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THE SOFT LAW ACTS OF THE UOKIK PRESIDENT AND THEIR IMPACT ON DETERMINING THE POSITION OF AN ENTREPRENEUR IN ANTI-MONOPOLY PROCEEDINGS

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Abstract
With the adoption of the *acquis communautaire*, the Polish administration encountered a significant number of soft law acts issued by the EU administration and began to utilise them extensively. The systematic 'hardening' of soft law acts leads to a discrepancy between their formally non-binding status and their actual intended meaning and effects – often resembling 'hidden directives' or even more imperative measures, producing legal consequences and defining the legal situation of e.g. entrepreneurs. Consequently, it is proposed that soft law acts should be subject to autonomous judicial review in terms of both interpretation and annulment.

The President of UOKiK may also issue official explanations and guidelines that fit the definition of soft law acts. Guidelines on the amounts of fines for entrepreneurs significantly impact the determination of their legal position, and judicial decisions increasingly refer to the methodology of setting fines specified therein without critical examination.

Keywords: soft law acts, guidelines, competition, challengeability of soft law acts

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INTRODUCTION

The declining quality of Polish law-making, attributed to the so-called qualitative inflation of legal regulations,[1] particularly in business law, creates uncertainty for regulated entities regarding the content of their mandatory conduct in the market, which contradicts the fundamental principle of legal certainty. In the practice of competition protection, authorising the UOKiK President to issue soft law acts, such as explanations and interpretations of major questions of anti-monopoly law, which become non-binding normative acts, is seen as a remedy for these deficiencies.

Despite the widespread and growing importance of soft law acts in both Poland and the European Union, they continue to provoke controversy, primarily due to their ambiguous position in the formal hierarchy of legal sources. The normative content of these acts, intended to influence entrepreneurs' behaviour and consequently affect their legal position, for instance, in anti-monopoly proceedings and the imposition of administrative fines, is of considerable significance. This should facilitate the challengeability of soft law acts in court or the citation of such acts in judicial proceedings to protect entrepreneurs' rights, traditionally the domain of hard law acts.

These issues, along with an exploration of the challengeability of soft law acts in court to protect the rights of entrepreneurs, will be the subject matter of this study.

SOFT LAW ACTS IN THE EUROPEAN UNION

The normative sphere of the European Union has exhibited clear evolution since the 1990s, as various 'soft law' instruments have increased in both number and significance.[2] O. Stefan highlights the political context of the 'soft law' concept, which became a recognised part of legal science only in the early 21st century.[3] As soft law instruments within the European Union become more prevalent, their legal force has become a subject of academic inquiry. Several approaches have been employed to define and distinguish between soft and hard laws, establishing a systematic classification of soft and hard remedies.[4] As the number of soft law acts issued, particularly by the European Commission,[5] continues to rise, there is growing doctrinal interest in studying the essence, normative content, and challengeability

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1 Cf., e.g., Knosala, E., *Zarys nauki administracji*, Warszawa, 2010, p. 253; Zawadzki, S., 'Inflacja prawa oraz problemy podnoszenia jego jakości', *Studia Prawnicze*, 1989, No. 2–3, p. 349.

2 Król-Bogomilska, M., *Zwalczanie karteli w prawie antymonopolowym i karnym*, Warszawa, 2013, p. 69.

3 Stefan, O., 'The future of European Union soft law: A research and policy agenda for the aftermath of COVID-19', *Journal of International and Comparative Law*, 2020, No. 7(2), pp. 330–331.

4 Láncos, P.L., 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?', *European Public Law*, 2018, Vol. 24, Issue 4, p. 755, DOI: 10.54648/EURO2018042.

5 Cappellina, B., 'EfSoLaw: a new data set on the evolution of soft law in the European Union', *ECPR Virtual General Conference 2020*, August 2020, Innsbruck (Virtual), Austria, hal-03117788f, https://hal.archives-ouvertes.fr/hal-03117788/document [accessed on 8 July 2022], p. 19, where the author states that research affirms the European Commission has a maximum impact on the EU policy as the key author of its legal acts.

of these acts, as well as their 'hardening'.[6] This is because, as O. Stefan notes,[7] the European Union administration now regularly relies on soft law instruments.

This analysis should begin with a brief reminder of the categorisation of the Union's legal acts, originating from primary legislation. According to Article 288 of the TFEU,[8] to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation has general application. It is binding in its entirety and directly applicable in all Member States. A directive is binding as to the results to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of forms and methods. Recommendations and opinions have no binding force.

In light of this provision, the division into binding and non-binding legal acts is fundamental.[9] The former includes regulations, directives, and decisions, while the latter includes recommendations and opinions, known as soft law acts and comprising, beside the 'typical' recommendations and opinions identified in Article 288 of the TFEU, 'atypical acts', not specified in Article 288 of the TFEU, such as: communications, notifications, Green and White Papers, resolutions, declarations, guidelines,[10] or frameworks.[11] Too much attention should not be paid to the labelling of individual soft law acts, as the terms are often interchangeable.

In his study of soft law and its application in the then European Community, L. Senden suggested a definition of 'soft law' as rules of conduct laid down in instruments that do not have legally binding force per se but may, nonetheless, give rise to certain indirect legal effects and are designed to produce actual effects.[12] A. Chudyba offers a synthetic definition of soft law acts as all non-imperative (non-binding) legal acts expressing norms (models of conduct).[13]

These definitions imply some basic characteristics of soft law acts, such as: (1) setting certain norms (models) of conduct, (2) no formal binding effect on intended targets, and (3) the potential to cause actual, though not legal, effects that influence the targets. This nature of EU soft law acts is coupled with the fact that they fulfil two principal, interconnected functions: to inform and to support the interpretation of binding regulations. Thus, non-binding legal acts aim to ensure that the Union

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[6] Láncos, P.L., 'The Phenomenon of "Directive-like Recommendations" and their Implementation: Lessons from Hungarian Legislative Practice', in: Popelier, P., Xanthaki, H., Robinson, W., Silveira, J.T., Uhlmann, F. (eds), *Lawmaking in Multi-level Settings*, Baden-Baden, 2019, pp. 199–218.

[7] Stefan, O., *Soft Law in Court. Competition Law, State Aid and the Court of Justice of the European Union*, Warszawa, 2013, p. 12.

[8] Treaty on the Functioning of the European Union, consolidated text: OJ C 202, 7.6.2016, p. 1.

[9] Steiner, J., Woods, L., Twigg-Flesner, Ch., *Textbook on EC law*, Oxford, 2003, p. 54.

[10] Wróbel, A., Kurcz, B., 'Komentarz do art. 288 TFUE, 288.1.1.', in: Kornobis-Romanowska, D., Łacny, J., Wróbel, A. (eds), *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz. Tom III (art. 223–358)*, Warszawa, 2012.

[11] Cf. judgment of the General Court of 19 March 2019, joint cases T-282/16 and T-283/16, paragraph 44, ECLI:EU:T:2019:168.

[12] Senden, L., *Soft Law in European Community Law*, Oxford, 2004, p. 3.

[13] Chudyba, A., 'Związanie aktami unijnego *soft law*. Uwagi na tle prawa konkurencji', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2019, No. 6(8), p. 65, DOI: 10.7172/2299-5749.IKAR.6.8.4.

operates in a transparent and predictable manner, providing legal certainty.[14] These functions are also highlighted by European court decisions, which note: 'In adopting such rules of conduct, such as those of the SGEI Framework,[15] and announcing, by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and, in principle, cannot depart from those rules without being found, where appropriate, to be in breach of general principles of law, such as the principle of equal treatment or that of the protection of legitimate expectations.'[16]

In its judgment in the *Grimaldi* case, the Court explained the circumstances under which recommendations can be accepted, which may also be extended to other soft law acts, stating that they are generally adopted by the Union institutions when they do not have the power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules.[17] They can be adopted in any field, at all possible stages of the decision-making processes, whether that is early, upstream consultation of the stakeholders or downstream implementation of legislative acts. Thus, those instruments can equally be both pre-legislative or post-legislative.[18]

Regarding the pre-legislative functions of soft law acts, critics and opponents of their increasing numbers and significance emphasise the ease of their adoption outside the normal legislative procedure (Article 289(1) TFEU), which makes them more than mere tools for realising Union policies and objectives. More importantly, they may be used to circumvent procedures, bypassing the European Parliament and the Council, and potentially disrupting the institutional balance and division of powers among EU authorities and institutions.[19] Furthermore, the legal effects of soft law cannot be precisely defined, which interferes with legal certainty and the rule of law.[20] These risks are also noted by the Member States[21] and the CJEU Advocate General[22] who points out: 'that creates (…) pre-emption (…) in particular for pre-legislative recommendations: the ability to articulate the norms before the actual legislative process takes place, which may even translate into unilateral

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[14] Staszczyk, P., 'Akty *soft law* jako reakcja instytucji unijnych na skutki pandemii COVID-19', *Europejski Przegląd Sądowy*, 2020, No. 7, p. 42.

[15] Communication from the Commission – European Union framework for State aid in the form of public service compensation (2011), OJ C 8, 11.1.2012, p. 15.

[16] Judgment of the General Court of 19 March 2019, joint cases T-282/16 and T-283/16, paragraph 44, ECLI:EU:T:2019:168; similarly, judgment of the Court of 28 June 2005, case C-189/02 P, *Dansk Rørindustri A/S and Others v. the Commission*, paragraph 211, ECLI:EU:C:2005:408.

[17] Judgment of the Court of 13 December 1989, case C-322/88, *Grimaldi v. Fonds des Maladies Professionnelle*s, paragraph 3, ECLI:EU:C:1989:646.

[18] Opinion of Advocate General Bobek delivered on 12 December 2017, case C-16/16 P, *Kingdom of Belgium v. European Commission*, paragraph 81, ECLI:EU:C:2017:959.

[19] Rošic Feguš, V., 'The growing importance of soft law in the EU', *InterEULawEast*, 2014, Vol. I(1), p. 145 et seq.

[20] Eliantonio, M., Stefan, O., 'Soft Law Before the European Courts: Discovering a "common pattern"?', *Yearbook of European Law* , 2018, Vol. 37, p. 458, DOI:10.1093/yel/yey017.

[21] Cf. the Kingdom of Belgium's second charge against the Commission Recommendation 2014/478/EU of 14 July 2014 on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online, case C-16/16 P, *Kingdom of Belgium v. the European Commission*, paragraph 12, ECLI:EU:C:2018:79.

[22] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraphs 94–95.

pre-emption of the legislative process', as 'they clearly have the normative ambition of inducing compliance on the part of their addressees.'

In the case of post-legislative process, soft law acts 'may contain "mild obligations" or "robust exhortations" that are coined in terms of "invitation"'. The soft law acts are likely to be used in legal interpretation, in particular to give meaning to indeterminate legal notions contained in binding legislation, primary or secondary, and thus complement binding regulations.[23]

However, the General Ombudsman M. Bobek argues in his opinion that recommendations (as well as other soft law acts, e.g., notices),[24] though clearly described as non-binding, can generate considerable legal effects, in the sense of inducing certain behaviour and modifying normative reality. They are likely to have an impact on the rights and obligations of their addressees and third parties.[25]

A similar view is advanced in the literature, suggesting that both the content and phrasing of provisions in soft law acts, as well as the legal framework within which these instruments operate, imply that they may be more than non-binding from the perspective of their addressees. The often prescriptive nature of soft law instruments, including absolute and obligatory phrasing and detailed provisions, along with the presence and design of implementation or enforcement tools (e.g., specific deadlines for actions, reporting, and information requirements for addressees), points to the intention of their authors (commonly the European Commission) to persuade or compel Member States to comply fully with these acts. C. Andone and F. Coman-Kund argue that the broader legal policy context in which the Commission's soft law instruments are adopted and implemented may contribute to their legal 'hardening' at both the European Union and Member State levels, given the EU principles of loyal cooperation, legitimate expectations, legal certainty, and their opaque relationship with legally binding acts.[26]

Thus, soft law acts do not easily fit the binary distinction between binding and non-binding legal effects of normative acts. C. Andone and F. Coman-Kund note that their systematic 'hardening' creates a discrepancy between their formally non-binding status and their actual intended meaning and effects.[27] For these reasons, the literature highlights the fundamental option of judicial control over soft law acts. Generally, courts may consider the effects of soft law from various perspectives, including: (1) grounds for judicial review, (2) the object of challenges to validity, (3) recourse by parties to court disputes, and (4) aids in the interpretation of hard law regulations.[28]

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[23] Ibidem, paragraphs 86 and 91.

[24] Cf. Opinion of Advocate General Kokott delivered on 6 September 2012, case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, in which the Court was to assess the Commission's *de minimis* announcement where the Commission sets out the circumstances under which it presumes that there is an 'appreciable restriction of competition' within the meaning of Article 101 TFEU.

[25] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraph 88.

[26] Andone, C., Coman-Kund, F., 'Persuasive rather than "binding" EU soft law? An argumentative perspective on the European Commission's soft law instruments in times of crisis', *The Theory and Practice of Legislation*, 2022, Vol. 10, Issue 1, DOI:10.1080/20508840.2022.2033942.

[27] Ibidem, p. 27.

[28] Snyder, F., Snyder, F., 'Interinstitutional Agreements: Forms and Constitutional Limitations', in: Winter, G. (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective*, Baden-Baden, 1996, p. 463.

Considering the possibility of soft law being subject to challenges to its validity, it should be noted that, in light of Article 263 TFEU, the Court of Justice of the European Union reviews the legality of legislative acts, acts of the Council, of the Commission, and of the European Central Bank, other than recommendations and opinions, and acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It also reviews the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. This final sentence of the provision seems to provide grounds for challenging the validity of a soft law act; however, its 'intention to produce legal effects' vis-à-vis third parties must be demonstrated. Due to the formal lack of binding power and the consequently vague legal effects of soft law, the availability of this route is somewhat limited, or even non-existent.[29]

Therefore, both researchers[30] and practitioners[31] have argued that the Court should lower the threshold of legal effects to allow for judicial review of all types of EU law, not only hard law. M. Eliantonio and O. Stefan[32] point out:

> 'in the circumstances, it's unreasonable to continue seeing the Union's legal framework as defined by a combination of soft and hard law, whereas European courts should accept the hybrid nature of soft law acts. At the same time, the basic concepts of judicial review need to be reconsidered, the tight corset of binding legal effects loosened (…) and it should be admitted soft law will remain a management tool in the Union that must be both used and controlled by European courts.'

E. Korkea-aho, cited by M. Król-Bogomilska,[33] likewise emphasises that, given the advantages and disadvantages of soft law acts, a more holistic and multi-faceted analysis is required, not limited to their role in judicial decisions. These proposals need to be accepted and fully embraced.

In its landmark judgment in the *Grimaldi* case, the Court stated: 'Since the choice of form cannot alter the nature of a measure, the court required to interpret a measure described as a recommendation in order to determine its scope must ascertain whether the measure is not in fact, in view of its content, intended to produce binding effects.'[34] Thus, a court should examine the actual purpose and effect of a legal act, rather than its format or nomenclature, to determine its true legal nature and effects. Advocate General M. Bobek explains that the criteria for assessing whether a Union legal act produces legal effects vis-à-vis its addressees

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[29] CJEU judgment of 15 July 2021, case C-911/19, *Fédération Bancaire Française (FBF) v. Autorité De Contrôle Prudentiel et de Résolution (ACPR)*, ECLI:EU:C:2021:599. The CJEU stated in its decision: 'Article 263 TFEU must be interpreted as meaning that acts such as the Guidelines of the European Banking Authority (…) cannot be the subject of an action for annulment under that article.'

[30] E.g., Stefan, O., 'Helping Loose Ends Meet? The Judicial Acknowledgement of Soft Law as a Tool of Multi-Level Governance', *Maastricht Journal of European and Comparative Law*, 2014, No. 21(2), pp. 359–379.

[31] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraph 110.

[32] Eliantonio, M., Stefan, O., 'Soft Law…', op. cit., p. 469.

[33] Król-Bogomilska, M., *Zwalczanie karteli…*, op. cit., p. 70.

[34] The CJ judgment of 13 December 1989, case C-322/88, *Grimaldi*, paragraph 2.

and/or third parties include: (1) the text, (2) context, and (3) purpose of the contested act. As far as the text is concerned, if the EU act features a number of specific and precise commitments, this is certainly an essential element of a desire to induce binding legal effects. This may also be supported by certain indirect compliance mechanisms required by the act, such as: compulsory reporting, notification, monitoring or supervision.[35]

These circumstances can mean that, despite an act's labelling as soft law, it is not, in fact, intended merely as an invitation or suggestion to Member States to introduce certain regulations into their domestic legislation but is instead a 'latent directive' or an even more imperative measure. If a state, being a reasonable addressee, can infer from the content, aim, general scheme and the overall context of a soft law act that it is expected to undertake the actions specified therein and incorporate them into its national legislation, these regulations affect the legal position of enterprises and possibly other entities which are their indirect addressees. Thus, an EU soft law act produces legal effects by determining the legal situation of its indirect addressees. Of course, it can be maintained that formally and in itself it is not a soft law act but the potential national legislation that will impact third party rights, yet it is hard to deny that the effective source of the national legislation is to be found in that act. Consequently, an apparently non-binding act of EU soft law can become the subject of a petition for a preliminary ruling concerning both its interpretation and validity.[36] This is upheld by the Court, which states: 'Article 267 TFEU must be interpreted as meaning that the Court has jurisdiction under that article to assess the validity of acts such as the Guidelines.'[37] Meanwhile, the option of challenging the legality of soft law acts is approached with considerable reservations in most states. This is because European legal thought is still largely founded on the prescriptivist theory, which, by rejecting the possibility of regarding non-binding norms as legal norms, effectively rules out the review of their legality in court.[38]

THE SOFT LAW ACTS OF THE UOKIK PRESIDENT

With the adoption of the *acquis communautaire*, the Polish administration encountered a large number of soft law acts issued by the EU administration. Moreover, Polish authorities were keen to make extensive use of this form.[39]

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[35] Opinion of Advocate General Bobek, case C-16/16 P, op. cit., paragraphs 111, 119–121.

[36] Ibidem, paragraphs 108, 113, 133.

[37] The CJEU judgment, case C-911/19, op. cit.

[38] Chudyba, A., 'Zaskarżalność aktów *soft law*. Podejście Trybunału Sprawiedliwości Unii Europejskiej na tle orzecznictwa wybranych państw członkowskich', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 155, DOI: 10.7172/2299-5749.IKAR.5.9.10.

[39] Błachucki, M., 'Wytyczne w sprawie nakładania administracyjnych kar pieniężnych (na przykładzie wytycznych wydawanych przez Prezesa UOKiK)', in: Błachucki, M. (ed.), *Administracyjne kary pieniężne w demokratycznym państwie prawa*, Warszawa, 2015, pp. 42–43.

Currently, the issuance of what the legislator refers to as 'legal explanations' is generally based on Article 33 of the Entrepreneurs Law.[40] This provision states that competent ministers and authorities issue explanations of business regulations concerning their practical application. It should be noted in this context that the Polish Constitutional Tribunal has frequently pronounced on the principles arising from Article 2 of the Constitution, including the principle of legal certainty. It has emphasised that legal certainty means not so much the stability of legal regulations as the predictability of actions by state authorities and the corresponding behaviour of citizens.[41] What should be stable is the application of law by public authorities, as this is the main pillar of public confidence in these authorities.[42] This is not to be underestimated in the context of the principle of democratic rule of law since, as J. Zimmermann notes, '(…) democracy can only exist where its informal rules are followed, of course, in conjunction with clear legal regulations.'[43]

Besides this general foundation for issuing legal explanations, the UOKiK President is additionally provided with specific grounds under Article 31a CCPA.[44] The provision states the UOKiK President may publish in the Public Information Bulletin explanations and interpretations of major significance to the application of law in cases subject to the President's competence. This provision states that the UOKiK President may publish in the Public Information Bulletin explanations and interpretations of major significance to the application of law in cases within the President's competence. These official explanations and interpretations align with the definition of soft law acts suggested in the literature since, in principle, they are not formally binding on their addressees and cannot produce legal effects, yet they cause actual effects, at least by creating a kind of promise that gives rise to their addressees' reasonable expectations regarding the future behaviour of the public authority, namely, the UOKiK President.[45] This is of particular importance given that the authority has a rather broad range of discretionary powers, which may cause uncertainty among entrepreneurs.

In search of legitimisation for soft law acts, one should refer back to Polish administrative science and F. Longchamps' theory of non-organised sources of administrative law.[46] He recognised the need to change the perception of the

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[40] The Entrepreneurs Law of 6 March 2018, Journal of Laws of 2021, item 162, as amended (hereinafter 'the EL').

[41] The Constitutional Tribunal judgment of 15 October 2008, P 32/06, http://prawo.sejm.gov.pl/isap.nsf/download.xs/WDU20081901172/T/D20081172TK.pdf [accessed on 14 June 2023].

[42] Wieczerzyńska, B., 'Obowiązki organów władzy w zakresie wydawania objaśnień prawnych przepisów dotyczących działalności gospodarczej w projekcie ustawy – Prawo przedsiębiorców – wersja z 5 października 2017 r.', in: Smarż, J. (ed.), *Złożoność materialnego prawa administracyjnego*, Radom, 2018, pp. 124–144; http://old.uniwersytetradom.pl/art/display_article.php?id=8943 [accessed on 14 June 2023].

[43] Zimmermann, J., *Aksjomaty administracji publicznej*, Warszawa, 2022.

[44] The Competition and Consumers Protection Act of 16 February 2007, Journal of Laws of 2021, item 275 (hereinafter 'the CCPA').

[45] Błachucki, M., 'Wytyczne w sprawie nakładania administracyjnych kar…', op. cit., p. 45.

[46] E.g., Longchamps de Bèrier, F., O źródłach prawa administracyjnego (problemy poznawcze)', in: Jaśkiewicz, W. (ed.), *Studia z zakresu prawa administracyjnego. Ku czci prof. dra Mariana Zimmermanna*, Warszawa–Poznań, 1973.

system of law sources – defined as 'closed-ended', that is, 'changing only in ways determined within itself' – from dogmatic to realistic and to accept 'the informal ways the legal system supplements itself'.[47] J. Zimmermann notes that naming these sources 'non-organised' implies a variety and unpredictability of their forms.[48] There are, therefore, acts that cannot be part of the constitutionally established, closed-ended catalogue of the sources of generally prevailing law but should be addressed in the administrative law system as forms affecting an individual's legal position, thus 'opening' that system.[49]

As far as the broadly defined business law, including competition law, is concerned, soft law acts play a significant regulatory role, bridging the gap between law and the market, the legal norm and best practices, or customs; their influence continues to expand.[50] Soft law acts are not accepted without doubts and fears, though. As M. Król-Bogomilska notes, these concerns are essentially caused by 'the penetration into the Polish system – via non-statutory routes – of totally new elements that are different from statutory regulations' and are normative novelties.[51]

Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych dla przedsiębiorców w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję (*The Explanations concerning the Amounts of Monetary Penalties on Entrepreneurs in Cases Relating to the Violations of the Ban on Practices Restricting the Competition*, hereinafter '*The Explanations*'),[52] effective as of 1 April 2021, are the UOKiK President's soft law official explanations of paramount importance to determining the legal position of entrepreneurs. Penalties for such practices are based on the penalty calculation algorithm contained in this regulation.

Some authors stress[53] that *The Explanations* have a considerable impact on court decisions, which increasingly reference the methodology set out therein. Two opposing approaches to *The Explanations* and their application by courts can be observed in the decisions. *The Explanations* most often serve an auxiliary function as a source of intellectual inspiration, with courts making subsidiary references to them in the process

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[47] Supernat, J., 'Przedmowa', in: Supernat, J. (ed.), *Niezorganizowane źródła prawa administracyjnego*, Warszawa, 2022, p. 16.

[48] Zimmermann, J., *Prawo administracyjne,* Warszawa, 2022, p. 148.

[49] Puczko, A., 'Wpływ niezorganizowanych źródeł prawa na system prawa administracyjnego', in: Supernat, J. (ed.), *Niezorganizowane źródła prawa administracyjnego*, Warszawa, 2022, p. 71.

[50] Iwaniec, M., '*Soft law* – współczesny instrument regulacji życia gospodarczego, *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 122, DOI: 10.7172/2299-5749.IKAR.5.9.8.

[51] Król-Bogomilska, M., *Zwalczanie karteli…*, op. cit., p. 73. The author cites the minimum and maximum percentages of revenue as the starting points for determining the base amounts of penalties for violations named as 'very serious', 'serious', and 'other', which had not been provided for in the 2007 CCPA law, included in the already obsolete version of *The Explanations*, as some instances of 'normative novelties'.

[52] *Wyjaśnienia dotyczące ustalania wysokości kar pieniężnych dla przedsiębiorców w sprawach związanych z naruszeniem zakazu praktyk ograniczających konkurencję*, 2021, https://uokik.gov.pl/Download/499 [accessed on 3 September 2024].

[53] Famirska, S., 'Wpływ regulacji typu *soft law* na orzecznictwo sądów polskich orzekających w sprawach kar nakładanych za praktyki ograniczające konkurencję (na wybranych przykładach)', *internetowy Kwartalnik Antymonopolowy i Regulacyjny*, 2020, No. 5(9), p. 142.

of mitigating penalties. There are other decisions where the method of determining penalties laid down in *The Explanations* is adopted as a point of reference for penalties adjudged by courts or is copied without any reservations or modifications, whether in the stages of determining the base amounts of penalties or the weights ascribed to the particular assumptions underlying the degree of penalties. The latter approach is controversial, or even incorrect, since *The Explanations* are not binding. The fact that the Court of Appeals in Warsaw, in the case of the cement cartel,[54] relied on the methodology of determining penalties set out in the UOKiK President's *Explanations* without establishing anything independently in this regard is problematic. However, it stated,

> 'It's true *The Explanations* are not normative; however, their preparation and publication in the UOKiK Official Journal are of significant informational value to entrepreneurs, provide an objective assessment of the directives on the degree of penalties (…), and allow entrepreneurs to make an initial estimate of their penalty'.

This view is shared by the Supreme Court when considering a cassation appeal in the same case of the cement cartel, declaring, 'The UOKiK President's *Explanations* (…) are not binding on the court, which does not mean, however, that it cannot apply the methodology adopted there, as it is grounded in legislation'.[55] Thus, the court does not merely rely on *The Explanations* but applies them in a straightforward manner.

The chief objections against *The Explanations concerning the Amounts of Monetary Penalties on Entrepreneurs in Cases Relating to the Violations of the Ban on Practices Restricting the Competition* include the absence of individual penalties for the gravest practices, the departure from the traditional method of penalty mitigation within the statutory range, and the inability to consider all conditions of penalty in a given case that are not envisaged in *The Explanations*. These shortcomings argue for decision-making courts to use *The Explanations* as a guide, rather than automatically replicating the UOKiK President's algorithm from *The Explanations*. The principle of judicial discretion requires decision-making courts to approach the contents of the document and the methodology of its algorithm more critically, especially since penalties imposed for anti-monopoly violations are comparable to penal sanctions.

The possibility of challenging soft law acts issued by the Polish anti-monopoly authority, such as *The Explanations*, in court is another matter. Like European thought, Polish legal theory remains heavily influenced by the prescriptive concept that rejects the option of treating soft law acts as sources of law, dismisses their non-binding norms as legal norms, and rules out the judicial review of their legality.

However, claims that the traditional notions of the sources of law, including the prescriptive concept, are losing their significance and that closed-ended catalogues of these sources cannot be constructed are increasingly present in legal discourse, particularly in the field of administrative law. In light of the multicentricity of

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[54] The Court of Appeals in Warsaw judgment of 27 March 2018, case VI ACa 1117/2014, unpublished.

[55] The Supreme Court judgment of 29 July 2020, case I NSK 8/19 (cassation concerning the cement cartel), LEX No. 3037828.

the legal system,[56] one can also speak of its multisourcity, as contemporary law encompasses an extensive catalogue of non-organised sources that shape its contents in various ways and to different extents. Whether something is a source of law is not determined by whether it meets certain defined requirements, but by its actual, real norm-making nature. This view presumes a plurality of rule-making centres and a shift from prescriptivism towards legal realism – from law in books to law in action – since the contents of law are revealed in practice.[57] The implementation of soft law acts like guidelines, best practices, or compliance programmes in every area of economic life, including competition law, exemplifies this approach.[58]

This concept is expected to pave the way for an autonomous judicial review of soft law acts, particularly as they are so prevalent in the legal system. The CJEU has already made a significant step in that direction by identifying an extensive catalogue of acts adopted by EU institutions, authorities, or organisations, including guidelines, whose validity may be reviewed as part of the Court's preliminary rulings under Article 267 TFEU.[59] This serves as a signal to domestic courts, including Polish courts, to be more receptive to the possibility of judicial review of soft law acts.

CONCLUSION

With the adoption of the *acquis communautaire*, the Polish administration encountered a large number of soft law acts issued by the EU administration and began to make extensive use of them itself.

By virtue of Article 31a of the CCPA, the UOKiK President is also authorised to issue explanations, guidelines, or interpretations that hold considerable significance for the application of competition and consumer regulations. The UOKiK President's official explanations and interpretations align with the definition of soft law acts proposed in the literature since, in principle, they are not binding on their addressees and cannot produce legal effects, yet they cause actual effects. *The Explanations*, particularly those related to the determination of monetary penalties for entrepreneurs, have a considerable impact on court decisions. Courts sometimes automatically apply the methodology for determining and mitigating monetary penalties against entrepreneurs as set out in these documents. Despite the non-binding nature of such guidelines, therefore, the fact that courts refer to them indicates a 'hardening' of soft law and its actual legal effects on the legal position of entrepreneurs, as seen in previous EU court decisions. This, in turn, suggests the need to subject these acts to autonomous judicial review.

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[56] Łętowska, E., 'Mechanizm nie tekst', *Portal konstytucyjny.pl*, 30 July 2017, http://konstytucyjny.pl/mechanizm-nie-tekst/ [accessed on 22 January 2023].

[57] Osajda, K., 'Multiźródłowość – teoria czy praktyka? Atypowe źródła prawa prywatnego', in: Giaro, T. (ed.), *Źródła prawa. Teoria i praktyka*, Warszawa, 2016, Lex.el.

[58] Iwaniec, M., '*Soft law* – współczesny…', op. cit., p. 121.

[59] CJEU judgment of 15 July 2021, case C-911/19, op. cit.

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