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The Triumph of Soft Law in the Financial Sector:

Can Non-binding Law Have Binding Domestic Legal Effects?

Abstract. Examining the seemingly simple question of whether guidelines in the financial sector are mandatory reveals a highly complex landscape for supervision of the financial sector across the European Union, where international and national financial law enter collision and the participants come to the table with differing mandates/expectations. The article addresses the results, with focus on banking regulation, wherein the European Banking Authority and, in Estonia, the Financial Supervision and Resolution Authority are among the main guideline-issuers. The balance achieved is critical because the fines that the supervisory and resolution authorities can impose on banks for non-compliance with mandatory rules can reach 10% of these entities' total annual net turnover from the preceding business year. An effort to consider all of the relevant factors for understanding which side of the mandatory/advisory line the guidelines stand on, the article constitutes an attempt to initiate vital discussion of the environment created in the financial sector for soft law (i.e., guidelines), which may under certain circumstances take on a larger role than that soft law's legal nature allows.

Keywords: financial supervision, EBA guidelines, Finantsinspektsioon, European Central Bank, soft law, banking law

1. Introduction

For some time now, the financial sector has been thick with regulations. According to several estimates, the number of applicable financial laws and regulations in force within the financial sector has reached more than 600[*2], with which both financial-supervision subjects as defined in the Estonian Financial Supervision Act[*3] (FSAA) and other persons subject to specific laws applicable to the financial sector must comply in their activities.

The purpose of this article is to assess the influence of soft law (i.e., regulation that is not legally binding) in the financial sector. The discussion here analyses whether, under the umbrella of soft law, a legal framework

1 The author's views are his own and do not reflect the official position of the Estonian Financial Supervision and Resolution Authority.

2 For an informal assessment of the work done by the Estonian Financial Supervision and Resolution Authority within the regulatory framework currently in place for the financial sector, as of the beginning of 2022, see 'Finantsinspektsioon Is Twenty Years Old' (6 April 2022) <https://www.fi.ee/en/news/finantsinspektsioon-twenty-years-old> accessed on 1 April 2024.

3 RT I 2001, 48, 267; RT I, 29.3.2022, 8.

has been established that, whether directly or indirectly, imposes obligations that are binding on those subject to financial supervision. Taking into account the length requirements of the article, the author addresses this issue primarily through the lens of banking law.

The paper focuses on the right of the Estonian Financial Supervision and Resolution Authority (FI), derived from Article 57 of the FSAA, to issue advisory guidelines to explain the legislation regulating the activities of the financial sector and to provide guidance pertaining to subjects of financial supervision. The origins of these guidelines are multi-layered, involving both guidelines produced by the FI itself and guidelines authored by the relevant European Union (EU) supervisory authorities: the European Banking Authority (EBA), the European Securities and Markets Authority, and the European Insurance and Occupational Pensions Authority. Particular attention is given to the EBA's power to issue guidelines and recommendations, referred to throughout this paper as EBA Guidelines[*4], under Article 16 of the EBA Regulation.[*5]

One of the main tasks of the EBA, as set out in Article 8 (1) (a)–(b) of the EBA Regulation, is to contribute to the establishment of high-quality common regulatory and supervisory standards and practices and to the consistent application of legally binding acts in the field of credit institutions[*6]. This task, which shall remain subject to the provisions of Article 8 (2) (a)–(c) of the EBA Regulation, encompasses

- developing draft regulatory technical standards in the specific cases referred to in Article 10,
- developing draft implementing technical standards in the specific cases referred to in Article 15, and
- issuing EBA guidelines as laid down in Article 16.

All of the EBA outputs referred to have their own legal bases and consequences. The purpose of this article is not to analyse the EBA regulatory technical standards or the EBA implementing technical standards, as they have significantly different consequences than the guidelines, which the competent authority[*7] can decide whether to comply with or not. Therefore, the article is limited to analysis of the EBA Guidelines.

Attention is given to two key questions:

1. Are the EBA Guidelines mandatory? In the event of non-compliance, what consequences follow?
2. Does the decision to issue an FI guideline under Article 57 of the FSAA, which transposes an EBA Guideline, render the guideline mandatory for financial-supervision subjects?

2. The credit-institution-supervision model in overview

State financial supervision, as defined in the FSAA, oversees the subjects and activities outlined in the FSAA, including the Credit Institutions Act (CIA)[*8] and related legislation based on it.

The CIA governs the establishment, operation, termination, liability, and supervision of credit institutions. Proceedings under the CIA are subject to the provisions of the FSAA, the Administrative Procedure Act[*9] (APA), and Council Regulation 1024/2013 of the EU[*10] (which assigns the European Central Bank (ECB) specific tasks related to the prudential supervision of credit institutions).

For a better understanding of the legal background to the regulation dealing with the specific tasks of the ECB and its evolution, it is necessary to turn to Article 127 (6) of the Treaty on the Functioning

4 In the context of this article, it is not relevant to distinguish between the EBA's guidelines and the recommendations issued under Article 16 of the EBA Regulation (see n 5). This is why, for the sake of clarity, these are collectively referred to here as the EBA Guidelines.

5 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 [2010] OJ L331 [12–47].

6 The EBA Regulation's art 1(2) sets the EBA's scope of action, which encompasses credit institutions and the competent authorities to supervise them.

7 The competent authority is defined in art 4(2) of the EBA Regulation. Both the FI and the ECB are competent authorities under the respective framework.

8 RT I 1999, 23, 349; RT I, 20.6.2022, 11.

9 RT I 2001, 58, 354: RT I, 13.3.2019, 55.

10 Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L287/[63–89].

of the European Union[*11] (TFEU) for a starting point. Under its terms, the Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the ECB, confer specific tasks upon the ECB in connection with policies related to the prudential supervision of credit institutions and other financial institutions (with the exception of insurance undertakings).

In September 2012, the European Commission proposed the creation of a single supervisory authority for euro-area banks. This followed the meeting of 28–29 June of that year whereby the leaders of EU member states agreed to deepening of the Economic and Monetary Union co-operation as one of the elements for remedying the economic crisis.[*12] Commenting on the new proposal, President of the European Commission Jose-Manuel Barroso stated that it would restore confidence in the supervision of banks in the euro area. He also noted that the future should see bankers' losses no longer becoming the people's debt and thus casting doubt on the financial stability of entire countries.[*13] The European Parliament's approval of the proposal in October 2013 led to the adoption of the regulation on the specific tasks of the ECB.

In addition, the entry into force of Regulation 468/2014 of the European Central Bank on 4 November 2014[*14] created the framework for establishment of the EU-wide *Single Supervisory Mechanism* (SSM). Alongside creation of the SSM, the architects of the process decided to harmonise the relevant legal framework, thus paving the way for adoption of a common set of rules, the *Single Rulebook*. This brings together a body of rules covering, *inter alia*, capital and resolution rules for banks: the Capital Requirements Directive (2013/36)[*15] and the Capital Requirements Regulation (575/2013).[*16]

When one looks specifically at the regulation covering the tasks of the ECB, one finds that Article 4 of the ECB Regulation assigns key supervisory responsibilities to the ECB. In examining this context, it is important to understand the distinction with regard to the EBA Guidelines issued under Article 16. In exercising its mandate, the ECB directly supervises those credit institutions that are 'significant institutions' (SIs). The ECB is the authority that decides whether or not to follow the EBA Guidelines.

Less significant institutions (LSIs), directly supervised by their national competent authorities, apply the EBA Guidelines if national competent authorities so decide. The decision to issue the relevant guidelines as their own under Article 57 of the FSAA rests with the FI.

The discussion below evaluates the legal impact of those EBA Guidelines issued under Article 16 of the EBA Regulation and those issued by the FI. In addition, the paper examines the practical impact of these guidelines on the day-to-day activities of subjects of financial supervision.

3. The EBA Guidelines

In accordance with item 26 of the preamble to the EBA Regulation, the EBA should, in areas not covered by regulatory or implementing technical standards, have the power to issue guidelines on the application of EU law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with these guidelines, there should be the possibility of the EBA publishing the reasons stated for supervisory authorities' non-compliance with these guidelines. In the literature, however, particular emphasis has been placed instead on transparency within the EU and on harmonisation of the banking framework across the various – often very different – areas of banking law.[*17]

11 See OJ C326, 26.10.2012, 47–390.

12 See 'Towards a Banking Union' (Commission press release, 10 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_12_656> accessed on 1 April 2024.

13 Per 'Commission Proposes New ECB Powers for Banking Supervision As Part of a Banking Union' (Commission press release, 12 September 2012) <https://ec.europa.eu/commission/presscorner/detail/en/IP_12_953> accessed on 1 April 2024.

14 Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation) [2014] OJ L141[1–50].

15 OJ L176, 27.6.2013, 338–436.

16 OJ L176, 27.6.2013, 1–337.

17 Sabine Lautenschläger has expressed the view that these objectives have not been fully met, as there are still national differences in the application of the legal framework: S Lautenschläger, 'Single Supervisory Mechanism – Single Supervisory Law?' (speech at the European Banking Institute workshop, 27 January 2016) <https://www.bis.org/review/r160128a.htm> accessed on 1 April 2024.

Pursuant to Article 16 (1) of the EBA Regulation, the EBA shall issue guidelines and recommendations addressed to competent authorities or financial institutions[*18] with a view to establishing consistent, efficient, and effective supervisory practices and to ensuring common, uniform, and consistent application of EU law. According to the first sentence of Article 2a of the EBA Regulation, the EBA Guidelines do not merely refer to or reproduce parts of legislative acts. Article 16 (3) of the EBA Regulation empowers competent authorities and financial institutions to make every effort to comply with EBA Guidelines. Within two months of the issuing of any guidelines, each competent authority shall confirm whether it is compliant with this already or intends to comply with it. In the event that a competent authority neither complies nor intends to comply, it shall inform the EBA of this, stating its reasons.

The EBA may issue guidelines without prior public consultation and also without consulting the Banking *Stakeholder Group* (per Article 16 (2) of the EBA Regulation). In this case, the EBA must justify this choice. Therefore when to hold a public consultation on guidelines and when not to is left to the EBA's discretion. Looking at the current law from the perspective of a market participant shows that it allows for a scenario wherein the participant becomes aware of EBA Guidelines only when they are issued, without having had an opportunity to intervene in their preparation or otherwise influence the content by expressing an opinion.

Coming back to the right of a competent authority to declare that it will not follow some EBA Guideline, one finds the question of whether there are legal or social measures that the EBA can take in such cases to motivate the competent authority to comply. The answer lies in the possibility of applying indirect sanctions, which the EBA Regulation grants to the EBA. These sanctions are connected with that fact that, in addition to informing the EBA of its non-compliance or of not intending to comply, the competent authority must explain why it is responding thus to a specific guideline. The sanction arises in that the EBA, in turn, discloses the fact that said competent authority neither is complying nor intends to comply with the guideline issued and also has the right to publish the reasons cited.

With the associated terms, the EBA Regulation includes a soft but potentially quite unpleasant way of dealing with those competent authorities that opt not to follow the EBA Guidelines, in the form of stigmatisation.[*19] This type of response to a notification of non-compliance does not mesh in the best way possible with the general notion that the EBA Guidelines are voluntary.

Let us look at things the other way around. What is the effect of the EBA Guidelines when a competent authority notifies the EBA that it is complying with the guidelines issued? Situations wherein a competent authority chooses to comply with a guideline instrument have been addressed by the Court of Justice of the European Union (CJEU), in its judgement of 15 July 2021. The case, C-911/19[*20], pertained to the EBA's guideline document of 27 September 2011 (GL 2015/18)[*21], on product-oversight and governance arrangements for retail banking products, known as the Retail Banking Guidelines. The parties to the dispute were the professional association of French banks, *Fédération bancaire française,* and the banking-supervision authority of France, *L'Autorité de contrôle prudentiel et de résolution*.[*22] The CJEU's decision discussed several important legal questions related to the guidelines, among them whether the CJEU was even permitted to review the legality of the Retail Banking Guidelines under Article 263 TFEU[*23] and whether the Retail Banking Guidelines had legal force and could therefore have legal consequences. The CJEU answered these questions in the negative.[*24]

18 Financial institutions are defined in art 4(1) of the EBA Regulation.

19 Before 1 January 2020, the stigmatisation was even more effective, in that the EBA was obliged to inform the European Parliament, the Council, and the Commission of the guidelines issued while also indicating which of the competent authorities had not complied with them. Furthermore, the EBA was required to describe how, in light of its mandate, it ensured competent authorities' future compliance with its guidelines.

20 See the documents available on Case C-911/19 via <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62019CJ0911> accessed on 11 July 2024.

21 See 'Guidelines on Product Oversight and Governance Arrangements for Retail Banking Products' (22 March 2016) <https://extranet.eba.europa.eu/sites/default/documents/files/documents/10180/1141044/a114bf1f-14c7-40d4-9018-97c14b2a0052/EBA-GL-2015-18%20Guidelines%20on%20product%20oversight%20and%20governance.pdf?retry=1> accessed on 1 April 2024.

22 The FI issued the EBA recommendation with resolution no 4.1-1/108, of 3 August 2016; see the Estonian-language <www.fi.ee/sites/default/files/2018-08/Juhatuse_otsus_03082016.pdf> accessed on 1 April 2024.

23 Pursuant to art 263(1) TFEU, the CJEU shall review the legality of legislative acts; of acts of the Council, of the Commission, and of the European Central Bank (apart from recommendations and opinions); and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. Also, the CJEU shall review the legality of those acts of bodies, offices, or agencies of the Union intended to yield legal effects vis-à-vis third parties.

24 In its ruling in case C-911/19; see paras 35–50.

According to the Court, for verifying the applicability of Article 263 of the TFEU, it is necessary to examine the substance of the Retail Banking Guidelines and to assess its effects on the basis of objective criteria, such as the content of said act; the context in which it was adopted; and the powers of the institution, body, office, or agency that adopted it. According to the Court, the non-binding nature of the Retail Banking Guidelines is evident from both the content and the wording. The Court based its assessment also on Article 16 (3) of the EBA Regulation. This requires competent authorities to decide explicitly whether or not to comply with the guidelines and to inform the EBA of their decision and the reasons for it; therefore, competent authorities have the option of not following the EBA Guidelines.

The CJEU ruling referred also to Article 288 TFEU, under which, to exercise the EU's competencies, the various institutions shall adopt regulations, directives, decisions, recommendations, and opinions. The last two are not binding under the relevant provisions.[*25]

In the same ruling, the CJEU stated, *inter alia*, that such EBA Guidelines may direct competent authorities to take national measures aimed at altering aspects of the activities of financial institutions or compelling them to comply with the EBA's guidelines.[*26] In the case before the court, the French supervisory body had taken corresponding measures and published a notice on its website via which it, firstly, stated that it had complied with the guidelines and, secondly, specified that those guidelines applied to the credit institutions, payment institutions, and electronic-money institutions under its supervision – i.e., that it had transposed the guidelines issued by the EBA.[*27] Furthermore, the Court noted that the EBA Guidelines must be taken into account by national courts when they are resolving disputes related to the application of these, particularly where their purpose is to supplement the implementation of the binding provisions of EU law.[*28]

Thus the Court, on one hand, ruled out the specific EBA Guidelines at issue being binding, for reason of the right of the competent authority to choose whether or not to apply them, while, on the other hand, finding the guidelines to carry legal force very similar to that of binding EU legislation. If we consider the EBA's power to stigmatise a competent authority that declares itself not in compliance with the guidelines (under Article 16 (3) of the EBA Regulation) in conjunction with this, the Court's decision can be considered self-contradictory in its reasoning. This situation tends to support the conclusion that the legal framework around the EBA Guidelines creates an umbrella of soft law, yet it simultaneously keeps a shroud over the fact that such guidelines are in some sense expected to have a binding effect. Perhaps the mere fact that non-compliance with the EBA Guidelines yields a punitive stigma for the competent authority will open the door to a debate as to whether the guidelines are still merely advisory in nature or whether a certain regulatory component is already built into the transposition process.

Let us put aside the above criticisms at least for now. The CJEU has clearly stated that a guideline issued under Article 16 of the EBA Regulation is not binding EU legislation.

This conclusion cannot automatically be transposed to the national level, such as the FI's resolutions for issuing EBA Guidelines. Assessment of the domestic legal effects must take into account the law in force in a given Member State, inclusive of the process for transposing EBA Guidelines.

Discussion naturally turns then to evaluation of the process of the EBA Guidelines' transposition as a non-binding framework under the EBA mandate. In connection with this, the next section of the paper examines the legal meaning of such guidelines in the context of Estonian law.

4. Transposition of the EBA's Guidelines to FI guidelines

In general terms, the FI makes decisions on the EBA Guidelines via a process[*29] that involves

a) deciding to inform the EBA of whether or not the FI is in compliance with the guidelines and,
b) in the case of compliance, choosing to issue and disclose the relevant EBA Guidelines in accordance with Article 57 of the FSAA.

25 Ibid, para 42.

26 Ibid, para 70.

27 Ibid, para 26.

28 Ibid, para 71.

29 Illustration of the transposition of the EBA advisory guidelines by the FI is provided through the resolution on the issue of the Retail Banking Guidelines as challenged before the CJEU (n 22).

The first of these two possible steps entails issuing a resolution that addresses whether or not the FI is operating in accordance with the EBA Guidelines. It would be premature to claim that the scope of the impact of such a resolution by the FI is limited to the EBA and FI, as opposed to affecting external parties too. The impact of such a resolution is clearly passed on to the Estonian financial sector (in the case of the EBA Guidelines, usually to credit institutions) and may affect the use of tens to hundreds of millions of euros of capital.

With a resolution in the second category, the FI chooses how to transpose the EBA Guidelines nationally; i.e., it indicates what legal force the EBA Guidelines will have in the country. The FI's usual practice is to adopt the EBA Guidelines on the basis of Article 57 of the FSAA. That is, it issues them as FI guidelines.[*30] Leaving aside legal assessment of such a choice and under the assumption that the FI possesses the right to issue EBA Guidelines as FI guidelines, one still finds the question of what is at stake in terms of administrative law in the case of this type of FI guidelines.[*31] Is such an EBA Guideline, which is in its turn FI guideline, an administrative act or, rather, a measure? The answer to this question is of considerable importance, because it determines the requirements for the form of respective decisions, the legal effect thereof, and the opportunities for the persons concerned to defend their rights.

4.1. Guidelines issued by the FI

The FI is the administrative authority responsible for financial supervision and resolution tasks in Estonia. These tasks are performed in connection with Article 8 (1) of the APA and Article 4 (2) of the FSAA.[*32] State financial supervision includes the supervision of the subjects of state financial supervision and the activities provided for in the acts specified both in Article 2 (1) of the FSAA and in legislation established on the basis thereof. According to Article 2 (3) of the FSAA, financial crises' resolution means the conducting of the resolution proceedings and the implementation of the resolution tools or powers prescribed by the Financial Crisis Prevention and Resolution Act (FCPRA)[*33].

For ascertaining the legal nature of the FI's guidelines, the answers to two questions are crucial.

The first of these is whether the FI is exercising its financial supervision and resolution function when it decides to report its compliance with the EBA Guidelines and issues them in Estonia as FI guidelines. In order to exercise financial supervision, the FI must have been granted the relevant powers[*34] either by law or by regulation or administrative agreement based on the law.[*35] Article 3 (1) of the FSAA explains the purpose of financial supervision – i.e., contributing to the stability, reliability, and transparency of the financial sector. Article 6 of the FSAA specifies and grants to the FI all the necessary rights related to exercising that kind of right. Moreover, Article 57 (1) explicitly grants the right to issue advisory guidelines.

Proceeding on the basis of the reasoning above, one finds that the FSAA unambiguously demonstrates the mandate of the FI both as a financial supervisor and as a financial-crisis resolution body, to issue guidelines. In summary, the Management Board of the FI, acting as an administrative authority, holds the statutory responsibility articulated under Article 18 (1) of the FSAA. The board's role, then, includes informing the EBA about compliance with the EBA Guidelines and issuing guidelines in Estonia in accordance with Article 57 of the FSAA.

The second key question that arises is whether the FI's guidelines are an administrative act.[*36]

30 Available online <https://www.fi.ee/en/juhendid/pangandus-ja-krediit> accessed on 1 April 2024.

31 T Rauk, 'Regulatiivsus ja selle sisustamise problemaatika [Regulativity and Problems Related to Its Definition]' [2013] (6) Juridica 371.

32 A Aedmaa and others, *Haldusmenetluse käsiraamat* [Handbook of Administrative Procedure] (University of Tartu Press 2004) 41–42, with regard to para 2.1.

33 RT I, 19.3.2015, 3; RT I, 29.3.2022, 9.

34 Aedmaa and others (n 32) 43, with regard to para 2.3.1.

35 The Supreme Court's ruling of 30 April 2004 in case 3-3-1-77-03 states 'Assignment of tasks can be made either by law, or by regulation or administrative agreement based on law' in its para 26.

36 See also P K Tupay, 'Riigivõimu otsused koroonaviiruse ohjeldamiseks: kas garantiikiri Eesti riigi püsimiseks või demokraatia lõpp? [The Government's Decisions To Fight the Coronavirus: Guarantee for the Existence of the Estonian State or the End of Democracy?]' [2020] (3) Juridica 163, in its para 2.2.4.

The commentaries on the APA express the view that, irrespective of the form in which an administrative act is performed or of the administrative authority's own understanding of the document issued or its content, it is the actual content of the administrative act that gets assessed in the process of classifying it.[*37] In the legal literature[*38] it has been noted that, in the event of doubt as to whether a decision is an administrative act or not, the following characteristics must be checked. All of the following criteria must be met at the same time in the case of an administrative act:

- the subject acting is an administrative authority;
- the activity is carried out in a public-law relationship;
- the activity constitutes an expression of intent to regulate a legal relationship;
- the declaration of intent is unilateral;
- an individual case is being regulated;
- the regulation is addressed to a person external to the administration.

Length considerations render it necessary to assess only the regulatory-case-related components of the FI guidelines in this paper. These are considered next.

4.2. The FI guidelines' regulatory nature

According to the legal literature, only declarations of intention that are aimed at creating, altering, or terminating someone's rights or obligations can be considered to be legislation – the regulatory component of the legal relationship is essential.[*39] The regulatory character is even considered to be one of the most important components, in that it distinguishes an administrative act from a measure and from a procedural act, neither of which have this feature.[*40] Regulatory character is expressed above all else in a certain mandatory nature, the regulation of a situation in a specific case, which presupposes that a legal position established on a legal basis and protected by law is infringed.[*41] Legal scholars have pointed out that the activity of an administrative authority must have an objective, some intention to bring about a regulatory character.[*42] Hence, for an administrative act to be of a regulatory nature, it must be aimed at producing legal effects – i.e., creating, altering, or extinguishing rights or obligations; establishing legally binding facts; or changing the public-law status of a matter. Otherwise, it is a measure.[*43]

With Article 57 (1) of the FSAA, the legislator has made it clear that these are 'advisory guidelines […] to explain legislation […] and to provide guidance to subjects of financial supervision'. According to the explanatory memorandum[*44] accompanying the draft version of the FSAA, '[a]ll over the world, it is common for financial supervisory authorities to issue advisory *guidelines* to harmonize practices and implement good practices and best international practices. The right to issue advisory guidelines is provided for in the respective German and Finnish laws, for example'. While advisory guidelines are not legislation, they 'nevertheless have an important influence on the behaviour of market participants through the authority of the financial supervisory authority'.

It can be concluded from the above that FI guidelines either do not feature an unambiguous regulatory component or at least do not have one extensive enough as to lead to a desire to definitively regulate the legal relationship. This is clearly indicated by the wording of the relevant provision, as well as by the international legal framework on the basis of which the EBA issues its Guidelines (discretionary transposition) and the above-mentioned judgement of the CJEU, which deemed the EBA Guidelines to be non-binding.

There are arguments against this approach as well.

37 K Merusk and I Pilving (eds), *Halduskohtumenetluse seadustik. Kommenteeritud väljaanne* [Code of Administrative Court Procedure, Annotated Edition] (Juura 2013) 66 (in ch 1).

38 Aedmaa and others (n 32) 248, with regard to para 9.1; Merusk and Pilving (n 37) 66–76.

39 Aedmaa and others (n 32) 254, with regard to para 9.1.3; also see the Administrative Chamber of the Supreme Court's judgement in case 3-3-1-44-10, of 13 October 2010, para 12.

40 Rauk (n 31) 377, with regard to para 4.

41 Ibid 371, on para 2.

42 Ibid 372, addressing para 2.1; Merusk and Pilving (n 37) 68, with regard to para 3.

43 Ibid.

44 *Finantsinspektsiooni seadus*, 630 SE, comment on ch 7 in Estonian <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d538bb5a-f974-3041-8eba-eb6410ffe8b5/Finantsinspektsiooni%20seadus> accessed on 1 April 2024.

The **first** brings in the matter of stigmatisation by the EBA, which is reflected in Article 16 (3) of the EBA Regulation. When a competent authority declares that it will not nationally transpose some EBA Guideline, the ensuing stigmatisation, which may lead to public chastisement, implicates that competent authority. In other words, it can be understood as a kind of sanction mechanism applied to the competent authority, one that could motivate it to transpose the EBA Guidelines. That said, however much additional motivation to implement the EBA Guidelines this might involve, it has no regulatory impact on the addressee of the FI guidelines.

The **second** argument deals with the content of each specific FI guideline. An EBA Guideline issued via the FI guidelines may go beyond providing behavioural recommendations in its content, and certain obligations can be derived therefrom. This conclusion seems to be supported by case C-911/19 of the CJEU, as discussed above: points 26, 70, and 71 accord to the EBA Guidelines a certain effect that should be taken into account. If a scenario of this type coincides with the considerably broad mandate of the FI – for example, in the context of credit institutions (per Article 104 (1) of the CIA) – the institution may face a specific consequence in the form of a precept if it fails to comply with the FI guidelines. Failure to comply with the precept may, in turn, result in a non-compliance levy amounting to as much as 10% of the credit institution's net annual turnover under the definition in Article 104[1] of the CIA. However, such a situation implies a breach of the mandate under Article 57 of the FSAA and the issuance of an administrative act under the guise of the FI guidelines.

With regard to the scope of this article, and without evaluation of all EBA Guidelines issued by the FI under Article 57 of the FSAA, it can be concluded that the mandate given to the FI under Article 57 of the FSAA does not hold a regulatory component. Were such a regulatory nature to be established upon assessing the content of a specific FI guideline or a part thereof, it would no longer be a guideline within the meaning of Article 57 of the FSAA.

5. The FI guidelines as information measures and/or administrative rules

The conclusion developed above that those FI guidelines that transpose EBA Guidelines lack the nature of administrative acts raises a legitimate question as to what they actually are.

According to Estonian legal scholars, an administrative act is not an explanation describing or interpreting existing legal provisions that does not contain new legal provisions and is not legally binding on persons, such as explanations, recommendations, warnings, and evaluations.[*45] The absence of a regulatory nature unequivocally points to the possibility that this is a measure.[*46] According to Article 106 (1) of the APA, a measure is an act performed by an administrative authority that is not issuing of a legal act and that is not performed in civil-law relationships. The Supreme Court has counted as measures various activities of an administrative authority that do not have a regulatory element.[*47]

Also, it is clear from the case law of the Supreme Court of Estonia[*48] that FI guidelines do not become administrative acts merely because they are approved by a resolution of the Management Board of the FI pursuant to Article 57 (3) of the FSAA. As is noted above, the content of the decision is relevant in ascertaining whether this is an administrative act or, in contrast, some other administrative activity.

45 Aedmaa and others (n 32) 255, with regard to para 9.1.3.2; Merusk and Pilving (n 37) 69–70, addressing para f.

46 Ibid 77, about para c.

47 For example, the Supreme Court considered the warning notice of the FI (in the Administrative Chamber decision of 28 January 2021 on case 3-19-885) and the instructions on refusal to grant consent by letter and on making changes to the draft project (in that chamber's ruling 3-3-1-12-16, from 8 June 2016).

48 Ruling 3-4-1-6-10 of the Constitutional Review Chamber of the Supreme Court, of 22 November 2010, states in para 43: 'In determining the type of act, the Supreme Court cannot be guided solely by the legislator's preference expressed in the text of the provision delegating authority, but must assess the type of act according to its content.' Also, the Administrative Chamber of the Supreme Court has assessed an act with respect to its content in cases wherein the regulator has issued clear guidance (see the chamber's ruling on case 3-3-1-57-09, from 15 October 2009, paras 11–12). The Constitutional Review Chamber expressed the opinion that the type of act specified by the regulator 'does not prevent the court from assessing the type of act by reference to its content'.

It is worth reiterating that the guidelines issued by the FI on the basis of Article 57 (1) of the FSAA are advisory, both in spirit and by law.[*49] Such guidelines from the FI may be considered measures within the meaning of Article 106 of the APA. According to a more precise definition, they may be an information measure characterised by, *inter alia*, the processing and transmission of non-regulatory information, both within and beyond the institution, as well as the publication of information contained in the guideline.[*50]

FI guidelines might also be considered informal administrative rules. This interpretation receives backing from the Parliament (*Riigikogu*) reading[*51] of amendments to the APA[*52] that were designed to supplement Article 4 of the APA with a Section 3. The corresponding proposal provided for a possibility of issuing an informal administrative rule for the uniform application of discretionary powers, handling of undefined legal concepts, and the possibility of related assessment; for the equal treatment of parties to proceedings; for clarification of decision-making criteria or other important matters; and for guidance of legal or natural persons.[*53] According to the explanatory memorandum on the draft act, 'an administrative rule […] is a document for internal use that is not provided for in any legislation but that has widespread use in practice to clarify complex legal solutions, to create uniform practice within the institution, and to establish binding guidelines for the institution itself (e.g., the desire that institutions in different regions of the country understand the law in the same way and make the same good decisions)'[*54]. Informal administrative rules are not unknown in administrative proceedings today and have been applied by the courts far into the past[*55]. In established practice, an informal administrative rule is still primarily addressed to the authority itself; i.e., the rule is binding on the administrative authority that issued it and supports the exercise of discretion under specific circumstances.

The author does not exclude the qualification of an FI guideline as an informal administrative rule. However, several important differences in context between the case law thus far and the proposed amendments to the APA deserve attention. Namely, FI guidelines are not so much of an informal nature; they have a clear impact on the subjects of financial supervision in the specific field of relevance. It would also be difficult to disregard the EBA Guideline if the FI has confirmed compliance with it via a notice to the EBA and thereby has taken on at least an implicit obligation to comply with it (under Article 16 (3) of the EBA Regulation).

The conclusion arrived at from all of the arguments presented above is that the FI guidelines are generally information measures. It is well known that there are exceptions to general rules, and indeed FI guidelines exist that obviously have been promulgated for the purpose of regulating mainly internal FI processes/activities and that therefore do not have a direct impact on third parties. This is usually characteristic of those FI guidelines of the kind based on EBA Guidelines. This is because the respective authorities create, among other things, common European standards with their guidelines, including standards for the competent authorities. Such FI guidelines may be informal administrative rules.

Whether or not the FI's guidance constitutes an information measure as opposed to an informal administrative rule, it is subject to national judicial review. In the case of FI guidelines, the final assessment of the guidelines' nature might depend on whether the FI, in issuing it, has respected its mandate and limited itself to recommendations aimed only at clarifying, explaining, or interpreting existing law or, on the other hand, has gone beyond this and started to regulate the field more broadly. Efforts to answer that question must consider the practical factor of how the FI has applied the relevant guideline – whether it functions more as a regulatory tool than as an explanatory one.

49 See the explanatory memorandum to the draft Financial Supervision Act (n 44), specifically the comments on para 7.

50 Aedmaa and others (n 32) 468.

51 For reason of the expiry of the mandate of the previous membership of the *Riigikogu*, the draft was dropped from the procedure.

52 See the act for amendment of the Administrative Procedure Act and other, related acts, 634 SE, in Estonian at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/21f6df90-a333-413a-a533-ebbf7e9deebe/Haldusmenetluse%20seaduse%20%20muutmise%20ja%20sellega%20seonduvalt%20teiste%20seaduste%20muutmise%20seadus> accessed on 1 April 2024.

53 Ibid; Art. 4(3) of the APA.

54 Per the explanatory memorandum on draft act 634 SE (n 52) with regard to cl 1 of s 1, para 6.

55 See the judgement of the Administrative Chamber of the Supreme Court in case 3-3-1-77-14, of 18 December 2014, para 18, and in case 3-3-1-81-07, of 16 January 2008, para 13.