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FENOMEN MOCY PRAWNEJ AKTÓW PRAWA MIĘKKIEGO KOMISJI UNII EUROPEJSKIEJ

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Adnotacja. Artykuł naukowy poświęcono zagadnieniu mocy prawnej współczesnych aktów prawa miękkiego Komisji Unii Europejskiej. Autor podkreśla, że moc prawna aktów prawa miękkiego Komisji Europejskiej jest kompleksową koncepcją, która składa się z trzech różnych rodzajów efektów prawnych: tworzenia „utajonych” obowiązków dla odpowiednich adresatów, interpretacyjnych i praktycznych efektów prawnych. Biorąc pod uwagę ustaloną orzeczniczą praktykę Trybunału Sprawiedliwości Unii Europejskiej, w celu ustalenia prawdziwej mocy prawnej aktów prawa miękkiego Komisji Europejskiej, należy zastosować podejście, zgodnie z którym „treść aktu ma pierwszeństwo przed formą aktu”. Udowodniono, że akty prawa miękkiego Komisji UE mogą nakładać „utajone” obowiązki na państwa członkowskie poprzez definiowanie różnorodnych systemów nadzoru bezpośredniego w przepisach takich aktów. Autor zauważa, że akty prawa miękkiego Komisji UE mają również efekt interpretacyjny, który znajduje swoje zewnętrzne odzwierciedlenie w tworzeniu jednolitego podejścia do zrozumienia i egzekwowania przepisów traktatów UE i podstawowych aktów prawnych UE w ramach praworządności UE. Ustalono, że praktyczny efekt aktów prawa miękkiego Komisji UE przejawia się w ograniczaniu własnych uprawnień uznaniowych Komisji, a także pomaga państwom członkowskim, osobom prawnym i fizycznym uniknąć stosowania kar i inicjowanie postępowań sądowych.

Słowa kluczowe: Unia Europejska, moc prawna, akty miękkie, obowiązki utajnione, efekt interpretacyjny, efekt praktyczny, Komisja Europejska.

PHENOMENON OF THE LEGAL EFFECT OF SOFT LAW ACTS OF THE COMMISSION OF THE EUROPEAN UNION

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Abstract. The scientific article is devoted to the issue of the legal effect of contemporary soft law instruments of the Commission of the European Union. The author emphasizes that the legal effect of Commission's soft law acts is a complex notion which is composed of three different types of effects: imposition of "latent" obligations on the addressees concerned, interpretative and practical effects. Taking into account settled case-law practice of the Court of Justice of the European Union the approach under which "the content of an act prevails over its form" should be applied in order to find out a genuine legal effect of Commission's soft law acts. It is concluded that Commission's soft law acts may impose "latent" obligations on the Member States by determining different supervisory systems in provisions of such acts. The author outlines that Commission's soft law acts have also an interpretative effect by setting up the united approach on legal understanding and enforcement of provisions of the EU Treaties and basic EU legislative acts within the EU legal order. Finally, it is concluded that the practical effect of Commission's soft law acts appears in limitation of Commission's own discretionary powers and prevents Member States, legal entities and individuals from possible penalties and court trials.

Key words: European Union, legal effect, soft instruments, latent obligations, interpretative effect, practical effect, European Commission.

ФЕНОМЕН ЮРИДИЧНОЇ СИЛИ АКТИВ М'ЯКОГО ПРАВА КОМІСІЇ ЄВРОПЕЙСЬКОГО СОЮЗУ

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Анотація. Наукова стаття присвячена питанню юридичної сили сучасних актів м'якого права Комісії Європейського Союзу. Автор підкреслює, що юридична сила актів м'якого права Комісії ЄС є комплексним поняттям, яке складається з трьох різноманітних видів юридичних ефектів: створення «латентних» обов'язків для відповідних адресатів, інтерпретаційний та практичний юридичні ефекти. Беручи до уваги сталу прецедентну практику Суду Справедливості Європейського Союзу, з метою визначення справжньої юридичної сили актів м'якого права Комісії ЄС, необхідно застосовувати підхід, відповідно до якого «зміст акта превалює над формою акта». Доведено, що акти м'якого права Комісії ЄС можуть покладати «латентні» обов'язки на Держав-членів шляхом визначення різноманітних систем нагляду безпосередньо в положеннях таких актів. Автор зазначає, що акти м'якого права Комісії ЄС також мають інтерпретаційний ефект, який знаходить своє зовнішнє відображення у створенні єдиного підходу до праворозуміння та правозастосування положень Договорів ЄС та базових законодавчих актів ЄС в межах правопорядку ЄС. Визначено, що практичний ефект актів м'якого права Комісії ЄС проявляється в обмеженні власних дискреційних повноважень Комісії, а також допомагають Державам-членам, юридичним та фізичним особам уникнути застосування штрафних санкцій та ініціювання судових проваджень.

Ключові слова: Європейський Союз, юридична сила, м'які акти, латентні обов'язки, інтерпретаційний ефект, практичний ефект, Європейська Комісія.

Introduction. The Commission of the European Union (hereinafter – the Commission) pursuant to Articles 288, 292 of the Treaty on the Functioning of the European Union (hereinafter – the TFEU) has an autonomous right to enact recommendations and opinions. The Commission has also been adopting a great variety of other types of soft law instruments such as communications, guidelines, notices, green and white papers, etc. that are not directly specified in the Founding EU Treaties. These types of acts are usually called as “atypical” or “non-standard” acts.

Paragraph 5 of Article 288 of the TFEU explicitly determines that recommendations and opinions shall have no binding force. Applying the principle of analogy of law, it is possible to assume that Commission’s “atypical” soft law instruments are also deprived of mandatory legal effect.

Nevertheless, among scholars there is no common view on the legal nature and, as a consequence, on the real legal effect of Commission’s soft law acts within the EU legal order.

O. Stefan emphasizes that doubts can be raised as to the true nature of soft law, and it is legitimate to wonder whether soft law does not transform into hard by the intervention of the European judicare (Stefan, 2013: 1).

Advocate General Bobek argues that both at the national as well as EU law levels, soft law instruments share the same key feature: they are not binding in the traditional sense, but they clearly have the normative ambition of inducing compliance on the part of their addressees (Bobek, 2017: 15).

L. Senden points out that EU soft law acts are composed of rules of behavior that do not have explicit obligatory character, nevertheless such acts may cause some (indirect) legal consequences and may create practical effects (Senden, 2004: 3).

Moreover, the Court of Justice of the European Union (hereinafter – the CJEU) in its landmark Grimaldi case has directly made national courts of Member States take recommendations into consideration when they solve disputes submitted to them (Salvatore Grimaldi v. Fonds des maladies professionnelles, 1989).

Having regard to the settled case-law practice of the CJEU and the content of modern Commission’s soft law instruments it is possible to state that the legal effect of Commission’s soft law instruments may cause three different types of effects: 1.) imposition of “latent” obligations; 2.) interpretative effect; 3.) practical effect.

Thus, it is vital both for the science of International law and legal practitioners to make a thorough legal analysis of the mentioned-above types of Commission’s soft law acts.

Analysis of the latest researches and publications. Some issues of Commission’s soft law acts have been outlined in scientific papers of such scholars as

C. Andone, D. M. Trubek, F. Coman-Kund, F. Snyder, F. Terpan, J. Klabbers, L. G. Trube, L. Senden, M. Cini, O.A. Ştefan, U. Mörth, V. R. Feguš and others. In spite of it, most of them limited their attention only to the issues of the legal nature, practical effects and particular place of soft law Commission’s acts within the hierarchic system of EU legal acts. So that, the mentioned-above aspects of the legal effect of the contemporary Commission’s soft law instruments should be analyzed in more details.

The **aim** of the article is to make a complex legal analysis of each aspect of the legal effect of Commission’s soft law acts.

In order to attain the aim, the following objectives have been set: to examine particular means by which Commission’s soft law acts impose “latent” obligations on addressees; to analyze the interpretative effect of Commission’s soft law acts; to characterize the practical effect of Commission’s soft law acts.

In the article the following general and special scientific methods have been applied: the analysis method, the logical method, the comparative method, the dialectic method and the empirical method.

The basis of the article is composed of Commission's soft law acts, landmark decisions of the CJEU, scientific works of European scholars and legal practitioners.

Results and discussion. From the first sight, the content of Article 288 of the TFEU, which specifies the list of legal acts of the European Union, does not raise any doubts on the legal effect of recommendations and opinions adopted by the Commission.

According to paragraph five of Article 288 of the TFEU recommendations and opinions shall have no binding force. Applying the principle of analogy of law, it is possible to assume that the same rule shall apply to the other types of atypical soft law Commission's instruments that are not specified in the Founding EU Treaties.

However, sometimes Commission in its soft acts may impose "latent" obligations on the addressees concerned.

When the CJEU had to figure out whether Commission's soft law instrument impose obligations it invokes approach under which "the content of an act prevails over the form of an act concerned".

The CJEU in its pioneer decision in joined cases 1-57 and 14-57 stipulated that "an opinion constitutes a disguised decision when it lays down a rule capable of being applied, namely, when the High Authority determines unequivocally the position which it decides to adopt if certain conditions are fulfilled" (*Société des usines à tubes de la Sarre v. High Authority of the European Coal and Steel Community*, 1957).

Later on, the issue of the legal effect of soft law acts has been raised in the context of the possibility to file a claim to annul an act concerned.

In case 22-70 the CJEU argued that "in accordance with the objective laid down by Article 164, an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects" (*Commission of the European Communities v. Council of the European Communities*, 1971).

In case 60/81 the claimant tried to annul Commission's letters in the competition policy. The CJEU made the following statement: "in order to ascertain whether the measures in question are acts within the meaning of Article 173 it is necessary, therefore, to look to their substance. The form in which acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that Article" (*IBM v. Commission of the European Communities*, 1981).

In its subsequent cases C-57/95, C-303/90, C-226/11, the CJEU examined Commission's notices, communications and codes of conduct and made the same conclusions.

Settled case-law practice of the CJEU shows that the Court has set up the principle according to which "the content" of the particular Commission's act prevails over the "form" of an act when the question of the genuine legal effect is raised.

Besides a big number of cases, case T-721/14 *Belgium v. Commission* should be definitely examined. In this case, the Kingdom of Belgium filed a claim against the Commission in order to annul Commission's recommendation 2014/478/EU of 14.07.2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online.

The Court emphasized that: "in order to ascertain whether or not a measure produces binding legal effects, it is necessary to look to its substance. It being understood that the binding legal effects of a measure must be assessed in accordance with objective criteria, such as the contents of that measure, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the measure... Paragraphs 1, 20, 37, 49 and 51 to 53 of the contested recommendation are, to some extent at least, drafted in more mandatory terms in other language versions, particularly the German, Spanish and Dutch versions" (*Belgium v. Commission*, 2015).

Nevertheless, the Court dismissed the claim of the Kingdom of Belgium as inadmissible under Article 263 of the TFEU. The mentioned-above decision has been upheld by the Grand Chamber of the CJEU in 2018.

Advocate General Bobek delivered his opinion on 12 December 2017 on this case where he stressed the necessity to set up a two-tier test in order to find out a genuine legal effect of Commission's soft law acts.

The first part of the test is composed of external elements of an act such as general content, the place of particular elements (preamble, descriptive part, articles, paragraphs, etc.) and the wording of an act concerned.

Under the second part of the test the following internal elements of an act should be examined: the content of its provisions, the aim, the scope of application, descriptive part, means of monitoring, reporting and other mechanisms that ensure maintenance of addressees (Bobek, 2017: 20-21).

Moreover, Commission's experts and officials emphasize that Commission's soft law instruments are considered to be "gentlemen agreements" which do not have any direct obligatory force but at the same time shall be executed by their addressees (Andonce & Comand-Kund, 2019: 179).

The fact of conferral of "latent" obligations by Commission is proved by the content of its soft law acts.

For instance, Article 52 of Commission's recommendation 2014/478/EU as 14.07.2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online stipulates the obligation of the Member States to notify the Commission of any measures taken pursuant to this Recommendation by 19 January 2016 in order for the Commission to be able to evaluate the implementation of the Recommendation (Commission recommendation 2014/478/EU on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, 2014).

In other cases, Commission's soft law acts are composed of provisions under which Member States are obliged to give an effect of an act by the specified date or inform the Commission on the reasons why they failed to do so.

Moreover, the legality of application of this technique is officially confirmed by the European Parliament, the Council and the Commission in their Joint practical guide for persons involved in the drafting of European Union legislation.

According to paragraph 20.16. acts which have no binding force, such as recommendations, do not have a date of taking effect or application; the addresses may be requested to give effect to them by a certain date (European Commission, 2016).

Taking all the mentioned-above into account it is possible to state that if the Commission does not want to emphasize the obligatory legal effect of provisions of its soft law acts, provisions that impose different obligations on the Member States via notification of the reasons to fail to execute provisions of such acts or reasons of non-implementation of provisions of such acts into their national legal order by the specified date or notification to the Commission on their implementation progress would be absent at all.

Moreover, the Commission would apply other types of mechanisms to supervise over the implementation of provisions of soft acts by the Member States such as exchange of thoughts or consultations between the Commission and Member States' representatives.

And last but not least, the Commission would not invoke measures that are aimed to monitor implementation progress by the Member States provisions of such acts.

Despite having no binding effect, Commission's soft law instruments may impose "latent obligations" on the Member States applying the mentioned-above legal techniques.

The interpretative effect of Commission's soft law instruments appears in providing by the Commission its own legal understanding and the way on how provisions of the Founding EU Treaties and basic EU legislative acts should be applied.

In this regard the CJEU in case *Alassini a.o.* states that "...individuals can rely on recommendations before a national court, in particular where such recommendations cast light on the interpretation of national measures adopted in order to implement them or where they designed to supplement binding provisions of EU law" (*Alassini and others v. Telecom Italia SpA and others*, 2010).

The interpretative aspect of the legal effect of Commission's soft law acts explicitly traced when Commission gives its own clarifications regarding a basic legislative act which has already been adopted via ordinary or special legislative procedures. Such explanations are vital especially when the content of a directive is explained.

A great example of Commission's interpretative act is Communication from the Commission to the Council and the European Parliament on the Interpretative Communication on waste and by-products of 21.02.2007. It directly states that "the Communication aims to explain the definition of waste set down in Article 1 of the Waste Framework Directive, as interpreted by the European Court of Justice, in order to ensure that the Directive is properly implemented" (European Commission, 2007).

Another example is Interpretative communication from the Commission on certain provisions of Directive 2007/58/EC of 28.10.2010. At the beginning of the communication, it is stipulated that "this interpretative communication sets out the Commission's views on implementation of Directive 2007/58/EC of 23 October 2007 which regulates opening of the market for international rail passenger transport services and had to be transposed by Member States by 4 June 2009... This communication therefore aims to ensure that the transposition measures adopted by the Member States fully comply with the Directive (Interpretative communication from the Commission on certain provisions of Directive 2007/58/EC, 2010).

Such Commission's acts play a vital role in setting up and maintaining the united approach in legal understanding and application of provisions of the EU Treaties and basic EU legislative acts.

The practical aspect of the legal effect of Commission's soft law acts mainly appears in ensuring parties of certain social relations, including Member States, the principle of legitimate expectations.

The principle of legitimate expectations is an element the principle of legal certainty and principle of good faith.

In a simple way, the doctrine of the principle of legitimate expectations means a condition when persons, who act in a good faith pursuant to and on the basis of valid legal norms cannot be punished or accused when they are waiting for the positive results.

When Commission enacts soft instruments on a certain issue, the Member States and other interested parties are provided with the legitimate expectations that Commission will act in accordance with such acts. From this point of view, adoption of such acts by the Commission can be understood as "self-limitation" of its own discretionary powers in the future.

Under the Founding EU Treaties Commission is granted with a wide range of supervisory powers especially in the spheres of competition and state aid. When Commission adopts different types of soft law acts, it prevents Member States, individuals and legal entities from possible penalties and court trials.

For example, in paragraph 5 of Communication from the Commission — 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 (*De Minimis Notice*) of 30.08.2014 Commission officially confirms that "in cases covered by this Notice, the Commission will not institute proceedings either upon a complaint or on its own initiative" (Communication from the Commission — 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).

Commission's soft acts also determine course of Commission's actions and limits Commission's own behavior. For instance, Rules of procedure of the Commission stipulates its internal organization and its operation forms. The Working Program of the European Commission for 2021 points out six key priority areas for 2021 (European Commission, 2021).

Sometimes Commission acting jointly with other EU institutions limits its own discretionary powers by adopting bilateral or multilateral interinstitutional agreements.

To this end, Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources of 16 December 2020 is aimed to implement budgetary discipline to improve the functioning of the annual budgetary procedure and cooperation between the Institutions on budgetary matters (Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on budgetary discipline, on cooperation in budgetary matters and on sound financial management, as well as on new own resources, including a roadmap towards the introduction of new own resources, 2020).

Commission's soft law instruments also have a practical impact on national authorities of Member States. However, such acts produce binding effect only if provisions of such acts are negotiated and there is a direct obligation to cooperate in a particular sphere under provisions of the Founding EU Treaties.

Thus, under Article 108 of the TFEU Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States.

To this end, Advocate General Wahl in his opinion delivered on 18 February 2016 in case C-526/14Kotnik and others points out that provisions of soft law acts in accordance with the principle of sincere cooperation, stipulated in Article 4(3) of the Treaty on the European Union, shall be taken into due account by the Member States' authorities, duty cannot be understood as making those rules binding – not even de facto — on pain of eluding the legislative procedure set out in the FEU Treaty (Wahl, 2016: 9).

In this respect it is possible to conclude that Commission's soft law instruments cause practical effect not only on the Commission itself. Under article 4(3) of the Treaty on European Union provisions of such instruments shall also be taken into consideration by Member States' national authorities.

Conclusions. According to paragraph five of Article 288 of the TFEU Commission's soft law instruments are deprived of binding legal effect.

Despite this fact, Commission's soft law acts may cause other types of legal effect. By examining settled case-law practice of the CJEU, particular content of Commission's soft law acts, scientific works of various European scholars and European practitioners it is possible to point out three types of legal effect of the Commission's soft law acts.

The first one is production of "latent" obligations on Member States by setting up supervisory and reporting systems that are mandatory for Member States. This effect may also be traced when Commission imposes obligation on Member States to implement a soft law act by the particular date.

The second one is the possibility of Commission's soft law instruments to produce interpretative effect for the addressees concerned. By enacting different kinds of soft law instruments Commission ensures the united approach on how to understand and execute provisions of EU Founding Treaties and basic EU legislative acts within the EU legal order.

The third type of the legal effect is a practical one. When Commission adopts soft law instruments, Member States, legal entities and individuals can predict its future behavior and helps them to avoid possible penalties and court trials.

Taking into account all the mentioned-above, it is possible to state that the legal effect of Commission's soft law acts may be characterized as *sui generis* within the EU legal order.

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