

EU acts without binding legal force producing binding legal effects at the national level: Enforcement of ESA soft law in the Czech Republic

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Abstract

The European Supervisory Authorities (ESAs) are empowered, by their founding regulations, to adopt guidelines and recommendations “*with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law*”. These acts can be considered genuine EU soft law since they lack the binding legal force. However, they remain perfectly non-binding only at the EU level and in the relation between the ESAs and the national competent authorities (NCAs). Although the NCAs have a duty “*to make every effort to comply*” with such soft law, they keep a certain leeway to decide whether they eventually comply or not. Nonetheless, the situation is different in case of financial institutions under their supervision. Formally, the EU regulations attribute to them also only a duty “*to make every effort to comply*”. However, once the NCA decides to comply and effectively enforces the compliance from financial institutions, the latter have a very limited, or even no leeway to decide about the compliance. Within the complex regulatory system, the NCA metamorphosis from a norm-taker into an effective norm-enforcer who is capable to determine what effects the ESA soft law have at the national level.

This paper focuses on the life of ESA soft law in the Czech Republic. It examines the role and power of the Czech NCA (the Czech National Bank, CNB) in the light of the legislative framework and other domestic binding legal rules. It takes into consideration the real enforcement strategy and practices of the CNB to show that, in the hands of the CNB, ESA guidelines and recommendations become acts, which produce binding legal effects upon financial institutions. Based on this observation, the paper raises questions about the proper control of ESA soft law and potential remedies.

Keywords:

Finance and banking, EU soft law, European Supervisory Authorities, national enforcement, control and remedies

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I. Introduction

Within the initiative to enhance the integration of the financial markets, the EU established² three independent supervisory agencies (European Supervisory Authorities, “ESAs”)³, namely European Securities and Markets Authority (ESMA), European Banking Authority (EBA) and European Insurance and Occupational Pensions Authority (EIOPA).⁴ According to their respective founding regulations, the main task of all three agencies is to protect the public interest by contributing to the stability and effectiveness of the financial system. Within this task, the ESAs are empowered to issue guidelines and recommendations in order to establish consistent, efficient and effective supervisory practices within the ESFS, and to ensure the common, uniform and consistent application of Union law.⁵

Concerning their legal status, guidelines and recommendations may be subsumed under the concept of EU soft law. Recommendations are even foreseen in primary law: Article 288 TFEU specifies that they are without binding legal force. However, their very inclusion in Article 288 TFEU indicates that they are in fact legal acts, that is to say, acts capable of interfering with the legal sphere of their addressees or of third parties. Guidelines have no legal definition in the primary law, but in practice and in case law of the CJEU, they are considered to have the same legal quality as recommendations – i. e. they are legal acts without binding legal force.⁶ Since both guidelines and recommendations are of the same legal nature,⁷ when the following text speaks only about guidelines, the arguments apply to recommendations under Article 16 accordingly.⁸

Unless the content of such acts proves otherwise, both guidelines and recommendations issued by the ESAs can be – when taken in isolation – considered pure and genuine soft law, legally non-binding and not producing binding legal effects.⁹ It is argued that without the binding legal force, the legal effects of any instrument are very uncertain.¹⁰ But when the ESA guidelines or recommendations are taken in their proper context and based on the analysis of their actual impact on the ultimate addressees, something stronger can be discerned. The complex system and its functioning show the necessity to make a difference between the “static” binding legal force of the act as such on the one hand and the “dynamic” (binding) legal effects that the given act is capable to induce on the other hand.¹¹ Even if an act is not equipped with binding legal force, a kind of bindingness can occur thanks to mechanisms, which are present outside that act.

This paper is based on the premise that the actual (legal) effects of the guidelines and recommendations issued by the ESAs must be analysed in the whole context and, especially, from the national perspective because they effectively intervene into the sphere of individuals at the national level. The paper uses the example of the Czech legal order to show that something that is adopted as “nothing more than soft law” at the EU level becomes “almost inevitable hard law” at the national level due to the involvement of the Czech National Bank.¹² Finally, based on the analysis of the effects, the paper discusses the issue of appropriate remedies and control of ESA soft law.

² In fact, the authorities were transformed from the existing advisory committees of the Commission.

³ See details on the role of all three authorities e. g. in Kostas Botopoulos, ‘The European Supervisory Authorities: Role-Models or in Need of Re-Modelling?’ (2020) 21 ERA Forum 177.

⁴ Regulation 1093/2010 establishes the European Banking Authority (EBA). The European Insurance and Occupational Pensions Authority (EIOPA) is established by Regulation 1094/2010. Finally, Regulation 1095/2010 establishes the European Securities and Markets Authority (ESMA). Together referred to as “founding regulations”.

⁵ Article 16 of the founding regulations.

⁶ See Oana Stefan, ‘European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects’ (2012) 75 The Modern Law Review 879.

⁷ In the currently effective version of the regulations (since 2021), there are differences in the scope of addressees: guidelines are issued to all competent authorities or all financial institutions, while recommendations are addressed to one or more competent authorities or to one or more financial institutions.

⁸ There are also recommendations under Art. 17 of the founding regulations, which have a different purpose, form and context.

⁹ Marloes van Rijsbergen, ‘On the Enforceability of EU Agencies’ Soft Law at the National Level: The Case of the European Securities and Markets Authority’ (2014) 10 Utrecht Law Review 116, 117.

¹⁰ CM Chinkin, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 The International and Comparative Law Quarterly 850, 862.

¹¹ Linda Senden, *Soft Law in European Community Law* (Hart 2004) 235.

¹² Similarly, see opinion of AG Bobek of 15 April 2021 *Fédération bancaire française* (C-911/19, EU:C:2021:294, p. 54).

II. The legal value of the ESA guidelines from the EU perspective

Each of the European Supervisory Authorities is established by a separate regulation.¹³ The structure of all three founding regulations is very similar, and the regulatory powers of the individual institutions are generally the same. Article 1 of all three founding regulations sets out the scope of each of the European Supervisory Authorities; this scope is delimited by legally binding Union law. The founding regulations directly list what particular rules fall within the scope of each ESA, and they refer to the possibility of adopting other legally binding acts which expressly confer powers on a particular ESA.¹⁴ The limits of the scope of powers are not entirely sharp, since the regulations allow ESAs to act also on issues that are not explicitly addressed in those legally binding or referenced acts, where this is “necessary to ensure the effective and consistent application of those acts”.¹⁵

Concerning the power to issue acts of general application, Articles 16 of all three regulations provide that the given ESA has the power to issue guidelines and recommendations addressed to competent authorities or financial institutions. According to Articles 16, the purpose of such acts is twofold. First, the guidelines and recommendations are intended to establish uniform, efficient and effective supervisory practices within the European System of Financial Supervision (ESFS). Second, they aim to ensure the common, consistent and uniform application of European Union law.

Once the guidelines or recommendations are issued, a question follows: What are the real legal effects of such acts? From the perspective of the scholarly classification of soft law acts according to functional criteria, guidelines and recommendations must be considered post-legislative (complementary) acts.¹⁶ This follows from the combination of Articles 1 and 16 of the foundation devices. According to Articles 16, the purpose of guidelines or recommendations is to ensure the common, consistent and uniform application of Union law. Articles 1 then define which legally binding acts of the Union constitute the scope of competence of a particular ESA. Therefore, guidelines and recommendations under Articles 16 must be deemed “implementing” soft law, i. e. complementary documents, which elaborate upon the content of provisions of binding acts and suggest how to implement those provisions in practice.

It can be inferred therefrom that a particular ESA has the power to issue guidelines and recommendations that ensure the consistent and uniform application of those legally binding Union acts that fall within its remit. Conversely, a negative definition of powers can be deduced from the setting that the ESAs cannot issue soft law acts whose content goes beyond the provisions of legally binding acts that fall within their respective scope of competences. Therefore, guidelines and recommendations cannot set out new rights and obligations going beyond the existing rights and obligations, which are already set out in binding legislation, even if such new rights and obligations are in the form of an advice or a recommendation formulated in non-mandatory language.

When looking solely at the text and the language of the guidelines, it seems easy to conclude that they represent classic or genuine soft law acts, which are, according to the test developed by the CJEU in case *Belgium v. Commission*, considered as producing no binding legal effects.¹⁷ First, they use non-mandatory language, which is characterized primarily by the conditional form of modal verbs (“should” in contrast to the mandatory “shall”) or by an explicit advice or recommendation to do something, or a by a call to behave in a certain way.

¹³ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, 15.12.2010, p. 12–47; Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, 15.12.2010, p. 48–83; Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, 15.12.2010, p. 84–119.

¹⁴ Article 1(2) of each of the founding regulations.

¹⁵ Article 1(3) of each of the founding regulations.

¹⁶ Linda Senden, ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’ (2013) 19 *European Law Journal* 57; Joanne Scott, ‘In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law’ [2011] *Common Market Law Review* 329; Steven Vaughan, ‘Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies’ (2015) 17 *Cambridge Yearbook of European Legal Studies* 66.

¹⁷ Judgment of 20 February 2018, *Belgium v Commission* (C-16/16 P, EU:C:2018:79).

Second, they do not indicate that their addressees have, actually, an inevitable obligation to follow the rules contained therein; they allow for a certain leeway to decide upon their respect. Third, since ESAs are not empowered to issue binding rules of general application, one cannot conclude that the very aim of any of the ESAs was to issue binding norms.

The basic setting of soft law acts issued by the European Supervisory Authorities is that they are legally non-binding acts. However, this characteristic does not, in itself, indicate what effects the ESA guidelines have or may have in practice. In fact, the very content and language of the guidelines cannot be the only factor from which we can infer the legal effects of such acts. The test made by the CJEU in case *Belgium v. Commission* therefore seems to be oversimplified and inadequate, because it forgets to look at what happens with the EU soft law at the national level.

The crucial aspect is the delimitation of addressees of such acts. According to Articles 16, guidelines and recommendations are addressed to “*competent authorities*” or “*financial institutions*”.

The national competent authorities (“NCAs”) are primary addressees and especially from their perspective, the ESA soft law acts are based on the principle “follow or explain”.¹⁸ The NSAs have a duty to “*make every effort to comply*”. Nevertheless, they are left with the discretion to decide whether to comply with the guidelines (opt-in) or not (opt-out). Articles 16 of all three regulations themselves provide for the possibility that NSAs choose not to comply with the soft law documents in question (opt-out). In such a case, however, they remain obliged to notify the ESAs of their decision within 2 months after the issuance of the act and to explain the reasons (thus there is a corollary obligation of notification and justification).¹⁹

In practice, such an opt-out usually occurs when national legislation does not allow the regulatory body to adopt the guidelines (in general, all Union guidelines or, in particular, guidelines in the given field)²⁰. There is also the possibility that the supervision of the financial markets within one Member State is carried out by several administrative authorities, not all of which have jurisdiction over the area covered by respective guidelines. It may therefore be the case that several regulators notify the ESAs of the use of the opt-out option, but at least one regulatory authority in the Member State remains to opt-in.²¹

At first sight, it may seem that the NSAs has complete freedom to decide whether to opt in or opt out. However, the guidelines may be accompanied by other mechanisms that encourage regulators to respect them, such as reporting and monitoring. For example, the EIOPA Guidelines on the Submission of Information²² in paragraph 1.31 states that national authorities “*should send a progress report to EIOPA on the implementation of these guidelines by the end of February of each following year. The first report should be submitted by 28 February 2015 and should cover the period from 1 January 2014 to 31 December 2014.*” While this is merely a mild request written in a non-mandatory language, it may increase the incentive for national authorities to comply with the guidelines. Also, the monitoring itself on the side of the ESAs is a factor that increases the likelihood of the compliance by the national competent authorities.²³ In any event, and formally speaking, there is no legal mechanism that would push the NSAs to comply; they are left with the discretion to make the final decision.

In any event, the situation of financial institutions is different. If a national competent authority opts in, it can be argued that for the financial institutions under its supervision this, in practice, means that they must almost always follow the guidelines. Respectively, it is extremely difficult for financial institutions to avoid complying with the content of the guidelines. This argument can be supported by the following reasons.

Although the guidelines use non-mandatory language, the non-mandatory rules are usually addressed to national competent authorities. In some cases, the guidelines explicitly address financial institutions as final

¹⁸ Jakob Schemmel, ‘The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market-Capturing the Administrative Influence’ (2016) 23 *Indiana Journal of Global Legal Studies* 455, 465.

¹⁹ The financial institutions have a similar duty only if it is stated in the guidelines/recommendation.

²⁰ E.g. Austria with regard to the Guidelines no. EBA/GL/2015/18, see p. 110 of the EBA annual report of 2016; or Germany with regard to Guidelines no. EBA/GL/2015/12, see the table of compliance from 4 August 2016. Both available at: eba.europa.eu.

²¹ For example, see the case of Finland with regard to Guidelines no. EBA/GL/2015/11. See the table of compliance from 4 August 2016, available at: eba.europa.eu.

²² EIOPA Guidelines on the Submission of Information for the National Competent Authorities, EIOPA-CP-13/010.

²³ Schemmel (n 18) 365.

addressees. It is the presence of two types of addressees that begins to complicate the question of how binding the guidelines are in the very end.

For example, the ESMA Guidelines on Cross-Selling Practices²⁴ are addressed to national competent authorities and articulate the following advice: “*Competent authorities supervising firms which distribute a tied or a bundled package should require firms to ensure that clients are provided with information on the price of both the package and of its component products.*”²⁵ Other guidelines are formulated in a similar way – thus recommending to national regulators what they should require from financial institutions. Financial institutions are not direct addressees; the guidelines do not recommend anything specific to the financial institutions themselves. However, by recommending what national supervisors should require, the guidelines indirectly apply to financial institutions that should, or possibly have to provide clients with information on the price of the package and its individual components. The extent to which financial institutions may voluntarily decide not to follow the guidelines thus, in fact, depends on how strongly and by what means the national competent authority will enforce them.

In other cases, the guidelines are addressed directly to financial institutions, such as the EBA guidelines on disclosure of capital requirements information²⁶. For example, paragraph 20 states that “[i]nstitutions that exclude exposures to their central bank from their total exposure measure [...] should add the disclosure [...] in a separate row to be inserted in the table ‘LRCo [...]’”. Next, national competent authorities are implicitly expected to require financial institutions to comply with these guidelines. Again, the degree of the actual obligation of financial institutions will depend on how the guidelines are enforced by the respective national regulator.

Remaining at the EU level, it can be concluded that ESA guidelines represent tools of harmonization and uniform application of binding EU law provisions. Although such acts do not have binding legal force, they still contain certain legal power; they are not mere policy suggestions, but proper legal acts having power to influence the conduct of their addressees.

The ESAs formally address their soft law acts to national competent authorities, with the main and effective addressees of the guidelines being financial institutions, which are called upon to implement specific requirements in their internal systems. In this respect, the guidelines are similar to legally binding directives: they also address the Member States and oblige them to transpose certain rules into national law, while the actual implementation of these rules is ultimately required from individuals. What is different in case of guidelines is the lack of bindingness in relation to the national competent authorities, and derivatively the lack of the possibility of individuals to claim direct effect if the authority does not follow the guidelines. However, if the authority opts in, the national life of guidelines is analogous to the functioning of the directives.

Hence, the real effects of ESA soft law acts depend on the choice of the national authority. The following text will show the concrete effects of the ESA guidelines or recommendations within the Czech legal system.

III. Legal effects of ESA guidelines in the Czech Republic

In the Czech Republic, the competent national authority to which the guidelines of the European Supervisory Authorities are formally addressed is the Czech National Bank (“CNB”). If the CNB decides to opt-in, then it states this in a notice published on the official notice board (in practice, on its website www.cnb.cz). In such a notice, the CNB usually announces that it intends to comply with the given guidelines and that it requires the financial institutions to make every effort to follow these guidelines. The example of such a notice looks like the following: “*The Czech National Bank will conduct its supervision in accordance with these guidelines and expects supervised entities to make every effort to comply with these guidelines. The CNB will also use these guidelines when supervising the provision of consumer loans for other purposes than housing.*”²⁷ The Czech

²⁴ The ESMA Guidelines which help to clarify the expected standard of conduct and organisational arrangements for those firms engaged in cross-selling practices in order to mitigate any associated investor detriment, 11 July 2016, ESMA/2016/574.

²⁵ ESMA/2016/574, Guideline 1, point 12.

²⁶ The EBA Guidelines on supervisory reporting and disclosure requirements in compliance with the CRR “quick fix” in response to the COVID-19 pandemic (EBA/GL/2020/11), 11. 8. 2020.

²⁷ CNB Notice from 1 June 2015 on EBA Guidelines EBA/GL/2015/11.

National Bank may also decide to comply only with a part of the guidelines,²⁸ or it may state that the opt-in is only conditional (in fact provisory opt-out, until a specific condition is fulfilled).

The legal nature of such notices is a questionable issue. The notices certainly open the door for the implementation of the content of the guidelines within the Czech legal order. However, it is not clear whether such a notice is a normative or merely an informative act. As regards the statutory empowerment, Section 49a (3) of the Act on the Czech National Bank states that the CNB issues official notices “*informing about...*”. It could be inferred from this that the notice itself is not of a normative nature, but nevertheless has practical implications.

Following the CNB's notice, the EU guidelines continue to be a legally non-binding document, but the content of the guidelines becomes a practical obligation for financial institutions primarily as a result of the CNB's supervisory activities or of the references in legally binding rules.

The empowerment of the CNB to take into account, in its supervisory activities, the EU soft law acts of the European Supervisory Authorities is sometimes explicitly mentioned in the statutes. For example, Act No. 21/1992 Coll. on Banks states that the CNB shall, within the exercise of its powers, follow “*the guidelines, recommendations, standards and other measures adopted by the European Banking Authority, unless it states the reasons why it does not do so.*”²⁹ Similar provisions can also be found in Act No. 87/1995 Coll. on credit unions³⁰ or in Act No. 256/2004 Coll. on doing business on the capital market³¹.

It means that the Czech legislation transposes the rule set out in the founding regulations, namely that the CNB, as the national competent authority, has the option of opt-out in relation to specific EU soft law acts, which must, however, be well-reasoned. Otherwise, i. e. when there are no reasons for opt-out, the CNB has a legal obligation to rely on such acts. In other words, as soon as the CNB informs in its official notice issued pursuant to Section 49a (3) of the Act on the CNB that it intends to exercise supervisory powers on the basis of specific EU guidelines, it is itself bound by this statement.

The open question is whether the CNB is bound, from the national point of view, by all its notices or whether it is only the case of guidelines included in the field covered by the legislation that explicitly obliges the CNB to follow the guidelines. The latter situation seems to be slightly stronger, since non-respect of the guidelines on the side of the CNB, without notification of reasons, could be considered a breach of binding national legislation. In the former case, on the other hand, non-respect (i. e. reluctance to enforce the guidelines from national financial institutions) would mean only a breach of a promise made to the ESAs. In any event, it is hard to imagine a situation where the non-enforcement of guidelines could be legally challenged. If the CNB does not interfere into rights of individuals stemming from public law (and non-enforcement could hardly be such interference), no one else has a legal standing to start judicial proceedings within the administrative judiciary. Moreover, there is no other mechanism within the administration that would compel the CNB to stand by its own notices.

Apparently, the willingness of the CNB to effectively enforce the ESA soft law acts is the crucial element having influence on their real “life” in the domestic conditions. In practice, the respect of its own notices to comply with ESA guidelines may get different forms.

For example, the CNB may require from the supervised entities to submit information and documents proving that they comply with legally binding Czech and EU provisions. As the guidelines are intended to clarify the content of the binding legal provisions of the Union in accordance with the founding regulations of the ESAs, the CNB may evaluate the non-compliance with the guidelines as a deviation from these binding legal provisions. Alternatively, if the CNB finds any deficiencies in the internal management of the financial institution that contravene the guidelines, it invites the financial institution to take remedial action. Failure to respond to the invitation may result in sanction proceedings. Effective enforcement of EU guidelines can also take place through licensing procedures. The CNB may require that the documents submitted by the applicant

²⁸ E. g. CNB Notice from 20 December 2016 on common guidelines for the prudential assessment of the acquisition or increase of qualifying holdings in the financial sector.

²⁹ Article 25(5) Act no. 21/1992 Coll. on banks.

³⁰ Article 21(7) Act no. 87/1995 Coll. on credit unions.

³¹ Article 135a(4) Act no. 256/2004 Coll. on doing business on the capital market.

must comply with EU guidelines, otherwise it will not grant the license.³² In all these cases, the CNB mediates the real impact of EU soft law on national financial institutions.

In this context, it should be emphasized that the guidelines themselves, from the perspective of EU law, do not and cannot create a separate obligation different from the obligation set out in legally binding EU legislation, as it stems from the combination of Articles 1 and 16 of the founding regulations. The purpose of the guidelines is to clarify the content of legally binding provisions and to recommend how they are to be interpreted and implemented in practice in the name of the uniform application of Union law. It can be deduced from this that the obligation to comply with binding regulations in the spirit of uniformity means the need to put into practice guidelines that follow the binding regulations.

The obligations of ultimate addressees (financial institutions) to comply with EU guidelines are sometimes explicitly stated in CNB decrees. For example, Decree No. 244/2013 Coll.³³, which regulates the setting up of management and control systems for investment fund managers and administrators, states that the supervised entities shall transpose into their internal rules the ESMA guidelines “*unless their specific provisions conflict with legal requirements*”.³⁴

Similarly, CNB Decree No. 163/2014 Coll.³⁵, which applies to banks, saving institutions and credit unions, securities dealers, and branches of a bank from the third countries, regulates, inter alia, the requirements for the management and control system. Within the rules for the sound administration and management of the financial institutions, the decree sets the obligation for the financial institution to always comply with the general guidelines of EBA, ESMA, EIOPA and the ESFS within its activities, “*unless their specific provisions are contrary to the requirements of the legislation or unless their implementation can circumvent the purpose of binding legal rules*”.³⁶

Legally binding national rules (specifically decrees of the CNB) therefore explicitly lay down obligations for financial institutions to comply with EU soft law acts. The only exception to this obligation occurs if a specific soft law rule conflicts with a legally binding rule. It is not clear whether this means an EU rule or a national rule. Theoretically, one can imagine a situation where the EU soft law provision contradicts the Czech legislation, but at the same time it is not in conflict with any binding legal act of the Union. The question therefore arises as to whether, in view of the principle of the primacy of EU law, it is also necessary to give priority to EU acts of a soft law nature over a legally binding Czech provision to which a soft law provision could be in conflict.

Again, one can find an argument saying that guidelines should not impose new obligations going beyond binding provisions (of EU law), but they may only clarify the content of the binding provisions and recommend how these provisions should be interpreted and applied. Therefore, if the guidelines meet this condition, they are only an extension of legally binding EU law. In such a case, it is difficult to imagine a situation where the implementation of the guidelines would be ruled out in view of the conflicting Czech provision, without such a national provision itself being contrary to EU law. On the contrary, if the guidelines set out requirements contrary to binding EU rules, it would be appropriate to consider them as being issued out of the scope of competences of the respective ESA – and this issue is closely linked to the question of the reviewability of EU soft law acts, and the question of who can pronounce such acts invalid or at least ineffective.

However, in practice, as far as I know, such a problem has not yet occurred, so it still remains at the level of academic debate. However, the opposite phenomenon – i. e. the situation where the CNB explicitly enforces the implementation of EU soft law – is not unusual in practice.

³² All these types of practical enforcement of EU soft law have no explicit statutory empowerment, but this practice was confirmed by lawyers working within the CNB or for the supervised financial institutions.

³³ CNB Decree no. 244/2013 Coll. providing a more detailed regulation of certain rules of the Act on Investment Companies and Investment Funds.

³⁴ Article 3(2) of Decree no. 244/2013 Coll.

³⁵ CNB Decree no. 163/2014 Coll. on the performance of the activities of banks, savings and credit unions and securities dealers.

³⁶ Article 10(3)(a)(2) of Decree no. 163/2014 Coll.

We can approach such a situation with the decision in *NEY spořitelní družstvo*.³⁷ In the administrative decision, the CNB imposed on the party to the proceedings, pursuant to the Act on Credit Unions³⁸, the obligation to introduce a process of regular evaluation of the adequacy of allocated capital through a comprehensive stress test within the specified period (point six of the effective part of the decision). In its justification, the CNB stated that, pursuant to Decree No. 163/2014, the party to the proceedings is obliged to comply with and incorporate into its internal system the guidelines of the EBA (specifically guidelines EBA/GL/2014/13). The CNB found out that the internal systems of the financial institution under assessment did not comply with the requirements set out in the given guidelines, which resulted in the breach of the obligation arising from Article 7a letter b) of the Act on Credit Unions.³⁹

This case shows very well the chain of legal effects that spans from the Union level to individuals within a Member State. Article 117(3) of Directive 2013/36/EU⁴⁰ (referring to the general authorization referred to in Article 16 of Regulation 1093/2010) provides that the EBA shall issue guidelines addressed to national competent authorities to further specify common supervisory and evaluation procedures and methodologies applicable to credit institutions. The EBA responds to this call by issuing guidelines no. EBA/GL/2014/13.

The said directive is transposed into the Czech legal system, inter alia, by means of Act No. 87/1995 Coll. on Credit Unions. The act states in article 21(7) that the CNB bases its supervision of credit unions on the guidelines adopted by the EBA. With regard specifically to credit unions, the act sets in Article 7a the obligation to have a management and control system. This provision is further elaborated by the above-mentioned Decree No. 163/2014, which obliges financial institutions to comply with the EBA guidelines and incorporate them into their internal systems. On the basis of the combined application of all the aforementioned acts, the CNB obliges the party to the proceedings in an individual administrative decision to implement the procedural requirements specified in the EBA guidelines into its own system.

Thus, although the EBA guidelines in question are, in themselves, an act of the Union which is not, following Article 288 TFEU, legally binding, their content becomes binding upon the final addressees (financial institutions) through references in legally binding acts or through the enforcement practice of the national supervisory authority. Based on the CNB decrees or as a part of requirements communicated by the CNB within administrative proceedings, the supervised entities are explicitly enforced to implement the content of the EU guidelines into their internal systems.

There are also other decisions where the CNB follows the same pattern of reasoning: Non-compliance with a specific ESA soft law act is evaluated as a breach of a binding provision of a decree, which leads to the breach of an obligation stemming from a statute (which is a transposition act of an EU directive).⁴¹

Apparently, the real masters of enforcement of EU soft law in the field of banking and finance are the national competent authorities, such as the CNB. The way the CNB requires the compliance from the financial institutions as the effective addressees of the guidelines therefore influences the strength of the guidelines in practice.

In general, we can sum it up by the fact that the EU body issues a soft law act, but its content becomes a clear legal obligation for national entities thanks to the supervisory activities of other actors. As follows from CNB decrees, the obligation does not apply only if the given EU soft law act contradicts legally binding rules, otherwise it is not possible to waive this obligation. And the possibility of avoiding implementation with reference to a conflict with a legally binding regulation is, as indicated above, not very likely.

³⁷ CNB Decision from 18 September 2019, decision no. 2019/99456/570, case no. Sp/2019/53/573.

³⁸ Act no. 87/1995 Coll. on Savings and Credit Cooperatives and Certain Related Measures and on Amendments to Act of the Czech National Council No. 586/1992 Coll., on Income Taxes, as amended.

³⁹ P. 15 of the CNB Decision no. 2019/99456/570.

⁴⁰ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176, 27.6.2013, p. 338—436.

⁴¹ Phoenix Investor CZ - decision no. 2021/21718/570 of 1 March 2021, file no. Sp/2018/230/573; KAPITOL - decision no. 2017/163117/570 of 8 December 2017, file no. Sp/2017/56/573; Expobank CZ - decision no. 2020/103353/570 of 17 August 2020, file no. Sp/2019/352/573; Československé úvěrové družstvo - decision no. 2017/108743/570 of 4 August 2017, file no Sp/2016/439/573.

The question is therefore whether it is possible to insist that such guidelines issued by the European Supervisory Authorities do not have (binding) legal effects vis-à-vis third parties. The guidelines are indisputably issued as EU acts having no binding force (by enlargement of Article 288 TFEU on atypical soft law acts). However, through the complex enforcement mechanism that relies on national implementation provisions and enforcement activities of national competent authorities, the content of the guidelines is practically transformed into binding obligations.⁴² The Czech example shows that something that is adopted at the EU level as a genuine soft law becomes binding for the ultimate addressees at the national level. Or, in other words, the very same act has no binding legal force vis-à-vis the national authorities but, due to their involvement, it induces binding legal effects vis-à-vis individuals under their supervision.

IV. Who is responsible for control and remedies?

The uncertainty about the legal value of ESA guidelines and recommendations and about their real impact on ultimate addressees is also linked to the question of appropriate remedies and control. As it was explained above, the content of guidelines must cover only those aspects that are already present in binding EU acts which delimit the scope of action of each of the ESAs. The guidelines serve as tools helping with the consistent and uniform application of EU hard law. They should be only an elaboration of the rules contained in hard law acts delimiting the scope of action of the respective ESA. It is also linked to so-called non-delegation doctrine: the EU agencies are not allowed to make their own policy choices; they have no wide margin of discretion.⁴³

Without any means of control, there is a risk that the ESAs would go beyond the scope of their respective competence or that they would issue soft law acts contradicting the EU hard law norms. The question is what body is responsible to control the production of ESA soft law and to provide for potential remedies. The practical bindingness of guidelines is somehow expected within the whole system having its roots at the EU level, but it becomes reality only through the national input. The question is whether the remedies should be provided at the EU level or at the national level.

The newest amendments⁴⁴ of the regulations establishing the ESAs show that the need for a remedy is already foreseen at the EU level. Chapter V, which bears the title “Remedies”, now contains the newly added Article 60a. It expects the possibility that any of the ESAs when acting under Article 16, and thus when issuing guidelines or recommendations, exceeds its competence. In such a case, it is possible to send reasoned advice to the Commission. Quite a peculiar (or hardly understandable) requirement is that such advice may be sent by any natural or legal person if this person was directly and individually concerned by the excess of competence by the given ESA. If the condition of “direct and individual concern” is to be interpreted in the same way as in the CJEU case law⁴⁵ on the admissibility of action under Article 263 TFEU, it is hard to imagine how anyone can be significantly concerned by an act of general application that is expected to be legally non-binding. Not only it is unclear why it is needed to be directly and individually concerned in order to merely inform the Commission about the excess of competences of an EU agency, but it is also strange to limit this possibility to individuals, thus omitting other EU institutions and bodies or the Member States.

⁴² van Rijsbergen (n 9) 122.

⁴³ Judgments of 13 June 1958, *Meroni v High Authority* (9/56, EU:C:1958:7); of 14 May 1981, *Romano* (98/80, EU:C:1981:104); and of 22 January 2014, *United Kingdom v Parliament and Council* (C-270/12, EU:C:2014:18). See also Marta Simoncini, ‘The Delegation of Powers to EU Agencies After the Financial Crisis’ (2022) 2021 6 *European Papers - A Journal on Law and Integration* 14851503; Merijn Chamon, ‘EU Agencies: Does the Meroni Doctrine Make Sense?’ (2010) 17 *Maastricht Journal of European and Comparative Law* 281; Stefan Griller and Andreas Orator, ‘Everything under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 *European Law Review*.

⁴⁴ Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds, OJ L 334, 27.12.2019, p. 1–145.

⁴⁵ See especially the Order of the General Court of 6 September 2011, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* (T-18/10, EU:T:2011:419, p. 45-49).

In any event, this new provision albeit being practically toothless confirms the argument that the ESAs are allowed to adopt guidelines or recommendations only within the scope of their respective competences and that any excess calls for a remedy. Nevertheless, and one is tempted to say unfortunately, the amended Regulations do not specify the powers of the Commission after it receives the reasoned advice informing about the excess of competences. It is not clear whether the Commission may pronounce any guidelines invalid or whether it may force the ESA to withdraw such an act. It may be argued that since ESAs are independent bodies, they are not supposed to receive instructions from other EU institutions. Therefore, probably, the Commission can only inform the given ESA about its excess of competence and leave it to solve it on its own.

Theoretically, the remedy could be somehow provided by national competent authorities. Since they have the (plausibly) unlimited leeway to decide whether to comply with concrete guidelines or not, they may compensate for the excess of competence on the side of the issuing ESA by mere opt-out. The guidelines would remain valid, but ineffective in the given Member State.

Ultimately, the legal remedy should be provided by the judiciary.⁴⁶ As it stems from the old *Meroni* case,⁴⁷ the delegated public power (and it is certainly the case of independent agencies in the domain of banking and finance) must be subject to judicial control. The question is whether it is practically possible to review and potentially annul the guidelines at the level of the CJEU, and if not, whether it is within the competence of national courts to step in and perform the control of validity of EU guidelines at the national level.

The CJEU seems to be reluctant to offer direct judicial review under Article 263 TFEU of acts that do not have binding legal force on their own. The Court constantly repeats that “*actions for annulment, provided for under Article 263 TFEU, are available in the case of all measures adopted by the institutions of the European Union, whatever their nature or form, which are intended to have binding legal effects.*”⁴⁸ As it stems from the judgment in case *Belgium v. Commission*, the presence of the binding legal effects is assessed only at the level of the act itself; the Court does not examine the very impact of the given act. In case *FBF* (even if it was a preliminary reference case), the Court confirmed that ESA soft law is not admissible for the direct judicial review.⁴⁹

Nevertheless, the Court allows for the possibility to perform the assessment of validity through the preliminary reference procedure.⁵⁰ In two recent cases – *BT v Balgarska Narodna Banka*⁵¹ and *FBF*⁵² – the Court provided for such an assessment in practice. In the first one, it even invalidated the contested recommendation of the EBA. In the latter, the Court acknowledge that even soft law acts deserve normal “stringent” review as any other binding EU legal act, but at the end, it did not find a reason why the contested act (EBA guidelines) should be invalidated.

⁴⁶ See Article 47 of the EU Charter of Fundamental Rights. See also Sacha Prechal and Rob Widdershoven, ‘Principle of Effective Judicial Protection’ in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU agencies: the rule of law in a multi-jurisdictional legal order* (Edward Elgar Publishing 2020).

⁴⁷ Judgment of 13 June 1985, *Meroni v Haute autorité* (C-9/56, EU:C:1958:7).

⁴⁸ Judgment of 26 March 2019, *Commission v. Italy* (C-621/16 P, EU:C:2019:251, p. 44), referring to other cases: *Deutsche Post and Germany v Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, p. 36); *Hungary v Commission* (C-31/13 P, EU:C:2014:70, p. 54); *Romania v Commission* (C-599/15 P, EU:C:2017:801, p. 47); *Belgium v Commission* (C-16/16 P, EU:C:2018:79, p. 31).

⁴⁹ Judgment of 15 July 2021, *Fédération bancaire française* (C-911/19, EU:C:2021:599, p. 50).

⁵⁰ Judgment of 20 February 2018, *Belgium v Commission* (C-16/16 P, EU:C:2018:79, p. 44); judgment of 13 December 1989, *Grimaldi* (C-322/88, EU:C:1989:646, p. 8); judgment of 13 June 2017, *Florescu and Others* (C-258/14, EU:C:2017:448, p. 30).

⁵¹ Judgment of 25 March 2021, *Balgarska Narodna Banka* (C-501/18, EU:C:2021:249). See also Pavlína Hubková, ‘Judicial Review of EU Soft Law: A Revolutionary Step Which Has Not Fully Happened (Case Note on *BT v Balgarska Narodna Banka*, C-501/18)’ [2021] *Revista General de Derecho Europeo*; Giulia Gentile, ‘To Be or Not to Be (Legally Binding)? Judicial Review of EU Soft Law after *BT* and *Fédération Bancaire Française*’ [2021] *Revista de Derecho Comunitario Europeo* 981.

⁵² Judgment of 15 July 2021, *Fédération bancaire française* (C-911/19, EU:C:2021:599). See, e. g., Merijn Chamon and Nathan de Arriba-Sellier, ‘*FBF*: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies: ECJ (Grand Chamber) 15 July 2021, Case C-911/19, *Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudenciel et de Résolution*, ECLI:EU:C:2021:599’ [2022] *European Constitutional Law Review* 1; Jörg Gundel, ‘*Rechtsschutz Gegen “Soft Law”-Regulierungsmaßnahmen Der Union Mit Dem Instrument Der Gültigkeitsvorlage: Zugleich Anmerkung Zu EuGH (GK), 15.07.2021, Rs. C-911/19’* [2021] *Europäisches Wirtschafts- & Steuerrecht - EWS* 317.

The possibility of reviewing the validity of ESA soft law acts at the EU level is confirmed by the Court, but it is limited only to preliminary reference procedure. The question is whether such a half-way solution is enough.

Since the bindingness (which is the main precondition for an act to be subject to direct judicial review by the CJEU under Article 263 TFEU) occurs at the national level, a possible option would be to allow for the national courts themselves to provide the control of legality of ESA soft law acts without the assistance of the Court of Justice. The legitimacy of such an approach could be found in the fact that it is just the involvement of national binding rules and national competent authorities which makes the ESA guidelines practically binding for the individuals in the given Member State. No binding force at the EU level means no direct judicial review at the EU level. Therefore, the bindingness that arises at the national level could potentially lead to a requirement of a national remedy. It would mean that so-called Foto-Frost obligation⁵³ of the national courts does not apply in case of EU soft law⁵⁴ and the national courts are free to decide that the particular soft law act was issued in breach of a binding rule, and therefore to make such an act ineffective on the territory of its Member State.

The Foto-Frost obligation of national courts is based on the premise that, in the name of the uniformity of EU law, the power to pronounce EU acts null and void shall always remain in the hands of the CJEU.⁵⁵ However, since the effective implementation of ESA soft law in the Member States depends on the decision of the national competent authority, it is practically impossible to keep the absolute uniformity across the whole EU. In such a context, the unilateral decision of the national court to invalidate ESA guidelines or to pronounce them ineffective in the given Member State would therefore have the same practical impact as the opt-out decision of the national competent authority.

To sum it up, if the CJEU does not change its general attitude towards reviewability of EU soft law within the action for annulment and does not accept that the ESA guidelines ultimately induce binding legal effects, the quasi-invalidation of the ESA guidelines by national courts by declaring the guidelines ineffective in the given Member State seems to be the only effective remedy for the excess of competences on the side of the particular ESA.

V. Conclusion

The case of soft law acts issued by the European Supervisory Authorities shows well the intricacies of the complex multi-level regulatory enforcement and the effective functioning of legally non-binding EU acts in the ever changing and evolving domain of banking and finance.

At the EU level, the ESAs adopt guidelines and recommendations, which are, taken in complete isolation, legally non-binding – they only suggest certain rules to be respected or invite to behave in a certain way. In any event, these acts send the responsibility of the enforcement to the lower level – to the national competent authorities. As the formal addressees of the guidelines, NCAs have a complete leeway to decide whether to comply or not with the given guidelines. In case of non-compliance, they have just the notification obligation to inform the relevant ESA about its decision.

However, once the NCA notifies the compliance, it overtakes the full responsibility of the enforcement of the guidelines in the given Member State. As the Czech example illustrates, the Czech National Bank as the competent authority, based on combination of the legally binding acts and its own willingness to follow the ESA guidelines, requires from the supervised entities to implement the content of the ESA guidelines into their respective internal systems.

From the strictly formal point of view, the situation is rather schizophrenic: The ESA guidelines remain legally non-binding acts, but the financial institutions as the ultimate addressees are obliged to respect them. In fact, the legally non-binding EU acts induce, due to the enforcement cascade, binding legal effects at the national level.

This double nature of the ESA guidelines is linked to the issue of their potential (judicial) control. If the validity of the guidelines is challenged, the CJEU should not exempt them from the direct judicial review under Article

⁵³ Judgment of 22 October 1987, Foto-Frost (C-314/85, EU:C:1987:452, p. 14-20).

⁵⁴ See opinion of AG Bobek of 15 April 2021, Fédération bancaire française (C-911/19, EU:C:2021:294, p. 131).

⁵⁵ Judgment of 22 October 1987, Foto-Frost (C-314/85, EU:C:1987:452, p. 15).

263 TFEU – because, at the end of the complex chain, they really induce binding legal effects, which is the requirement of admissibility. However, if the CJEU keeps refusing to admit the national effects as binding legal effects of an EU soft law act, the competence to review the guidelines could be given to national courts. Since the effective enforcement of EU guidelines is in the hands of national competent authorities which have the power to make them practically binding, the competence of judicial review can stay at national level as well.

Without the clear determination of the competence to provide judicial review, and especially from the perspective of rule of law, the whole system appears to be misbalanced: The ESAs issue acts that have, thanks to the external mechanisms, quite a strong regulatory power significantly influencing individuals in the Member States. In contrast, the offer of remedies and the possibility of judicial control of such a power are rather uncertain and weak. Even with the employment of the preliminary reference procedure, the system remains incoherent. Either there are legal effects of an EU act requiring remedy at the EU level, or the legal effects are produced at the national level which leads to the necessity of the national remedy. Therefore, considering the real effects of ESA guidelines within their whole context, the CJEU should change its approach towards the admissibility of actions against EU soft law. Otherwise, if the binding legal effects were considered only part of the national production, national courts should be allowed to control the legality of the guidelines on their own.

VI. Bibliography

Botopoulos K, ‘The European Supervisory Authorities: Role-Models or in Need of Re-Modelling?’ (2020) 21 ERA Forum 177

Chamon M, ‘EU Agencies: Does the Meroni Doctrine Make Sense?’ (2010) 17 Maastricht Journal of European and Comparative Law 281

Chamon M and de Arriba-Sellier N, ‘FBF: On the Justiciability of Soft Law and Broadening the Discretion of EU Agencies: ECJ (Grand Chamber) 15 July 2021, Case C-911/19, Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de Résolution, ECLI:EU:C:2021:599’ [2022] European Constitutional Law Review 1

Chinkin CM, ‘The Challenge of Soft Law: Development and Change in International Law’ (1989) 38 The International and Comparative Law Quarterly 850

Gentile G, ‘To Be or Not to Be (Legally Binding)? Judicial Review of EU Soft Law after BT and Fédération Bancaire Française’ [2021] Revista de Derecho Comunitario Europeo 981

Griller S and Orator A, ‘Everything under Control? The “Way Forward” for European Agencies in the Footsteps of the Meroni Doctrine’ (2010) 35 European Law Review

Gundel J, ‘Rechtsschutz Gegen “Soft Law”-Regulierungsmaßnahmen Der Union Mit Dem Instrument Der Gültigkeitsvorlage : Zugleich Anmerkung Zu EuGH (GK), 15.07.2021, Rs. C-911/19’ [2021] Europäisches Wirtschafts- & Steuerrecht - EWS 317

Hubková P, ‘Judicial Review of EU Soft Law: A Revolutionary Step Which Has Not Fully Happened (Case Note on BT v Balgarska Narodna Banka, C-501/18)’ [2021] Revista General de Derecho Europeo

Prechal S and Widdershoven R, ‘Principle of Effective Judicial Protection’ in Miroslava Scholten and Alex Brenninkmeijer (eds), *Controlling EU agencies: the rule of law in a multi-jurisdictional legal order* (Edward Elgar Publishing 2020)

Schemmel J, ‘The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market-Capturing the Administrative Influence’ (2016) 23 Indiana Journal of Global Legal Studies 455

Scott J, 'In Legal Limbo: Post-Legislative Guidance as a Challenge for European Administrative Law' [2011] *Common Market Law Review* 329

Senden L, *Soft Law in European Community Law* (Hart 2004)

——, 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' (2013) 19 *European Law Journal* 57

Simoncini M, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2022) 2021 6 *European Papers - A Journal on Law and Integration* 14851503

Stefan O, 'European Union Soft Law: New Developments Concerning the Divide Between Legally Binding Force and Legal Effects' (2012) 75 *The Modern Law Review* 879

van Rijsbergen M, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority' (2014) 10 *Utrecht Law Review* 116

Vaughan S, 'Differentiation and Dysfunction: An Exploration of Post-Legislative Guidance Practices in 14 EU Agencies' (2015) 17 *Cambridge Yearbook of European Legal Studies* 66