



INSIGHT

SOFT LAW IN EU ELECTRONIC COMMUNICATIONS REGULATION: A BULGARIAN CASE STUDY

GEORGI SULEV*

ABSTRACT: Soft law adopted by the European Commission is an integral part of the EU regulatory framework for electronic communications networks and services, and has always played an important role in the regulatory process. In economic regulation under the framework, the use of binding legislation is limited to prescribing general regulatory powers and applicable procedures. The regulatory framework allows broad discretion in its application by national regulatory authorities constrained by their duty to take into utmost account soft law adopted by the Commission. The discussion in this *Insight* relates to the legal, practical and psychological effects of soft law, taking into account the institutional setting and the role of the various actors involved – the Commission, national regulatory authorities, European and national courts, exemplified by a case study of the regulatory practice of the Bulgarian regulator and the case-law of Bulgarian administrative courts.

KEYWORDS: soft law – electronic communications – regulation – EU regulatory framework for electronic communications networks and services – legal effects of non-binding acts – Bulgarian administrative law.

I. INTRODUCING SOFT LAW IN THE EU REGULATORY FRAMEWORK FOR ELECTRONIC COMMUNICATIONS NETWORKS AND SERVICES

The EU regulatory framework for electronic communications networks and services is a set of five directives detailing the legal regime for electronic communications.¹ The legal framework allows broad discretion to national regulatory authorities (NRAs) constrained by their duty to take into utmost account soft law acts of the European Commission (Commission). The regulatory framework was partly revised and codified by Di-

* Legal Adviser, Head of Unit Legal Regulation and Individual Administrative Acts at the Communications Regulation Commission (Bulgaria), g.t.sulev@gmail.com. The opinions of the Author are purely personal and do not necessarily represent the official position of the Communications Regulation Commission.

¹ 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 (Directive 2002/21/EC) and four specific directives (Directive 2002/19/EC, Directive 2002/20/EC, Directive 2002/22/EC and Directive 2002/58/EC).



rective (EU) 2018/1972 (the European Electronic Communications Code) applicable from 21 December 2020.

The EU regulatory framework for electronic communications networks and services harmonises the procedures, the powers of NRAs and the set of available remedies for economic regulation without prescribing their exact application in every Member State. The Commission adopts soft law to provide the necessary consistency in application of the EU regulatory framework for electronic communications networks and services by NRAs. In European law, the term *soft law* encompasses all non-binding acts adopted by the institutions of the EU containing rules of conduct which, in principle, have no legally binding force but which, nevertheless, may have practical effects.²

Soft law in the regulatory framework for electronic communications is used mostly in the area of economic regulation of dominant undertakings. Regulatory obligations are imposed by NRAs after an analysis of relevant markets and identification of undertakings with significant market power based on competition principles. NRAs' decisions are adopted after notification to and assessment of the draft decision by the Commission. The Commission has the power to veto the draft regulatory obligations if markets or undertakings are identified contrary to EU law, or at least delay the adoption of the final decisions of NRAs if the draft measures are considered as non-compliant with the regulatory framework, including soft law.

To guide the regulatory process, the Commission has adopted various recommendations on major regulatory approaches and uses "comments letters" and specific recommendations to steer notified draft decisions. Electronic communications markets are defined and analysed according to the 2014 Recommendation on relevant markets³ and the 2018 Guidelines on market analysis,⁴ the former reviewed by the Commission in the end of 2020.⁵ Guidance on regulatory obligations related to access to high capacity networks (optical fibre networks) is provided by the 2010 Next Generation Access Recommendation⁶ and the 2013 Non-discrimination and costing methodologies Rec-

² F. SNYDER, *The effectiveness of European community law: Institutions, processes, tools and techniques*, in *The Modern Law Review*, 1993, p. 19.

³ Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services.

⁴ Communication from the Commission C/2018/2374 — Guidelines on market analysis and the assessment of significant market power under the EU regulatory framework for electronic communications networks and services.

⁵ See the Commission updated Recommendation on relevant product and service markets within the electronic communications sector, available at ec.europa.eu

⁶ Commission Recommendation 2010/572/EU of 20 September 2010 on regulated access to Next Generation Access Networks (NGA).

ommendation.⁷ Price regulation of interconnection rates charged between telephone networks for connecting phone calls is recommended by the Commission in its 2009 Termination rates Recommendation.⁸ In terms of volume and frequency of use, comments letters of the Commission on notified draft decisions represent by far the biggest part of soft law in electronic communications regulation.

Soft law is successfully applied by the Commission to guide NRAs which markets to regulate and which set of obligations to impose on undertaking(s) with significant market power on these markets. This article analyses the legal and practical effects of soft law used as the main tool for harmonising electronic communications regulation in the EU exemplified by a case study of the regulatory practice of the Bulgarian NRA and the case-law of Bulgarian administrative courts.

II. LEGAL AND PRACTICAL EFFECTS OF SOFT LAW IN EU ELECTRONIC COMMUNICATIONS REGULATION

EU soft law produces various legal and practical effects at European and national level which are well known and studied in the literature.⁹ Soft law in electronic communications regulation is applied indirectly through decisions adopted by NRAs at national level and its legal and practical effects are amplified by the institutional setting and express obligation in European legislation to take soft law into utmost account. Practical effects of soft law are further strengthened by its form and status of best regulatory practice.

In general, soft law can be adopted more speedily than traditional legislation which enables it to meet a need for regulation faster.¹⁰ This is especially important in electronic communications regulation where obligations are imposed under a framework which requires periodic review of relevant markets.

Regulation is carried out through a complex multi-level governance structure consisting of the Commission, NRAs and the Body of European Regulators for Electronic Communications. The division of powers between various actors is complicated and regulation is applied to diverse national markets each with their specific characteristics. Soft law is particularly suitable for this setting of frequent tension between national sovereignty and EU competence. One of the driving forces behind the creation of soft law is that, under the shared administration model of the EU, national authorities are responsible for en-

⁷ Commission Recommendation 2013/466/EU of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.

⁸ Commission Recommendation 2009/396/EC of 7 May 2009 on the Regulatory Treatment of Fixed and Mobile Termination Rates in the EU.

⁹ O. STEFAN, M. AVBELJ, M. ELIANTONIO, M. HARTLAPP, E. KORKEA-AHO, N. RUBIO, *EU Soft Law in the EU Legal Order: A Literature Review*, SoLaR-Network, 2018.

¹⁰ H. COSMA, R. WHISH, *Soft Law in the Field of EU Competition Policy*, in *European Business Law Review*, 2003, p. 125.

forcement and so is the Commission, which does not possess hierarchical oversight powers, but can give orientation to national authorities through soft law documents.¹¹

Soft law increases the predictability of Commission's practice and indirectly the predictability of NRA decisions since operators will generally expect regulators to follow the regulatory practice established in soft law. When soft law acts are in line with binding provisions and their interpretation by the CJEU or based on established regulatory practice, these documents increase legal certainty since they provide solutions compliant with EU law.

According to the Court of Justice, NRAs should follow, when imposing obligations, the guidance contained in soft law.¹² It is only where it appears that the recommended regulatory approach is not appropriate to the circumstances, the NRA may depart from it, giving reasons for its position, which in essence shifts the burden of proof.

At the national level, the obligation to take soft law into utmost account is an additional procedural requirement under European law.¹³ An NRA must be able to explain divergences from the recommendations of the Commission, in its comments letter regarding a notified draft regulatory decisions.¹⁴ When assessing the legality of the NRA's decision, the national court should consider to what extent the NRA has stated the reasons for which it diverged from the recommendations of the Commission.

Several judgments from different EU jurisdictions illustrate the practical application of the duty to take soft law into utmost account. In one case from 2007, the Austrian Supreme Administrative Court decided that the NRA did not provide sufficient justification for acting contrary to the recommendations of the Commission in its comments letter and annulled the decision.¹⁵ In my view, the procedural requirement to take soft law into account requires at least discussion in the grounds of the regulatory decision of the applicability of the recommended approach to the specifics of the national market. If the NRA simply disregards the recommendations or comments of the Commission or does not justify its alternative regulatory approach, the national court should annul the respective regulatory decision.¹⁶ An NRA cannot simply accept the arguments of the Commission without its own reasoning – supported by a Belgian case, where the NRA, considered the opinion of the Commission as binding and the Belgian Appellate Court

¹¹ A. KOVÁCS, T. TÓTH, A. FORGÁCS, *The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts*, in *ELTE Law Journal*, 2016, p. 70.

¹² Court of Justice, judgment of 15 September 2016, case C-28/15, *Koninklijke KPN NV and Others v. Autoriteit Consument en Markt (ACM)*.

¹³ Arts 7, 7, let. a), 14-16 and 19 of Directive 2002/21/EC, now Arts 32, 33, 63-67 and 38 of Directive (EU) 2018/1972.

¹⁴ Court of First Instance, judgment of 22 February 2008, case T-295/06, *Base NV v. Commission of the European Communities*, para. 65.

¹⁵ Austrian Supreme Administrative Court, judgment of 28 February 2007, no. 2004/03/0210.

¹⁶ See also H. LEHOFER, *Panel discussion: The role of national judges in ensuring legal certainty in the electronic communications sector – The relevance of soft law for the judiciary*, ec.europa.eu.

of Brussels decided that the regulator has acted contrary to the fundamental principles of the regulatory framework, which require NRAs to decide which regulatory obligations are imposed on undertakings with significant market power (and not the Commission).¹⁷ In contrast to the previous two cases, the Council of State of Italy in its judgment of 15 May 2012 decided that recommendations are not binding, and national judges are not bound to set aside national decisions which run contrary to recommendations. On these grounds, the Council reversed the judgment of the Regional Administrative Court of Lazio, which annulled a regulatory decision on the grounds that the NRA has not duly justified why it did not comply with the Commission's comments.¹⁸

Another feature of soft law is that it provides ready solutions to complex regulatory issues and reduces lobbying before individual NRAs, which are facing pressure by national operators to diverge from recommendations. NRAs, which decide to follow soft law can use the additional argumentation readily provided by the Commission, thus reinforcing the grounds of their regulatory decisions.

Soft law in electronic communications regulation intentionally uses the same form and structure as binding acts. From 2010 the Commission labels its comments letters as *decisions* and the notification procedures as *cases*.¹⁹ The second phase of the notification procedure is self-described by the Commission as an *investigation* in its press releases accompanying important comments letters or recommendations for withdrawal.²⁰ Recommendations are drafted as directives and published in the L part of the Official Journal and even include a date of entry into force and transitional provisions. When non-binding instruments are adopted, drafted and formulated like binding acts, they result in a bluff effect on the intended audience.²¹

As long as the Commission keeps its position as the most authoritative source of regulatory knowledge and practice, its soft law instruments will bear the stamp of *European best practice*. As a result, there is a certain pressure on the NRAs to comply with European expectations. If an NRA deviates from such expectation, it also has to anticipate high costs in explaining its non-compliance.²²

¹⁷ Belgian Court of Appeal (Brussels), judgment of 4 April 2008, no. 2007/AR/3394.

¹⁸ F. BALESTRA, *Il-2.20: The Italian Conseil D'Etat Pays Little Attention to the Role of EC Commission*, in *Journal of Regulation & Compliance*, 2012, thejournalofregulation.com.

¹⁹ One of numerous examples: the Commission decision concerning case UK/2010/1139: Wholesale fixed analogue exchange lines markets in the UK.

²⁰ European Commission, news article of 24 November 2014, *European Commission has opened an investigation over the German proposals on mobile termination rates*, ec.europa.eu.

²¹ A. FLÜCKIGER, *Why Do We Obey Soft Law?*, in S. NAHRATH, F. VARONE (eds), *Rediscovering Public Law and Public Administration in Comparative Policy Analysis: A Tribute to Peter Knoepfel*, Bern: Haupt Verlag AG, 2009, p. 50.

²² B. VAN ROOSEBEKE, *European Regulation of Mobile Termination Rates (MTR) – Unsustainable, arbitrary, assumptive and full of legal difficulties*, Centrum für Europäische Politik, 20102, p. 12, cep.eu.

Finally, soft law is draft hard law in the making. Once soft law entrenches itself in the regulatory practice of NRAs its transformation to hard law is more easily achieved through the legislative process. The new Directive (EU) 2018/1972 includes major aspects of the soft law adopted by the Commission as binding provisions of the regulatory framework.²³ Soft law of the Commission can also be used as a model for national law or even transposed directly in national legislation.

These legal and practical effects of soft law in EU electronic communications underpin its effectiveness in guiding sectoral regulation at national level. The next part discusses these effects with reference to the decisional practice of the Bulgarian NRA and administrative courts.

III. EU ELECTRONIC COMMUNICATIONS SOFT LAW IN THE DECISIONS OF THE COMMUNICATIONS REGULATION COMMISSION AND THE CASE-LAW OF THE ADMINISTRATIVE COURTS OF BULGARIA

The Communications Regulation Commission (CRC) is the Bulgarian NRA tasked to implement the EU regulatory framework for electronic communications. European law requires from the CRC to take utmost account of soft law adopted by the Commission. The decisional practice of the CRC and the case-law of Bulgarian administrative courts demonstrate that the Commission's soft law can be used to support the grounds for administrative decisions. Compliance with the duty to take soft law into utmost account requires at least discussion by the CRC on the applicability of the recommended regulatory approach to the specifics of the national market.

In the first round of market analysis of the markets for termination rates, the CRC made a commitment to apply the 2009 Termination Rates Recommendation even though it was not yet adopted by the Commission.²⁴ The actual price obligations imposed by the CRC were gradual reduction of prices for termination rates according to a *glide path* which was set by the regulator and a statement to apply the recommendation once it enters into force. Clearly this was a far reaching example of compliance with a recommended approach heavily influenced by the institutional setting, peer pressure and the *bluff* binding effect of the Commission's recommendations.

The market for transit services in the fixed public telephone networks was deregulated by decision of 30 April 2010, no 506. The CRC based its decision by reference to

²³ Art. 67, para. 1, incorporates the Three Criteria Test for identification of markets considered to justify the imposition of regulatory obligations which was first established in the 2003 Recommendation on relevant markets. Annex III contains the main elements of the 2009 Termination rates recommendation. Art. 76 and Annex IV include the principle of Equivalence of Input established in the 2013 Non-discrimination and costing methodologies Recommendation. Art. 81 deals with migration from legacy infrastructure largely based on the 2010 Next Generation Access Recommendation.

²⁴ Communications Regulation Commission, Decision of 17 March 2009, no. 236, and Communications Regulation Commission, Decision of 17 March 2009, no. 237.

the *Three Criteria Test* established by the Commission in the Recommendation on relevant markets.²⁵ In this instance the CRC based its decision almost entirely on the interpretation of binding legislation contained in soft law, adopted by the Commission.

By decision of 22 February 2011, no. 246, the CRC regulated the market for wholesale (physical) network infrastructure access and wholesale broadband access in Bulgaria. In its comments, the Commission noted that the proposed cost-orientation obligation does not include dark fibre, contrary to its 2010 Next Generation Access Recommendation.²⁶ The CRC decided not to follow the comments of the Commission and provided justification for non-imposition of price controls for access to dark fibre infrastructure.

In the second round of market analysis of the market for local access infrastructure, the Commission commented on the notified draft measure by confirming the imposition of virtual unbundled local access and invited the CRC to impose all necessary safeguards.²⁷ In its final decision of 13 August 2015, no. 372, the CRC imposed obligations for virtual unbundled local access in order to implement the EC's recommendations.

The Court of Justice established in *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej* that soft law does not need to be translated in all official EU languages or published in the Official Journal of the EU in order that NRAs are able to refer to its text.²⁸ The CRC has followed such approach until the national court interpreted the national law as requiring the translation of all soft law documents, which the regulator uses in its argumentation.²⁹ In this instance, the decision of the NRA was not annulled on the grounds that it refers to soft law in English. However, in order to ensure legal certainty, the CRC published unofficial translations in Bulgarian of several soft law documents used in the grounds of its regulatory decisions.

As mentioned in the previous part, European soft law can transform into hard law. Under Bulgarian Law on Electronic Communications, the CRC (assisted by the competition authority) adopts a methodology for market analysis which is binding under national law. The methodology basically transformed the most important parts of the Commission's Guidelines on market analysis into binding secondary legislation.

The case-law of the Bulgarian Supreme Administrative Court gives some insights on the Bulgarian judges' perception of soft law. The court had to deal mainly with the ap-

²⁵ See Commission's comments pursuant to Art. 7, para. 3, of Directive 2002/21/EC in case BG/2010/1055: Transit services in the fixed public telephone network.

²⁶ Commission Recommendation 2010/572/EU, cit.

²⁷ Commission's comments pursuant to Art. 7, para. 3, of Directive 2002/21/EC in case BG/2015/1766: Wholesale local access provided at a fixed location and case BG/2015/1767: Wholesale central access provided at a fixed location for mass-market products.

²⁸ Court of Justice, judgment of 12 May 2011, case C-410/09, *Polska Telefonia Cyfrowa sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej*.

²⁹ Bulgarian Supreme Administrative Court, judgment of 26 May 2016, no. 6261, confirmed by the court of last instance. All judgments cited are available on the website of the court, sac.government.bg (in Bulgarian).

plication of the 2009 Termination rates Recommendation which was not surprising considering its significant effects on the revenue of the leading telephone network operators. In two cases the court discussed the application of the Recommendation on relevant markets indirectly through the national law. Overall, Bulgarian courts look favourably at administrative decisions based on or compliant with soft law of the Commission.

In 2011, the CRC was developing a model for calculating cost oriented prices for termination of calls which was based on the 2009 Termination rates Recommendation. The process required gathering comprehensive information on network topologies and costs of telephone operators in Bulgaria. On appeal against the decision of the CRC requesting information, the Bulgarian Supreme Administrative Court held that “The recommendation is non-binding according to the express provision of Art. 288, TFEU.³⁰ It aims to achieve a specific legal result without creating it, but being interpretative and subsidiary source of European law according to the Court of Justice the recommendation is not totally devoid of legal effects and national authorities are obliged to apply it. Norms and *per argumentum a fortiori* – administrative practices, contrary to the recommendations, should not be applied under the principle of sincere cooperation enshrined in Art. 4, para. 3, TEU. Therefore, the 2009 Termination rates Recommendation of the Commission imposed on the CRC compliance with the prescribed approach for regulating fixed and mobile termination rates in the EU and therefore justified as lawful its decision requiring information”. On appeal, the Bulgarian Supreme Administrative Court confirmed the first instance judgment and stated that “since the European regulatory framework provides powers for the Commission to make recommendations they should be taken into account and applied by national regulatory authorities in this case – the CRC”.³¹

In another appeal against a decision of the CRC for request for information, the Bulgarian Supreme Administrative Court held that “The fact that the recommendation is not binding does not mean that the NRA cannot adopt administrative practices which are consistent with it.³² Accordingly, the reference to the 2009 Termination rates Recommendation of the Commission in the decision does not indicate its illegality”.

The CRC imposed cost oriented prices for termination rates on all telephone operators with two regulatory decisions in 2012, both of which were appealed. In its judgment on appeals against regulatory obligations imposed on mobile operators, the Bulgarian Supreme Administrative Court stated at first that cost-oriented prices for call termination are determined pursuant to the 2009 Termination rates Recommendation which according to the Court of Justice is a subsidiary source of law EU which NRAs are obliged to apply. According to the judges, “the Termination rates Recommendation of

³⁰ Bulgarian Supreme Administrative Court, judgment of 8 June 2012, no. 8244.

³¹ Confirmed by the Bulgarian Supreme Administrative Court, judgment of 21 November 2012, no. 14573.

³² Bulgarian Supreme Administrative Court, judgment of 04 July 2012, no. 9769.

the Commission imposed on the CRC a duty to take into utmost account the prescribed approach in regulating fixed and mobile termination rates in the EU and as the court correctly found, the measure adopted by the CRC imposing obligations to implement cost-orientation aims to achieve the most rapid reduction of regulated termination rates to the costs of an efficient operator".³³

By Order of 19 January 2015, no. 578, the Bulgarian Supreme Administrative Court confirmed earlier case-law that the "recommendation of the Commission in relation to the relevant markets of products and services in the electronic communications sector is relevant to the application of the powers of NRAs". On appeal, the appellant claimed incorrect transposition of the 2007 Recommendation on relevant markets. The court held that "adopting the text of the Recommendation into national law does not constitute adopting national legislation to implement it, as is the case with EU Directives, which require transposition. The legislature has accepted the views of the Commission contained in the Recommendation on relevant markets at the time of adoption of the amendments to Art. 152 of Law on Electronic Communications".³⁴

In a more recent case regarding a decision for market analysis of the wholesale local access market, the Bulgarian Supreme Administrative Court became more cautious when discussing the effects of soft law. In judgment of 26 May 2016, no. 6261, the court held that the reference to soft law by the CRC is valid grounds of the regulatory decision. Although the judgment is remarkable in its detailed discussion on the applicable soft law and how it was implemented by the CRC, the national court only considers recommendations as part of the grounds of the decision of the regulator. The judgment partly annulled the CRC's decision of 13 August 2015, no. 372, stating the virtual unbundled local access remedy was not proportionate by underlining that "the obligations set out in the 2014 Recommendation on relevant markets should be aimed at gradually reducing *ex ante* regulation in order to achieve benefits for end-users, and market analysis should be forward-looking. The obligation for virtual access does not fit into these requirements". In this case, the Bulgarian Supreme Administrative Court held its own interpretation of European soft law against the CRC and at the same time disregarded the comments letter of the Commission where the regulatory approach to virtual unbundled local access was accepted as appropriate.³⁵

From the case-law summarised above, it is clear that the court looks favourably at soft law. The duty to follow recommendations can be seen as justified under Art. 4 TEU in specific cases. However, the court is very careful not to discuss the legal effect of recommendations *vis-à-vis* the court itself. In all cases described above the appellants did

³³ Bulgarian Supreme Administrative Court, judgment of 26 June 2014, no. 8887.

³⁴ Bulgarian Supreme Administrative Court, order of 28 May 2015, no. 6219.

³⁵ Commission's comments pursuant to Art. 7, para. 3, of Directive 2002/21/EC in case BG/2015/1766: Wholesale local access provided at a fixed location and case BG/2015/1767: Wholesale central access provided at a fixed location for mass-market products, p. 7.

not make claims that alternative approaches should be followed by the CRC, but rather claimed that application of soft law as grounds for administrative decisions is by itself unlawful. In my view, the national court simply confirms that, by taking soft law into account and applying it, the CRC adopts decisions compliant with the regulatory framework and the duty of loyal cooperation. It cannot be deduced that the Bulgarian Supreme Administrative Court accepts binding force of the recommendation. The case-law only reinforces the obligation to take recommendations into utmost account by referring to Art. 4 TEU. From more recent cases it seems that Bulgarian Supreme Administrative Court is considering soft law only as additional grounds for supporting the decisions of the regulator.

IV. FINAL REMARKS

Soft law in EU electronic communications regulation is used successfully to steer NRAs when adopting regulatory decisions. The success of soft law as regulatory tool is due to the multitude of its legal, practical and psychological effects. When applying the regulatory framework NRAs should follow, as a rule, the guidance contained in soft law recommendations. This shifts the burden of proof and NRAs have to provide additional argumentation supporting their regulatory decisions, which would normally not be required under national administrative procedures. In specific cases compliance with soft law can even be seen as an extension of the duty for loyal cooperation. These documents provide ready solutions to complex regulatory issues and also reduce lobbying before individual NRAs. The form of soft law can also be deceiving of its non-binding nature by using language of binding acts. Form reinforces the psychological effects of soft law and triggers self-imposed compliance and pressure on NRAs to comply with European *expectations*.

Most of these features of soft law can be identified by looking at the practice of the NRA of Bulgaria which generally follows soft law recommendations when adopting regulatory decisions. The national court fully supports this approach by reference to binding obligations to take soft law into utmost account and the principle of loyal cooperation in TEU. Bulgarian courts do not accept that the obligation to take soft law into utmost account requires from the CRC to act only in compliance with recommendations and on several occasions confirmed that different regulatory approaches can also be applied even contrary to the Commission's soft law.