

**The publication of the European Commission's guidelines in an official language of a new Member State as a condition for their application**  
**Case comment to the order of the Polish Supreme Court of 3 September 2009 (Ref. No. III SK 16/09<sup>1</sup>) to refer a preliminary question to the Court of Justice of the European Union (C-410/99 *Polska Telefonia Cyfrowa sp. z o.o. v President of the Electronic Communications Office*)**

## Facts

The President of the Polish Office of Electronic Communication (hereafter, UKE) established by a decision issued on 17 July 2006 that the relevant service market for call termination in mobile telecommunications was not subject to effective competition. The operator Polska Telefonia Cyfrowa (hereafter, PTC) was declared to be an undertaking possessing significant market power on that market and thus subjected to regulatory obligations in order for PTC to provide services to other telecoms undertakings in that market.

PTC appealed the decision to the Court of Competition and Consumer Protection (hereafter, SOKiK) claiming that the UKE President infringed: Articles 2 and 88(1)<sup>2</sup> of the Polish Constitution, Article 6 of the Code of Administrative Procedure<sup>3</sup>, Article 58 of the Accession Act<sup>4</sup> together with Article 6 of the Treaty establishing the European Union and Article 254 of the Treaty establishing the European Community

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<sup>1</sup> Not yet reported, fragments of the reasoning available [in:] D. Miąsik, (2010) 1(28) *Zeszyty Naczelnego Sądu Administracyjnego* 103-108. The preliminary question available in: OJ [2010] C 24/19.

<sup>2</sup> Article 2 of the 1997 Constitution states: 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice'. Article 88(2) of the 1997 Constitution states: 'The principles of and procedures for promulgation of normative acts shall be specified by statute'.

<sup>3</sup> Article 6 of the 1960 Code of Administrative Procedure states: 'The organs of public administration act on the basis of rules of law'.

<sup>4</sup> OJ [2003] L 236/33. Article 58 states: 'The texts of the acts of the institutions, and of the European Central Bank, adopted before accession and drawn up by the Council, the Commission or the European Central Bank in the Czech, Estonian, Hungarian, Latvian, Lithuanian, Maltese, Polish, Slovak and Slovenian languages shall, from the date of accession, be authentic under the same conditions as the texts drawn up in the present eleven languages.'

(currently Article 297 TFEU), Article 2 of the Polish Telecommunication Law of 16 July 2004 (PT 2004)<sup>5</sup>. The infringement alleged by PTC consisted of the fact that the UKE decision was based on the European Commission Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services<sup>6</sup>. The said act was issued under Article 15(2) of the Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)<sup>7</sup>. The key issue to be stressed here is that the scrutinised Guidelines were not published in the Polish language in the Official Journal of the EU.

SOKiK upheld the UKE decision as no infringement was found<sup>8</sup>. PTC appealed the first instance ruling to the Court of Appeals in Warsaw but the appeal was dismissed<sup>9</sup>. PTC filed then a cassation request to the Supreme Court which decided to stay the proceedings and to refer to the Court of Justice the following question: 'Does Article 58 of the Act of Accession allow reliance to be placed against individuals in a Member State upon European Commission guidelines of which, under Article 16(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), the national regulatory authority should take the utmost account when carrying out an analysis of the relevant markets, where those guidelines have not been published in the Official Journal of the European Union in the language of that State and that language is an official language of the European Union?'

## Key legal problems of the case

### *The character of the Commission guidelines on market analysis*

One of the key points of the referral lies in the clarification of the legal character of guidelines issued by the European Commission. They are generally believed to belong to the so-called 'soft law' category of EU acts (either named in the founding Treaties or not) that are not formally binding upon their addressees<sup>10</sup>. They are issued in order to induce interested parties to follow certain proposed and preferred behaviours

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They shall be published in the Official Journal of the European Union if the texts in the present languages were so published'.

<sup>5</sup> Journal of Laws 2004 No. 171, item 1800, as amended. Article 23(2) provides: 'An analysis of the relevant markets should be done with respect to the European Commission guidelines on market analysis and the assessment of significant market power'.

<sup>6</sup> OJ [2002] C 165/3.

<sup>7</sup> OJ [2002] L 108/33.

<sup>8</sup> Judgment of 10 July 2007, XVII AmT 26/06, not reported.

<sup>9</sup> Judgment of 17 October 2008, VI ACa 315/08, not reported.

<sup>10</sup> A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego [Interpretation and application of Community law]*, Warszawa 2007, p. 85; K. Wellens. G. Borchardt, 'Soft Law in European



without imposing any formal mechanisms of constraint<sup>11</sup>. For national judicial and administrative bodies, they are a source of inspiration concerning the interpretation of EU legal rules (they indicate how the applicable provisions should/could be interpreted and applied)<sup>12</sup>. Nonetheless, they bind their issuer as they are perceived as a form of self-obligation of that body to follow its own declarations<sup>13</sup>. As one commentator stated, soft law ‘can produce a large array of legal effects such as, among others, to create legitimate expectations for the individuals, to clarify the content of certain hard law provisions, or to structure the discretion of certain institutions’<sup>14</sup>.

Guidelines are most often issued by the Commission and primarily in the field of European Competition law. Their character has been object of the interpretation of EU courts: ‘[Guidelines] may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice [in French it is formulated in a broader way: *règle de conduite indicative de la pratique à suivre*] from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment’<sup>15</sup>. Indeed, the ECJ included guidelines into the body of EU law *sensu largo* stating that ‘having particular regard to their legal effects and to their general application [...] such rules of conduct come, in principle, within the principle of ‘law’ for the purposes of Article 7(1) of

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Community Law’ (1989) 14(5) *European Law Review* 280; L. Senden, *Soft Law in European Community Law*, Oxford and Portland Oregon 2004, p. 45.

<sup>11</sup> As a matter of principle, they are not binding. However, examples can be found of EU soft law that are binding for the addressees also from the formal point of view: cf Article 126 TFUE (ex. Article 104.7 TEC).

<sup>12</sup> C-322/88 *Grimaldi* [1989] ECR 440, para. 18: ‘national courts are bound to take recommendations 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’.

<sup>13</sup> A. Wyzomska, ‘Nieformalne porozumienia w prawie wspólnotowym i krajowym (na przykładzie Obwieszczenia Komisji w sprawie współpracy w ramach Sieci Organów ds. Ochrony Konkurencji)’ [‘Non-formal agreements in the Community and national law (on the example of the Commission Notice on co-operation within the Network of Competition Authorities)’] (2004) 2 *Kwartalnik Prawa Publicznego* 217. Advocate General Warner referred in this context to the principle of estoppel, cf: Opinion of Advocate General Jean-Pierre Warner in Case 19/77 *Müller* [1978] 2 CMLR 342; cited by: S.A. Stefan, ‘European Competition Soft Law in European Courts: A Matter of Hard Principles?’ (2008) 14(6) *European Law Journal* 765. The EU courts have repeatedly stressed that the Commission is bound by its own guidelines/notices: C-3/06 P *Groupe Danone v Commission* [2007] ECR I-1331, para. 23; T-119/02 *Royal Philips Electronics v Commission* [2003] ECR II-1433, para. 242; T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon v Commission* [2005] ECR II-10, para. 157; Case T-16/99 *Lögstör Rör* [2002] ECR II-1633, para. 344.

<sup>14</sup> O.A. Stefan, ‘European Competition Soft Law...’, p. 756.

<sup>15</sup> C-167/04 *JCB Service v Commission* [2006] ECR I-8935, para. 207; C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para. 209. Cited by the Supreme Court in its reasoning; cf also: O.A. Stefan, ‘European Competition Soft Law...’, p. 763.



the ECHR<sup>16</sup>. They are therefore binding upon their institutional author and create for their addressees a legitimate expectation that the Commission would follow the practice announced in its guidelines, unless there are reasoned grounds to depart from this practice. It should be also noted that most guidelines issued in the field of Competition law are not published in the Polish language in the Official Journal<sup>17</sup>.

However, guidelines issued in the framework of EU Competition law are not identical with the particular Guidelines to which the preliminary question refers to. The former are binding on the Commission but not on national authorities. By contrast, the Guidelines on market analysis constitute the obligatory basis for market assessment undertaken by national regulatory authorities (NRAs) as stated in Articles 15 and 16 of the Framework Directive. More specifically, Article 15 (2) declares that: 'The Commission shall publish, at the latest on the date of entry into force of this Directive, guidelines for market analysis and the assessment of significant market power (...) which shall be in accordance with the principles of competition law'. In its Article 15 (3), it states that 'National regulatory authorities shall, taking the utmost account of (...) the guidelines, define relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law'. Article 16 (1) of the Framework Directive clarifies further that: '(...) national regulatory authorities shall carry out an analysis of the relevant markets, taking the utmost account of the guidelines' (the same expression is used in Article 16 (5) concerning transnational markets).

According to the reasoning of the order of the Supreme Court, the discretion of NRAs is therefore greatly reduced as far as the definition and analysis of relevant markets is concerned. NRAs are obliged to apply common standards stemming from these Guidelines, which should therefore be perceived as binding upon NRAs<sup>18</sup> even if they form part of EU soft law. The Polish Supreme Court stressed however that some ECJ jurisprudence suggests that the binding power of guidelines issued under the Framework Directive can be questioned. In case C-274/07 *Commission v Lithuania*<sup>19</sup>, the ECJ stated that the guidelines issued under this Directive are not binding upon Member States and they are not obliged to follow them strictly. It is worth noting as a matter of digression that the Supreme Court has ruled on the character of similar guidelines issued by the President of the Polish Office of Competition and Consumer Protection (UOKiK) judging them as not binding upon Polish courts<sup>20</sup>.

<sup>16</sup> C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission*, para. 223; cf. O.A. Stefan, 'European Competition Soft Law...', p. 764.

<sup>17</sup> Cf for instance, OJ [2004] C 101 containing seven important Commission notices neither of which is available in any of the new official languages.

<sup>18</sup> Reasoning of the decision to refer the preliminary question; cf cited there: C-311/94 *Ijssel-Vliet Combinatie* [1996] ECR I-5023.

<sup>19</sup> [2008] ECR I-7117, para. 25-27.

<sup>20</sup> III SK 5/09, referred in: D. Miąsik, 'Orzecznictwo Sądu Najwyższego w sprawach z zakresu ochrony konkurencji i konsumentów w latach 2006–2009' ['The Supreme Court case law in competition and consumer cases in 2006-2009'] (2010) 5-6 *Biuletyn Sądu Najwyższego. Izba Pracy, Ubezpieczeń Społecznych i Spraw Publicznych* 2010, p. 74. The practice of issuing guidelines

According to the wording of the Framework Directive, the Guidelines on market analysis have formal grounds to be binding on Member States and can be perceived as creating some legitimate expectations for individuals in the territory of those Member States. However, the present ECJ jurisprudence gives a different interpretation of their character. The resulting uncertainty should be resolved by the answer to the question submitted by the Polish Supreme Court in this case. Referring to the content of the Guidelines themselves (26 pages, 156 points), their addressees are identified already in the opening words of point 1. They '(...) set out the principles for use by national regulatory authorities (NRAs) in the analysis of markets and effective competition under the new regulatory framework for electronic communications networks and services'. The Guidelines contain therefore very precise and broadly described obligations on the part of NRAs mostly based on the provisions of the Framework Directive.

### *Scope of obligation to publish in EU official languages*

Article 297 (1) TFEU (ex 254 TEC) provides in its last sentence: 'Legislative acts shall be published in the Official Journal of the European Union (...)' whereby the notion of 'legislative acts' is defined in Article 289 TFEU as 'legal acts adopted by legislative procedure'. Thus the only criterion to treat an act as 'legislative' is formal: it is an act adopted by EU institutions (normally jointly by the European Parliament and the Council) on the basis of Treaty procedures (either ordinary or special legislative procedures)<sup>21</sup>. Some 'non-legislative' acts must also be published according to Article 297(2) TFEU namely: 'regulations and directives which are addressed to all Member States, as well as decisions which do not specify to whom they are addressed'. Selective (i.e. in some official languages only)<sup>22</sup> or partial publication (missing integral elements e.g. annexes)<sup>23</sup> of the acts so listed is perceived as a breach of the Treaty. However, while the publication obligation discussed by the ECJ concerns acts published in the Series L (*Legislation*) of the Official Journal, publications in its other Series (Series C

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by the UOKiK President is very critically assessed by M. Król-Bogomilska, 'Kary pieniężne – główne kierunki ewolucji w okresie 20 lat rozwoju polskiego prawa antymonopolowego' ['Pecuniary penalties – main directions of evolution during the 20 years of development of Polish antimonopoly law'] (2010) 5 *Europejski Przegląd Sądowy* 12-14, but judged positively by T. Skoczny, 'Polskie prawo kontroli koncentracji – ewolucja, model, wybrane problemy' ['Polish law of concentration control – evolution, model, selected problems'] (2010) 5 *Europejski Przegląd Sądowy* 21.

<sup>21</sup> Cf also C. Herma, 'Reforma systemu aktów prawa pochodnego UE w Traktacie z Lizbony' ['The Treaty of Lisbon and the reform of the EU legal acts system'] (2008) 5 *Europejski Przegląd Sądowy* 22.

<sup>22</sup> C-161/06 *Skoma-Lux* [2007] ECR I-10841.

<sup>23</sup> C-345/06 *Heinrich* [2009] ECR I-1659; cf. M. Bobek, 'Case C-345/06, Gottfried Heinrich, Judgment of the Court of Justice (Grand Chamber) of 10 March 2009' (2009) 46 *Common Market Law Review* 2077-2094.

and Series S) is not obligatory<sup>24</sup>. All the guidelines ever to be published in the Official Journal were included in Series C.

The Treaty does not provide for an obligation to publish such acts as guidelines. Such an obligation stems however from the Framework Directive as far as the Guidelines on market analysis are concerned. The Directive does not define if the publication should be translated into all official languages of the EU within the meaning of the present Article 55 TEU. The said Guidelines were published in 2002 in all eleven languages that were official at that time. Like most acts published in Series C of the Official Journal issued before the last two accessions, they were never translated into any of the new official languages<sup>25</sup>.

On the other hand, Article 58 of the Accession Act provides that 'the texts of the acts of the institutions (...) adopted before accession' if translated into any of the new languages, should be as authentic as the acts published in the old official languages. The last sentence of Article 58 states that '[the texts] shall be published in the Official Journal of the European Union if the texts in the present languages were so published'. The Accession Act clearly excludes therefore any 'discrimination' between the old and the new official languages and does not distinguish between different Series of the Official Journal or different types of texts that might have been published therein. Thus, literally speaking, all texts that had ever been published in any of the Series of the Official Journal of the European Union (before 1 February 2003 in the Official Journal of the European Communities) should be translated into all new official languages if that was the case for all old official languages. Unfortunately, that rule is not followed by the EU institutions in practice. The only acts that were (sometimes with major delays)<sup>26</sup> translated in their entirety are the formally binding acts from the

<sup>24</sup> The Official Journal consists of two related series (L for legislation and C for information and notices) and a supplement (S for public procurement). There is also an electronic section to the C series known as the OJ C E which is the sole source for documents it contains, cf: [http://publications.europa.eu/official/index\\_en.htm](http://publications.europa.eu/official/index_en.htm), last visited 20 August 2010.

<sup>25</sup> [http://eurlex.europa.eu/JOHtml.do?year=2002&serie=C&textfield2=165&Submit=Search&\\_submit=Search&ihmlang=pl](http://eurlex.europa.eu/JOHtml.do?year=2002&serie=C&textfield2=165&Submit=Search&_submit=Search&ihmlang=pl), last visited: 20 August 2010.

<sup>26</sup> P. Błędzki, 'Praktyczne problemy związane z publikacją prawa wspólnotowego w Polsce' ['Practical problems related to publications of Community law in Poland'] (2007) 1 *Europejski Przegląd Sądowy* 53; G. Wierczyński, 'Konsekwencje braku urzędowego ogłoszenia aktów prawa wspólnotowego w języku polskim' ['Consequences of lack of official promulgation of Community law instruments in Polish'] (2007) 1 *Europejski Przegląd Sądowy*; G. Wierczyński, 'Skutki braku publikacji rozporządzenia w języku urzędowym nowego państwa członkowskiego – glosa do wyroku ETS z 11 grudnia 2007 r. w sprawie C-161/06 Skoma-Lux' ['Consequences of failure to publish a regulation in the official language of a new Member State – commentary about ECJ judgment of 11 December 2007 in case C-161/06 Skoma-Lux'] (2008) 3 *Europejski Przegląd Sądowy*; A. Wróbel, 'Dopuszczalność odmowy zastosowania rozporządzenia Komisji Europejskiej przez krajowe organy administracji publicznej i sądy' ['Possibility for public administration authorities and courts to refuse to apply regulations of the European Commission'] (2006) 1 *Europejski Przegląd Sądowy* 48–53; R. Hauser, R. Talaga, 'Publikacja rozporządzeń WE w języku krajowym a ich stosowanie przez sądy administracyjne' ['Publication of EC law in languages





previous Article 249 TEC (at present, Article 288 TFEU), thus only those published in Series L of the Official Journal.

### *Publication of acts creating 'negative' effects for individuals*

In the motifs of its decision to refer a preliminary question to the ECJ, the Polish Supreme Court stressed the distinction between publication of acts creating negative effects for individuals and those that do not have such effects. The distinction is important because the former cannot be effectively applied (enforced) unless they have been formally published in the Official Journal. However, the ECJ's jurisprudence on this issue relates so far only to acts that are, by definition, binding in nature<sup>27</sup>. ECJ has not yet analysed the eventual obligation to publish guidelines that create negative effects for individuals. This point constitutes one of the main problems of the Polish request for a preliminary ruling.

In its request, the Supreme Court referred to *Skoma-Lux*<sup>28</sup> and *Balbiino*<sup>29</sup> where the principles of equivalent treatment and legal certainty were invoked to reason the obligation of EU institutions to publish acts that might have negative effects for individuals. According to the Supreme Court, those two principles are infringed if the Commission's guidelines are not published in Polish even though they are published in other official languages. That fact alone places domestic telecoms undertakings in a worse position than entrepreneurs from other EU Member States. It is worth recalling the ECJ's view that the two principles of EU law are applicable if a non-published act of EU institution places obligations on individuals. The ECJ noted in *Skoma-Lux* that Article 58 of the Accession Act 'precludes the obligations contained in Community legislation which has not been published in the *Official Journal of the European Union* in the language of a new Member State from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means' (paragraph 51)<sup>30</sup>. Still, the cited fragment refers clearly to 'legislation' while it is unlikely that guidelines, even based on the Framework Directive, can be perceived as part of EU legislation. An acceptance of such an 'informal' way of producing 'legislation' would contradict the principle of legal certainty and the idea of the European Union being an entity based on the law.

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of new Member States and its observance in Polish administration courts'] (2009) 2 *Europejski Przegląd Sądowy*.

<sup>27</sup> Most of the cases analysed to date by the ECJ concerned EU regulations: C-161/06 *Skoma-Lux* [2007] ECR I-10841; C-560/07 *Balbiino* [2009] ECR I-4447; C-345/06 *Heinrich* [2009] ECR I-1659; some related to decisions: C-162/96 *Racke* [1998] ECR I-3655; C-158/06 *ROM-projecten* [2007] ECR I-5103.

<sup>28</sup> C-161/06 *Skoma-Lux* [2007] ECR I-10841, para. 36 and f.

<sup>29</sup> C-560/07 *Balbiino* [2009] ECR I-4447, para. 30.

<sup>30</sup> The solution taken by the ECJ corresponds to the French Constitutional tradition, rather than the German or *common law* approach, described in: M. Bobek, 'Case C-345/06, Gottfried Heinrich...', p. 2084-2087. In French tradition such an act is *imposable* but valid, whereas in German or Polish law such acts would be void.



By contrast, the Supreme Court noted that the *Heinrich*<sup>31</sup> judgment presents arguments in favour of interpreting the *Skoma-Lux* rule in a broader manner that encompasses also Commission guidelines. Point 43 of the *Heinrich* ruling suggests that it is the 'negative effect for individuals' criterion, rather than the nature of the act itself, that represents the main criterion to consider while analyzing the scope of the obligation to publish the Guidelines on market analysis in all EU official languages. The judgment states: 'an act adopted by a Community institution cannot be enforced against natural and legal persons in a Member State before they have the opportunity to make themselves acquainted with it by its proper publication in the Official Journal of the European Union', without distinguishing between different acts adopted by EU institutions. Although the *Heinrich* case concerned regulations, the Polish Supreme Court perceives this statement as encompassing all acts issued by the EU institutions.

The Polish Supreme Court referred also to *ROM-projecten*<sup>32</sup> noting on its basis that obligations stemming from a given act do not have to be imposed directly on the individuals by that very act. It is sufficient that it places an obligation on Member States to undertake specific actions towards individuals in that country. *ROM-projecten* concerned an unpublished decision of the Commission imposing an obligation on a Member State upon which an authority of the Member State based its own decision addressed to an individual. Thus, the ECJ went further than the Article 254 TEC which did not impose an obligation to publish such decisions (neither does the present Article 297 TFEU). Perhaps this wide approach to the obligation to publish EU acts could be further broadened to include soft law acts that may create negative effects for individuals but there is no textual legal basis for such an interpretation. Just like the Polish Supreme Court, one can only refer to general EU law principles.

### The considerations for the possible ECJ's answer

In practice, hardly any acts published before the last two accessions in the Official Journal Serie C have ever been translated into the new official languages of the EU. It might thus be simple pragmatism that stops the ECJ from questioning the lack of publication of all Commission guidelines in all of the new official languages. There are also formal reasons against undermining the existing practice – the Treaties do not contain such an obligation and the scope of Article 58 of the Accession Act is ambiguous with respect to the meaning of 'texts of institutions'. Moreover, since the publication obligation contained in Article 297 TFEU does not relate to non-binding acts defined in Article 288 TFEU (recommendations and opinions), a comprehensive publication of guidelines is also not necessary. Indeed, if the provisions of TFEU were considered in conjunction to Article 58 of the Accession Act only, their lack of publication would not constitute a breach of EU law. The situation is different for the Guidelines on market analysis because they are subject to a special publication duty

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<sup>31</sup> C-345/06 *Heinrich* [2009] ECR I-1659.

<sup>32</sup> C-158/06 *ROM-projecten* [2007] ECR I-5103.





contained in the Framework Directive. Formally speaking, these particular Guidelines must be published even if they do not bear any negative consequences for individuals. Otherwise, an obligation directed to the European Commission to publish them, specifically provided for in the Directive, would be void.

In this case, if the ECJ's answer does not state that the obligation to publish the said Guidelines exists, or that the lack of such publication does not cause any consequences as far as their application is concerned (even if it violates the Directive), such a position might lead to the denial of the equivalent treatment rule of both Member States and their undertakings. It would create a division between those with access to all EU texts in their official languages and those that lack access to some of them without, however, that fact resulting in any consequences. Even if one could find arguments supporting such a division in legal terms, with respect to texts with no formal legal value issued before the accessions, an explicit ECJ's statement of this kind would not be politically correct and would infringe one of the most basic ideas of EU law – namely the principle of non-discrimination.

If the act in question, or indeed any other guidelines, is causing legal consequences for anyone beside the Commission despite its soft law nature, its publication is indispensable in order to ensure legal certainty. Lack of publication should cause the 'non-application' of the Guidelines by NRAs that are theoretically bound to follow them. Any reproaches from the Commission concerning the 'not following' of their rules should thus be perceived as unfounded. If a NRA applies them despite the lack of their publication, the negative consequences of their use should be undermined by anyone negatively influenced by the Guidelines because their application would be based on an improper legal basis (or lack thereof).

If the European Commission wants the guidelines to have any legal consequences, either for Member States or individuals, it should certainly introduce a comprehensive and transparent publication practice. Otherwise, Guidelines cannot be perceived as creating any form of effects for anyone other than the Commission, regardless of the reference made to them in the Framework Directive. If they are to bear any legal consequences, they should also be published in the Official Journal of Series L (*Legislation*) rather than Series C in order to clearly show their factual legal status. If not, the principle of legal certainty would be constantly infringed, according to which both the bodies that apply the law and the individuals affected by it are able to get properly acquainted with its content. The new Treaty provisions ensuring the openness of EU actions (Article 15(1) TFEU) and the transparency of its legislative process (Article 15(2) TFEU) also stress the need to change of existing practice. Last but not least, Article 296 TFEU in its last sentence clearly states that "When considering draft legislative acts, the European Parliament and the Council shall refrain from adopting acts not provided for by the relevant legislative procedure in the area in question". The same should become a part of the European Commission code of good practise.



## Final remarks

Regardless of the answer ultimately given by the ECJ, the presented case clearly shows that the European Union needs to redefine its practice of issuing and (not) publishing acts of 'undefined legal value' in order of it, to be perceived as a democratic and law-abiding international organisation. Two possible solutions to the current problem can be identified: a stronger and a weaker one. First, in order to truly respect the rule of law principle, the Commission should change its current practice of issuing acts that are formally of no legal value but practically create effects for individual because these acts *de facto* oblige national authorities to follow certain behavioural practices towards those individuals. Instead, the Commission should stick to the catalogue of binding acts provided for in Article 288 TFEU preferably issuing 'implementing decisions' as defined in Article 291 TFEU. It should also analyze more carefully the possible consequences of its own soft law acts and where there is any possibility that the act would influence the legal situation of individuals, it should stick to the Treaty catalogue. Second, in a softer approach, even if the Commission does not change its current practice of issuing guidelines, it should publish them in all official languages of the European Union where there is any chance that they bear any consequences for individuals. Otherwise, it will find itself subject to much more widespread reproach alleging that it has breached the principles of legal certainty and equality. It remains to be seen whether such acts in the circumstances described above should only be unenforceable or rather null and void as if they never existed?<sup>33</sup>

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<sup>33</sup> The question asked in the context of non-publication of annexes to Regulations in the *Heinrich* case by: M. Bobek, 'Case C-345/06, Gottfried Heinrich...', p. 2077 and 2089.

