 2007/2028(INI), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0366+0+DOC+XML+V0//EN&language=EN, 19.05.2019.

sometimes very complex provisions. Regarding this issue, we get two main ways to verify whether a recommendation has been intended to produce legal effect: 1) we can focus on the title/form – which will mostly result in declaring recommendation inadmissible or 2) we can study the text and actual meaning of the written provision – which obviously may result identically with the previous approach or the contrary – the act being considered to be admissible on the basis of having been intended to produce legal effects[34].

Contrary to the CJEU, the Advocate General M. Bobek provided a more in-depth analysis on this matter – he pointed out that this recommendation's scheme looks like a legal text and also its structure may suggest the same conclusion[35]. What is more, this act also „sets out the detailed content of the information that should be displayed on the landing page of the operator's gambling website"[36]. Furthermore, the recommendation states that the Member States are invited to notify the actions that were taken to act accordingly, and *crème de la crème* – obliged to collect data for statistics purposes. Moreover, the Commission under one of the provision shall evaluate previously mentioned actions being taken by the Member States. The Advocate General also rightly noticed that if the recommendation had not been intended to produce legal effects it would not be necessary for it to include the information that this act does not exclude the Member States' competence to regulate on-line gambling and hazard[37]. I agree wholeheartedly on the evaluation from the Advocate General and I think that in this case the CJEU had not verifed it accurately enough, thus they misinterpret the real intention of the authors of this provisions. Although the argument regarding language version stands firm and is undeniable, it is evident that the text of the provision *per se*, its form and very detailed regulation regarding on-line gambling and hazard was meant to produce legal effects, instead of being just a suggestion or invitation. The CJEU should not have declared it inadmissible but instead – they should have reviewed it and declared those provisions void because they directly violated the EU Treaties.

C) Regarding European Commission's competence to adopt such act and possible violation of the EU Treaties/basic principles: the CJEU fairly pointed out that there is no legal basis justifying control of recommendation based on the argument that it may be violating law of the EU. Although it may be worth noting that such exception should be included in the upcoming EU primary law. On the other hand, what if the CJEU (theoretically) could have had the possibility to consider the recommendation being admissible, basing solely on this argument, but because there is no legal basis, it would violate the EU law itself – K. Lasok justly noticed that the courts' competences are defined in the treaties and „all proceedings therefore must be founded on a specific provision

[34] Obviously, when verifying we are focusing on those two aspects, but sometimes they might contradict each other, thus there is a need to choose which one might truly be a key to reveal the intentions of the authors.

[35] Opinion of Advocate General in case C-16/16 P, point 126, ECLI:EU:C:2017:959.

[36] *Ibidem*, point 129.

[37] *Ibidem*, point 134.

(…) (the court) has no power to depart from the system of remedies provided"[38]. Although this means that a Union institution, in some cases, may violate EU principles, while there is no protection provided neither for the Member States nor for the European citizens[39]. It realistically is highly unlikely to happen because whenever European Union is going to violate the EU principles, it is always connected with another basis, which makes the remedy accessible – for instance, in this argument a review is not justified but there are other alternatives provided such as „AETR" test or reviewing the contested recommendation as a hidden directive.

D) Briefly regarding the subsidiary argument related to the advisory opinion: I can see why the CJEU referred to those judgments in that way – some circumstances of the cases were different and practically they allowed them to uphold the previously made points and statements while staying consequent. By considering recommendation to be inadmissible (in my opinion unjustly) there was no other choice to be made rather than reaffirming at the same that that the only possibility for it to be reviewed is when it was intended to produce any legal effects or being a hidden directive.

6. Final conclusions

In the light of the above deliberations it has to be pointed out that this judgment might really influence the possible review of upcoming recommendations and other soft-law acts in the future. The judgment of the CJEU reaffirmed the possibility to review it under the conditions of having been intended to produce legal effects or being a hidden directive. That means that article 263 TFEU does not prevent recommendation from being reviewed in an absolute way but also was meant to provide some exceptions from this prohibition, which cannot be further expanded (*exceptiones non sunt extendae*). Furthermore, the CJEU rightly explained that recommendation cannot be solely considered admissible based on the argument of violating the Treaties/general principles of the EU, which at the end shall be agreed upon generally because there is no legal basis for acting in such a way for the Court. I think that the CJEU justly pointed out that we cannot differentiate legal text and its meaning on the basis of a particular language version in the EU. As has been stated previously, this might lead to divergent outcomes and therefore it will undermine the idea of authentic languages in the EU, which have the same value and legal effects. But my objection regards to the process of verifying whether the contested recommendation have been intended to produce legal effects. The CJEU's „investigation" was very one-dimensional and lacked in-depth analysis.

[38] K.P.E. Lasok, *The European Court of Justice. Practice and Procedure*, London 1984, p. 120-121.

[39] Just theoretically regarding this matter, maybe an acceptable solution would be to provide the necessary protection while declaring the objection inadmissible, like for example the Irish Courts did, and that the General Advocate mentioned in his opinion regarding the case C-16/16 P, point 126, ECLI:EU:C:2017:959, citing after him: „a legal action against an administrative report in the context of planning procedures, High Court, *De Burca v Wicklow County Manager* (2009) IEHE 54; also about guidelines of the Irish Competition Authority, see High Court, *Law Society of Ireland v Competition Authority* (2006) 2 IR 262".

They either not noticed some provisions, which directly obliged the Member States to act in some way and allowed the Commission to supervise it, or just ignored restraining it to the concept of being a formal recommendation understood as an invitation. What is more, they have not paid enough attention to details such as a very detailed and complex provision, which might indicate being a regulation/directive/decision rather than just an invitation or suggestion. Because of that, they considered it to be inadmissible, therefore eliminating the possibility of declaring the contested recommendation void. Lack of actual judicial review in this case, despite the opportunity to act within the scope („with an intent to produce legal effects") of the CJEU in this case, might result in the lack of reflection from the European institutions regarding the concept of recommendation (soft-law) as a non-binding. More decisive reaction/in-depth analysis would have not enabled it – stating that recommendations are capable of being reviewed under some conditions is not enough in this case! Moreover, this means that in the future EU institutions will be still capable of adopting act in such a manner that denies the idea of soft-law itself (treated as an invitation contrary to the regulations/directives/decision), therefore posing a threat to the rule of law in the European Union and other founding principles, which have to be respected in order to achieve further integration and respect towards the European Union and its institutions.

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Sądowa kontrola zaleceń w Unii Europejskiej a sprawa *Belgia przeciwko Komisji,* C-16/16 P, z 20 lutego 2018 roku

Celem tego artykułu jest omówienie ostatnio wydanego orzeczenia Trybunału Sprawiedliwości Unii Europejskiej z 2018 roku dotyczącego możliwości sądowej weryfikacji zaleceń przyjętych przez unijne instytucje w ramach skargi o nieważność aktu z art. 263 TFUE. Wprawdzie zalecenia, jako przejaw *soft-law*, nie mają charakteru wiążących niejako z definicji, jednakże argumenty przedstawione w tej sprawie przez Belgię, zarzucającą m.in. wydanemu zaleceniu przymiot ukrytej dyrektywy oraz aktu nakładającego na państwa członkowskie poszczególne obowiązki, mogą nasuwać wątpliwości już nie do samej możliwości wspomnianej kontroli, lecz nawet jej konieczności. Dlatego też w artykule tym chciałbym odnieść się do podniesionych argumentów, ostatecznego rozstrzygnięcia TSUE, a także przedstawić wady oraz zalety możliwości weryfikacji zaleceń przez unijne sądy.

Słowa kluczowe: zalecenia, skarga o nieważność, *soft-law*, prawo Unii Europejskiej, Trybunał Sprawiedliwości Unii Europejskiej