
Petra Lea Láncos¹

Soft law, and in particular, the burgeoning body of non-binding EU norms continues to fascinate lawyers, fuelling litigation and research. The present article focuses on the research and jurisprudence related to a particularly enigmatic type of EU soft law: Commission recommendations that highly resemble directives. While this type of measure has been around for a few decades now, it is the first time that the CJEU has had opportunity to rule on whether or not the chosen form of recommendation was indeed correct. This article gives insight into the phenomenon of directive-like recommendations on the example of the new Commission recommendation on online gambling, discussing and criticising in detail the test devised by the CJEU to determine the nature of European norm under scrutiny.

Keywords: directive-like recommendations, gambling, language comparison, implementation clause, institutional balance

¹ Researcher, Deutsches Forschungsinstitut für öffentliche Verwaltung, Speyer; associate professor, Péter Pázmány Catholic University, Faculty of Law. I am indebted to Philippe Vlaeminck, Yseult Marique, Eljalill Tauschinsky and Wolfgang Weiß for their invaluable help.
Introduction .................................................................................................................................................. 3
1. The market and regulation of gambling services: All bets are off? ................................................. 4
2. Decisions rendered by the CJEU: A house edge for the Commission? ........................................... 8
   2.1 Order of the General Court ............................................................................................................. 9
   a) A directive in disguise? ....................................................................................................................... 9
   b) A breach of fundamental principles? .................................................................................................. 12
   2.2 Findings of the Court’s judgment rendered upon appeal ............................................................... 14
3. Conclusion: Chasing losses? .................................................................................................................. 14
Introduction

Gambling has traditionally been a highly fragmented and nationally regulated market in Member State jurisdictions, yielding considerable income to the state purse. With the progress of integration, however, the European Commission sought to regulate cross-border gambling and gaming services in the gambling market. Facing resistance from the Member States trying to protect their markets, the Commission eventually adopted Commission Recommendation 2014/478/EU (Recommendation) proposing the implementation of national measures for the protection of consumers, players and minors in online gambling. Certain Member States considered the Commission Recommendation a species of ‘hidden directive’, a possible first step towards the harmonization of gambling regulation and the erosion of national regulatory prerogatives. While the decisions rendered in Belgium v Commission (T-721/14 and C-16/16 P) and discussed in this case-note are important milestones in the gambling feud of the Commission and the Member States (evidenced by the growing number of gambling cases before the CJEU), the cases actually concerned the contestability of EU recommendations, and in particular, a special category of EU soft law which I have termed directive-like recommendations (DLRs).

DLRs are a specific version of Commission recommendations carrying a clause on implementation, deadlines and Member State reporting, highly reminiscent of directives. As such, DLRs are evidence that while the laconic wording of the TFEU seems to suggest a clear-cut taxonomy of formal EU legal acts, in fact, the lines between these measures may appear fuzzy. As the decisions in Commission v Belgium demonstrate, lawyers are intrigued by acts that seem to transcend the confines of their allotted genre. The decisions described in this case-note are but the latest episode in the pursuit of unlocking the potential of seemingly soft norms through questioning their affiliation to the category of European soft law by means of creative lawyering.

---

This case-note first presents the factual background of the cases by describing the development of gambling market regulation in the European Union and the main concerns of the Member State governments and the European Commission, respectively. It then discusses the arguments put forward by the Parties to cases T-721/14 and C-16/16P and the decisions rendered by the General Court and the Court, with due regard to the phenomenon of DLRs. Finally, some criticisms regarding the CJEU’s assessment of the cases are formulated, highlighting the possible consequences on institutional balance and the division of competences of the bar on challenging any EU measure that fails to produce binding legal effects.

1. The market and regulation of gambling services: All bets are off?

To understand the core of the problem underlying the legal dispute before the General Court and the appeal lodged at the Court, one must go back to the European Economic Community of the early 90’s: the budding internal market and the enduring stand-off between the Commission and the Member States on the issue of gambling regulation. The problem boils down to the position of the Member States who considered the exclusive competence to regulate gambling as a way to “control and limit the supply of gambling in their territory and to ensure that the revenue of gambling is to a certain extent used for the public benefit”.4 This, in turn was perceived by the Commission as a protectionist stance of Member States insisting on retaining their monopoly on state-run gambling to secure huge revenues.5

While services in the common market comprised commercial activities rendered for remuneration (Article 50 TEC), it was not clear whether gambling should be considered a service in the meaning of the Treaty.6 The Commission’s 1991 study: “Gambling in the Single Market – A study of the Current Legal and Market Situation” sought to address this issue. In its study, the Commission noted the strong fragmentation of the gambling and gaming industry along Member State lines, with

---

6 Maulding, supra n. 5, p. 417.; Vlaeminck-De Waer, supra n. 4, p. 177.
diverse regulatory regimes reflecting different national preferences. Meanwhile, what was common to the Member States was that state controlled and/or state operated gambling nevertheless existed to satisfy latent demand, while upholding public order and yielding considerable state income. Yet, as the Commission pointed out, while Member States maintained that only state monopolies can guarantee the protection of players, state-run games were in fact actively promoted, with the effect of encouraging gambling. At the same time, strongly siloed national gambling regimes did not prevent cross-border betting: where gambling demands were not met on the national level, cross-border betting occurred naturally through convenience. For the time being, however, Member States’ strong resistance took the matter of integrating national gambling markets off the table, as evidenced by the Conclusions of the Presidency in December 1992.

The issue of cross-border gambling resurfaced before the European Court of Justice, starting with the Schindler case, where agents of the German public body Süddeutsche Kassenlotterie were charged under the Lotteries and Amusements Act 1976 for sending invitations to UK nationals to participate in the SKL lottery. While certain intervening governments, including Belgium, tried to argue that lotteries are not an economic activity, since they are heavily controlled in the public interest, with no economic purpose and being of solely recreational or amusement nature, the ECJ clarified, that in line with the Commission’s position, lottery activities must be considered services within the meaning of the Treaty. In particular, the ECJ emphasized that the economic nature of lotteries could not be called into question with reference to the morality of these activities, since they are not prohibited in the Member States. Nor does the element of chance, the entertainment nature or the allocation of the profits made by a lottery deprive them of their economic character. Nevertheless, the ECJ allowed, that lotteries are of special nature, where different moral, religious, cultural, health and law enforcement considerations are at play, which may justify the application of non-discriminatory restrictions by national authorities to protect

8 Ibid, 3, 16.
9 Ibid, 16, 41.
10 Ibid, 18-19, 33.
12 ECJ 24 March 1994, Case C-275/92 Her Majesty’s Customs and Excise v Schindler, paras 16, 25.
players and maintain public order. After the definition of lotteries as services in the meaning of the Treaty in *Schindler*, other gambling cases emerged before the ECJ, offering the Court a chance to refine its gambling related jurisprudence.

At the turn of the millennium, the Commission embarked upon the grand scale project of providing the framework a more competitive market in services, seeking to dismantle existing barriers with the drafting of the so-called Services Directive. Although initially the Commission sought to include gambling under the scope of the Directive, not surprisingly, the final version of the text expressly excluded the application of the Directive to games of chance (Article 2 para 2). Indeed, as Fiynaut points out: “one interesting detail about the duel between the European Commission and the Member States is that the European Parliament, when it came to the crunch, sided with the member States and not the Commission.”

The reason for the exclusion of such services from the scope of the Directive was the familiar allusion to the role of Member States in managing social challenges related to gambling. As a result of the resistance of the Member States and the European Parliament, gambling remained firmly cemented in the national regulatory realm.

Beyond the occasional cross-border betting in traditional gambling scenarios, however, the rise of the internet held the promise of unlimited, borderless gambling

---

14 Without calling into question the possibility of national authorities to regulate gambling services in a non-discriminatory and proportionate manner, these ECJ judgments further refined the conditions of lawful Member State restrictions. In *Gambelli*, the Court emphasized that where a Member State “incites and encourages consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures”, alluding to the contradiction already raised by the Commission in its 1991 study (ECJ 6 November 2003, Case C-243/01, *Gambelli*). This had been confirmed earlier in *Zenatti*, where the ECJ stressed that national restrictions must actually “reflect a concern to bring about a genuine diminution of gambling opportunities, and the financing of social activities through a levy on the proceeds of authorized games must constitute only an incidental beneficial consequence and not the real justification for the restrictive policy adopted” (ECJ 21 October 1999, Case C-67/98, Questore di Verone v Diego Zenatti, para 36).
16 C. Fiynaut, ‘General Introduction’, in T Coryn and C. Fiynaut and A. Littler (eds.), *Economic Aspects of Gambling Regulation: EU and US Perspectives* (Martinus Nijhoff Publishers 2007), at p. 4. The reason for the exclusion of such services from the scope of the Directive was the familiar allusion to the role of Member States in managing social challenges related to gambling. “Gambling activities, including lottery and betting transactions, should be excluded from the scope of this Directive in view of the specific nature of these activities, which entail implementation by Member States of policies relating to public policy and consumer protection.” Recital (25) of Directive 2006/123/EC.
and the emergence of a true internal market of online games of chance.\textsuperscript{17} National regulatory regimes accommodated online gambling through licensing or state monopolies, which allowed for the emergence of ‘grey’ and illegal on-line gambling markets across the Member States.\textsuperscript{18} The Commission took the opportunity to launch a consultation with stakeholders in its 2011 Green Paper to determine whether EU action was necessary. The Commission’s Communication adopted just a year later, entitled \textit{Towards a comprehensive European framework on online gambling}\textsuperscript{19} declared that „as a first step the Commission will prepare a Recommendation on common protection of consumers”,\textsuperscript{20} foreseeing its adoption for 2013. This time, surprisingly, the European Parliament sided with the Commission, calling upon the institution to propose legislation for tackling gambling addiction.\textsuperscript{21}

The ensuing Commission Recommendation 2014/478/EU was finally adopted in 2014, based on Article 292 TFEU, the general article of the TFEU authorizing the Commission to adopt recommendations.\textsuperscript{22} The Recommendation is meant to


\textsuperscript{18} Green Paper on on-line gambling in the Internal Market, SEC (2011) 321 final, p. 3. Indeed, in several cases the CJEU found against protectionist elements of the national gambling systems, while upholding the Member States right to organize gambling in line with general interest considerations. In \textit{Global Starnet} the CJEU confirmed, that “betting and gambling is one of the areas in which there are significant moral, religious and cultural differences between the Member States. Failing any harmonization on the issue at EU level, the Member States enjoy a wide discretion as regards choosing the level of consumer protection and the preservation of order in society which they deem the most appropriate”, where the organization of gambling and games of chance must meet the conditions of justification by overriding reasons in the general interest and their proportionality” (CJEU 20 December 2017, Case C-322/16, \textit{Global Starnet Ltd.}, para 39.) See also: M. Gindler, ‘Anmerkung’, 29 EuZW (2018), at p. 285. In \textit{Sporting Odds} the CJEU expressly stated that while the freedom of establishment does not preclude a dual system where certain games of chance are held by the state monopoly and others fall under a concession and license scheme, this system must be objective, and cannot introduce disguised discrimination by reserving licenses exclusively for operators holding concessions for casinos located in the Member State (CJEU 28 February 2018, Case C-3/17 \textit{Sporting Odds Ltd. v Nemzeti Adó- és Vámhivatal}).

\textsuperscript{19} Communication from the Commission to the European Parliament, the Council, the Economic and Social Comittee and the Committee of the Regions: Towards a comprehensive European framework for online gambling. COM/2012/0596 final.

\textsuperscript{20} Nair supra n. 17.


\textsuperscript{22} Article 292 TFEU: The Commission, and the European Central Bank in the specific cases provided for in the Treaties, shall adopt recommendations.
“safeguard the health of consumers and players and thus also to minimize eventual economic harm that may result from compulsive or excessive gambling” in the context of the online gambling market. 23 A typical DLR, this specific Recommendation contained a clause on “Reporting”, foreseeing a deadline for national implementation, the notification of the Commission of measures taken, impact assessment and Commission evaluation. 24 Although adopted in the seemingly unthreatening form of a soft law measure, the Belgian government feared that the Recommendation would constitute a first step in the process of harmonizing gambling regulation across Europe, claiming that the measure was in fact, a directive in disguise. Furthermore, it also understood the gambling recommendation as a move to circumvent the Council, where the Commission would have otherwise expected some push-back.

2. Decisions rendered by the CJEU: A house edge for the Commission?

Belgium filed its action for the annulment of the Recommendation in October 2014 at the General Court, with supporting interventions from Greece and Portugal. Belgium pleaded that the Commission breached fundamental principles of the EU by exceeding its powers, upsetting the institutional balance and failing to provide sufficient time for the national members of the expert group to carry out their consultative mandate. Furthermore, Belgium argued that the Commission adopted the measure without an appropriate legal basis, and that the Recommendation is in fact a binding measure in disguise, actually giving rise to obligations on the side of the Member States. The Commission however, raised the plea of inadmissibility, and maintained throughout that the Recommendation has no binding force, and being a measure with no legal effect, it cannot be challenged. In its order, the General Court upheld the Commission’s plea of inadmissibility, supporting its decision with grounds related to the wording, content, context and intention of the Recommendation and its ensuing lack of binding legal effect, as well as additional procedural considerations. Upon appeal by Belgium, the Court’s judgment upheld the order of the General Court and dismissed the action.

23 Recital (9) of Commission Recommendation 2014/478/EU.
24 Paragraphs 52-54 of Commission Recommendation 2014/478/EU.
2.1 Order of the General Court

In what follows, I analyze the order of the General Court, focusing on the pleadings put forward by Belgium. Belgium’s pleadings may be divided into two main parts: the assertion that the Recommendation was in fact a hidden directive and that the Recommendation does indeed have ‘negative legal effects’ breaching fundamental principles of EU law, and as such, may be challenged under Article 263 TFEU.

a) A directive in disguise?

A central claim made by Belgium in the case was that the Recommendation was in fact a ‘hidden directive’, a legislative instrument with the aim of harmonizing and liberalizing the gambling market running counter to CJEU case-law and exceeding the Commission’s powers.25 To substantiate the claim that the intention behind the Recommendation was in fact harmonization, Belgium pointed to the very detailed nature of the Recommendation’s provisions and its directive-like paragraphs on notification, impact assessment and Commission evaluation.26

What Belgium considered to be a recommendation in form, but a directive in substance has already been identified in scholarly literature as a special category of EU soft law measures. As Linda Senden, a leading scholar in EU soft law research notes, while most recommendations will be restricted to specific issues without general reach,27 in some cases, it is clear that they are actually geared towards harmonization.28 It is within the latter category that Senden identifies certain Commission recommendations as measures strongly resembling directives: apart from their designation as recommendations, the wording, the structure and the general nature of these measures make it difficult to distinguish them from hard law.29

26 Paragraphs 52-54 of the Recommendation. Belgium also referred to the recitals of two earlier draft recommendations, which stated that “the Member States’ rules on the protection of consumers, players and minors from online gambling are fragmented and the objective of the recommendation could be better achieved by action at Union level”, implying that the Commission intended to harmonize the area. However, the General Court did not accept that draft recommendations should be taken into account, especially given the fact that the Recommendation under scrutiny did not reflect this harmonizing aim. CJEU 25 October 2015, Case T-721/14, Belgium v Commission, paras 76-77.
28 Ibid, p. 166.
29 “Meanwhile, the Commission may accompany such recommendations with a ‘threat’ to propose binding legislation in case implementation is untimely or insufficient.” Senden, 164; Géczi Kinga:
recommendations call upon the Member States to implement the recommendations by any necessary measures, they also include a typical clause on implementation. Such clauses typically set forth a deadline for implementation and “requests to inform the Commission of the implementation measures that have been taken and of any other action to comply with the recommendation in question. It seems that in most cases one could even speak of information and notification obligations in respect of these measures, given the mandatory way in which they are often formulated.”

Based on Senden’s findings, there seems to be a spectrum between the ideal types of directives and recommendations described by the TFEU; these are what I have termed directive-like recommendations (DLR). The Recommendation contested by Belgium is in fact such a DLR, that is, a soft law measure of the Commission exhibiting traits strongly resembling those of directives. These legal measures are defined and adopted as recommendations, nevertheless, they several features characteristic of directives, making them appear to be more than genuine recommendations by seemingly affording them binding force. Were Belgium’s claim found to hold water, the recommendations pertaining to the category of DLRs would be challengeable and possibly annulled for violation of fundamental principles and procedural rules.

In its order, the General Court confirmed, that in line with the Grimaldi case-law “the choice of form cannot alter the nature of the measure ... the mere fact that the contested recommendation is formally designated as a recommendation ... cannot automatically rule out its classification as a challengeable act.” It then proceeded to scrutinize the Recommendation in particular, starting with an assessment of its wording, underlining that it is “worded mainly in non-mandatory terms”. Following a comparison of the French, Danish, German, Estonian, Spanish, Italian, Dutch, Polish, Swedish and English language versions of the Recommendation, it came to the conclusion that the

---

30 Senden, supra n. 27, p. 164.
31 These clauses may be entitled e.g. ‘Reporting’ (COM Rec 2014/478/EU), ‘Supervision and Reporting’ (COM Rec 2016/396/EU, Chapter VII.), ‘Reporting and Monitoring’ (COM Rec 2017/1805/EU, Chapter IV.).
32 Senden, supra n. 27, p. 349.
33 Ibid, 165.
measure was clearly not meant to be binding. Acknowledging that certain language versions (German, Spanish, Dutch) seem to have a more mandatory connotation, it held that these are only slight differences, not calling into question the non-binding nature of the Recommendation.\(^\text{35}\) In addition, it noted that the detailed nature of the provisions had no bearing on the bindingness of the Recommendation.\(^\text{36}\)

Turning to the content, context and intention of the Recommendation, the General Court recalled that where the language versions of a legal text diverge, heed must be paid to the “purpose and general scheme of the rules of which it forms part”\(^\text{37}\). In fact, several provisions of the Recommendation clarify, that the measure is not meant to interfere with national regulatory prerogatives in the area of gambling, recalling that in the absence of harmonization, Member States are free to design their own policies for the organization of gambling and the protection of consumers.\(^\text{38}\) The General Court specifically elaborated on the special directive-like Section XII of the measure, noting that “despite the binding wording of [the relevant paragraphs] of the recommendation in certain language versions, the recommendation does not impose any obligation” on the Member States effectively to apply the principles set out in the act.\(^\text{39}\)

Not only did the comparison of the different language versions and the ‘disclaimer’ of the Commission that the Recommendation was not meant to interfere with national regulatory power indicate a lack of mandatory nature according to the General Court, but also the “analysis of its context”. Here, the court took recourse as interpretative aids to a Communication\(^\text{40}\) and an impact assessment\(^\text{41}\) of the Commission on gambling, where – at least for the time being – the adoption of EU legislation on gambling is rejected.\(^\text{42}\) The General Court further noted, that since recommendations do not limit the discretion of Member States in protecting and enforcing their


\(^{40}\) Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Towards a comprehensive European framework for online gambling. COM/2012/0596 final.

\(^{41}\) Impact Assessment accompanying the document Commission Recommendation on principles for the protection of consumers and players of online gambling services and for the prevention of minors from gambling online. C(2014) 4630 final) SWD(2014) 233 final.

\(^{42}\) CJEU 25 October 2015, Case T-721/14, Belgium v Commission, para 36.
respective values and moral convictions, there was actually no interference with national regulatory powers in the case at hand.\textsuperscript{43} Hence, it concluded that since the Recommendation “does not have and is not intended to have binding legal effects”, it cannot be challenged in an action for annulment, and dismissed the action as inadmissible.\textsuperscript{44}

\textbf{b) A breach of fundamental principles?}

As far as the asserted ‘negative legal effects’ are concerned, Belgium claimed that in line with the case-law of the CJEU, the duty of sincere cooperation entails that national courts must take recommendations into account when deciding disputes before them and national authorities are required to comply with them. Therefore, “the formal absence of binding force for the contested recommendation is irrelevant in view of the significant legal consequences of the recommendation.”\textsuperscript{45}

Belgium further pleaded that the Recommendation infringed the principle of conferral, upset the institutional balance and breached the duty of sincere cooperation between the institutions and the Member States. Regarding the infringement of the principle of conferral, in its oral pleadings Belgium argued that it did not suffice for the Commission to refer to Article 292 TFEU as a sort of blank check to be the legal basis for adopting the Recommendation. Article 292 TFEU is merely of procedural nature and should have been accompanied by a reference to a substantive Treaty legal basis indicating the relevant scope \textit{ratione materiae} of EU competence.\textsuperscript{46} Failing to do so amounted to an infringement of the fundamental principle of conferral.

Belgium also claimed that the Commission further breached the duty of sincere cooperation by not leaving sufficient time for the group of experts composed of representatives of the Member States to consider the draft recommendation. It even presented correspondence between Commission officials and the national experts to

\textsuperscript{43} CJEU 25 October 2015, Case T-721/14, \textit{Belgium v Commission}, para 68.
\textsuperscript{44} CJEU 25 October 2015, Case T-721/14, \textit{Belgium v Commission}, para 37.
\textsuperscript{45} CJEU 25 October 2015, Case T-721/14, \textit{Belgium v Commission}, para 42.
\textsuperscript{46} Belgium noted that while the Commission’s impact assessment indicated Articles 114, 168 and 169 TFEU as possible legal bases for the Recommendation, these were later abandoned and not featured in the act. Meanwhile, Belgium also noted that even these articles failed to empower the Commission to adopt a recommendation on games of chance. In fact, Article 168 TFEU only empowers the Council upon a proposal made by the Commission, while Article 169 TFEU only provides for the adoption of acts via ordinary legislative procedure. (Impact Assessment C(2014) 4630 final) SWD(2014) 233 final).
underscore the hasty manner in which the consultation was completed. In Belgium’s view, the duty of sincere cooperation applies even where the act adopted was a recommendation. In fact, it applies all the more so since it was adopted without the control of the other institutions.

Finally, Belgium submitted that by exceeding its regulatory competences and breaching its duty of sincere cooperation, the Commission had also failed to respect the institutional balance, disenfranchising the co-legislators. Belgium proposed that even though the contested measure was formally a recommendation, it must at least be open to a limited review from the aspect of these fundamental principles of EU law, since the absence of such review would amount to a lack of effective judicial protection.47

Without examining the substance of the claims made by Belgium, the General Court focused on the procedural issue of contestability. In its order, the General Court noted, that while the Grimaldi case-law of the Court stipulates that recommendations cannot be regarded as having no legal effect and as such must be taken into consideration by national courts, this does render them challengeable, since that “would lead to the conclusion that any recommendation constitutes a challengeable act”.48 The General Court further added that the possible illegality of an act does not give rise its contestability:49 “the seriousness of the alleged infringement by the institution concerned or the extent of its adverse impact on the observance of fundamental rights cannot justify an exception to the absolute bars to proceedings laid down by the Treaty.”50 As a result, not even a possible breach of fundamental principles or procedural rules could render an otherwise non-challengeable act subject to review. Finally, the General Court recalled that although the consistent case-law of the Court maintains that legal effects capable of affecting the interests of the applicant must be interpreted in the light of effective judicial protection,51 such an interpretation cannot

47 CJEU 25 October 2015, Case T-721/14, Belgium v Commission, para 49.
48 CJEU 25 October 2015, Case T-721/14, Belgium v Commission, para 44.
have the effect of setting aside the requirement of legal effects in violation of the jurisdiction rules set forth under the Treaty.\textsuperscript{52}

### 2.2 Findings of the Court’s judgment rendered upon appeal

Upon appeal by Belgium, the Court rendered its judgment C-16/16 P focusing on the assessment of the standard of review employed by the General Court. The Court reiterated that acts not producing legal effects fall outside the scope of acts reviewable in the framework of annulment proceedings, however, “in exceptional cases, the impossibility of bringing an action for annulment against a recommendation does not apply if the contested act, by reason of its content, does not constitute a genuine recommendation.”\textsuperscript{53} Nevertheless, recapitulating that the analysis of whether a measure is intended to produce binding legal effects should be ascertained with due consideration to its wording, content, context and intention, the CJEU repeated the assessment of the General Court and arrived at conclusion, that the analysis of the General Court was to the requisite legal standard and that the Recommendation could indeed not be challenged under Article 263 TFEU.\textsuperscript{54}

### 3. Conclusion: Chasing losses?

The decisions of the General Court and the Court are important milestones in the caselaw rendered on EU soft law, however, in many respects, the decisions are deeply unsatisfactory. As a positive aspect, we may note that finally, the hitherto unanswered status of DLRs was clarified: it is now clear DLRs are no more binding than any other recommendation adopted by the institutions, notwithstanding the special implementation clause and the possibly “more mandatory terms”. No graduation between recommendations is accepted: a measure will either be considered a genuine recommendation which is necessarily non-binding, or, in case its wording, content, the context and intention of its adoption so indicates, it will be a mandatory measure producing legal effects, mistakenly adopted in the form of recommendation. This conclusion also seems to call into question the expedience of developing the specific template of DLRs employed by the Commission in several policy fields, for in light of

\textsuperscript{52} CJEU 25 October 2015, Case T-721/14, \textit{Belgium v Commission}, para 58.

\textsuperscript{53} CJEU 20 February 2018, Case C-16/16P, \textit{Belgium v Commission}, paras 27, 29.

\textsuperscript{54} CJEU 20 February 2018, Case C-16/16P, \textit{Belgium v Commission}, para 37.
the decisions it is clear that DLRs have no added value when compared with other recommendations.

However, the repetitive and poorly edited order and the judgment may exacerbate existing problems of the fragile institutional balance, without supporting Members States with guidance as to how Union law should be interpreted. Namely, the case-law of the CJEU on language comparison forces national authorities to bear the onus of interpreting measures in the elaboration of which they did not partake, or hardly participated in. Since national experts, ministerial officials were excluded from or hardly had the chance to participate in the legislative procedure, it will be particularly difficult for them to understand the exact intention of the act. Making sense of the text will be all the more confusing, where one or several official language versions of the measure translated by EU translation services contain “more mandatory terms” than others. National bodies must be alert at all times to the fact that any and all EU measures may in fact be mistakenly worded (in fact, translated) in any language version, compelling them to undertake a broad comparison with an undetermined set or number of language versions. However, the CJEU has consistently failed to give guidance as to the number and/or set of language versions to be compared in order to arrive at a correct interpretation of the measure concerned. While this proposition may seem overly casuistic, the Recommendation discussed in the present case note demonstrates, that sometimes it is not just one language version that is the outlier, but in fact, there may be several. Case in point: the language versions of the Recommendation worded in more mandatory terms were German, Spanish and Dutch, three of the six language versions considered most frequently by the CJEU in the framework of its language comparisons in the period between 2004 and 2008. Since there are no strict guidelines as to how many language versions must be compared to arrive at a correct solution, resorting to the analysis of these “more mandatory” versions would have sufficed, but will have produced an incorrect result. While a complete comparison of all language versions may be unrealistic, the practice of the CJEU does no indication as to how many language versions should be included in the analysis. According to Zedler’s empirical findings, apart from blanket references to “the different language versions”, in one-fourth of the cases rendered by the CJEU...

---

between 2004 and 2008 only one other language version was consulted, one third of the cases saw a comparison between 2 to 6 language versions, with the Court carrying out an even more comprehensive comparison in only 17% of the cases. Meanwhile, even where the majority of language versions indicates a certain meaning or interpretation, this shall not necessarily mean that conclusions based on the same will be correct. It may well be the case that it is the ‘minority meaning’ that “conforms with the purpose of the rule as understood by the Court or with the actual intention of the person who drafted the rule and the objective which that person wanted to achieve”. In such cases, a ‘simple’ language comparison conducted by national bodies will not be able to unlock the true legislative intention of the drafters. Consequently, national bodies are particularly hard-put to arrive at a correct interpretation of an EU measure.

The CJEU also insisted that possible breaches of procedural rules and fundamental principles, such as the choosing the wrong legal basis for adopting the Recommendation, infringing the prohibition of *ultra vires* decision-making, the duty of sincere cooperation or upsetting institutional balance must yield to rules governing the scope of judicial review laid down in the Treaty. While doctrinally sound, disappointingly the order and the judgment seem to be giving a green light to the Commission to disregard competence constraints, rules of law-making and fundamental principles that would otherwise apply. The fact that neither the General Court, nor the Court found it necessary to address the possible procedural violations of the Commission effectively normalizes this unwelcome practice, inviting the risk that the Commission will increasingly turn to soft law measures disenfranchising co-legislators and the Member States. On the long run, this may result in a shift in the distribution of competences between the institutions, and the Member States respectively. Senden notes that such recourse to soft law may distort the institutional balance by “being used as a means to circumvent the influence of other institutions in the ‘regular’ decision-making process.” Finally, the laconic findings of the EU courts are particularly unsatisfactory, since they totally disregard the very pressing reasons why the Commission may effectively be forced to circumvent procedural constraints. As evidenced by the present case, the Commission found itself locked in the double

56 Ibid, 181.
58 Senden, supra n. 27, p. 79.
bind: while the European Parliament called upon it to propose legislation on online gambling, Member States and consequently the Council were sure to oppose any measure to be put forward. As such, the unchecked recourse of the Commission to soft measures, and in particular, DLRs in areas where convergence is desired, but legislation is unfeasible, is actually just a symptom of a larger problem.

The fact that the Recommendation has in the end been found to be non-binding does ameliorate the quandary. In fact, while a binding measure could have been challenged under Article 263 TFEU and possibly annulled, this soft law measure will persist and in line with the CJEU’s consistent case-law59 Member State legislators, authorities and courts must consider its substance. More generally, this means that recommendations adopted in flagrant disregard for the participation of national experts, the competences of other institutions and the choice of the correct legal basis must nevertheless form part of Member State courts’ and authorities’ considerations. And while Belgium may be satisfied that the Recommendation was found to be a genuine recommendation with no binding effect, excluding any direct obligations of the Member States, the fact that the Recommendation could not be annulled means that these unwanted and uncontestable effects of the same will prevail: the slow push toward the Europeanization and the liberalization of gambling market. After all, this is what the Commission seemed to be gambling for all along.

59 ECJ 13 December 1989, Case C-322/88, Grimaldi, paras 7, 16 and 18; ECJ 11 September 2003, Case C-207/01, Altair Chimica, para 41; CJEU 18 March 2010, Cases C-317/08 to C-320/08 Alassini and Others, para 40.