

This article is published in a peer-reviewed section of the Utrecht Law Review

On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority

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1. Introduction

The proliferation of EU agencies¹ is one of the most important institutional developments at the EU level.² Because they are considered to be an effective tool in implementing EU policies,³ the scope of delegation to agencies has grown not only in quantitative terms, but also qualitatively, implying the growth of agencies' powers.⁴ Next to their information-gathering, cooperation, service and advice-providing tasks, EU agencies have been given regulatory powers as well. Overall, there are two main types of rule-making through which 'EU agencies seem to provide a substantial regulatory contribution to the smooth functioning of their policy sectors.'⁵ First, agencies may participate, as technical actors, in procedures leading to the adoption of binding implementing rules, either assisting the European Commission or directly adopting technical rules. Second, they are often formally or *de facto* granted the power to issue soft law instruments, either to the regulatees or to other administrations participating in the sectoral network they coordinate.⁶ What sets these 'regulatory' agencies apart within the broader agency population is that these powers, 'although not binding, are anything but negligible and represent a culmination of agency contribution to rule-making.'⁷ Especially the delegation of more and more soft regulatory powers to EU agencies occurs in a growing number of policy areas, e.g. in the field of aviation, medicines and financial services, in order to increase the effectiveness of EU action.⁸ Indeed, the flexibility of soft law instruments

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1 Following Chiti, agencies can be understood as bodies (i) aimed at establishing and managing a plurality of cooperative relationships involving both the Commission and the Member States' administrations, and (ii) enjoying a certain degree of autonomy from the Commission, but not fully isolated from the Commission's influence. See: E. Chiti, 'An important part of the EU's institutional machinery: Features, problems and perspectives of European agencies', 2009 *Common Market Law Review*, no. 5, pp. 1396-1397.

2 D. Curtin & R. Dehousse, 'European Union Agencies: Tipping the Balance?', in M. Busuioc et al. (eds.), *The Agency Phenomenon in the European Union: Emergence, Institutionalization and everyday Decision-making*, 2012, pp. 193-205.

3 Joint Statement and the Common approach of the European Parliament, the Council of the EU and the European Commission on decentralised agencies, 19 July 2012, p. 1.

4 M. Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, 2014.

5 E. Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment', 2013 *European Law Journal* 19, no. 1, p. 100.

6 Ibid., p. 99.

7 M. Busuioc, 'Rule-making by the European Financial Supervisory Authorities. Walking a Tight Rope', 2013 *European Law Journal* 19, no. 1, p. 119.

8 M. Shapiro, 'Independent Agencies', in P. Craig & G. de Búrca (eds.), *The Evolution of EU law*, 2011, p. 112.

allows for easy anticipation on the dynamics of societal and technological developments. Although the growing scope of the delegation of public authority to agencies is said to be necessary to enhance the effectiveness of EU policies, it raises doubts concerning the legitimacy of agencies and their decisions at the same time.

First of all, while being an increasingly important part of the Union's institutional framework, the creation of EU agencies and the delegation of regulatory competences thereto are matters that are not explicitly regulated in the European Treaties or general secondary legislation.⁹ As a consequence, agencies are usually established by secondary law acts on the basis of a specific Treaty provision, such as Articles 114 and 352 TFEU.¹⁰ Because of the absence of a general legal framework on the possibility to delegate general implementing powers to entities other than the Commission and the Council, the powers of EU agencies are still subject to the constitutional limits the Court of Justice of the European Union (CJEU) formulated in its case law.¹¹ In its famous *Meroni* judgment, the CJEU established that powers may be delegated to such organs, but this must be confined to clearly defined executive powers and does not extend to powers involving a wide margin of discretion.¹² As a result, the delegation of general regulatory powers to agencies is excluded. Yet, the delegation of soft rule-making powers to agencies seems to provide a means for circumventing the properly competent legislative bodies in the decision-making process. In addition, such delegation appears to bypass the *Meroni* restrictions, because they are not considered to stand in the way of allocating soft rule-making powers to agencies.¹³ It must be said, though, that the relevance of the *Meroni* doctrine in the future is unclear, since this non-delegation standard seems to have been overturned at least in part by the CJEU in its recent *ESMA – Short-selling* case.¹⁴

Secondly, EU agencies' soft rule-making acts are not legally binding by definition, but may generate both practical and legal effects. The EU Treaties do not grant any form of legally binding force to soft law documents and EU soft law cannot by itself create any rights or impose any obligations. However, soft law obtains an important authoritative function in legal practice and it appears from the case law of the CJEU that it is definitely not devoid of legal effects.¹⁵ Soft law measures are thus not 'harmless', especially when they are simply 'rubber-stamped' by the Commission into legally binding acts.¹⁶ Given their lack of (inherent) legally binding force it is uncertain to what extent soft law instruments are an adequate and sufficient means to realize the regulatory goals laid down therein, and thus to what extent they can actually be effective. The purpose of a particular instrument is namely not always clearly stated by its maker or emitter.¹⁷ The question remains, therefore, whether agencies' soft law acts put enough pressure on the Member States and other possible addressees to implement and enforce them.¹⁸ Those concerned must be at least willing to give effect to them.¹⁹

Thirdly, EU agencies' regulation by soft law 'is concerned with an extremely low degree of proceduralisation'.²⁰ There is no overall tendency to formalize the procedures through which soft law measures are adopted, no common framework for agencies' governance, and the attempts to conclude an inter-institutional agreement on regulatory agencies so far have not led to any concrete results.²¹ In

9 M. van Rijsbergen & M. Scholten, 'Zaak C-270/12 (ESMA-short selling) als opvolger van de Meroni en Romano non-delegatiedoctrine', 2014 *Nederlands Tijdschrift voor Europees Recht*, no. 2-3, p. 87.

10 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 23.

11 Ibid., p. 65.

12 Case 9-56, *Meroni & Co., Industrie Metallurgiche, SpA v High Authority of the European Coal and Steel Community*, [1958] ECR 133.

13 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 65.

14 M. Scholten & M. Van Rijsbergen, 'The ESMA-Short Selling Case: Erecting a New Delegation Doctrine in the EU upon the Meroni-Romano Remnants', 2014 *Legal Issues of Economic Integration* 41, no. 4, pp. 389-406.

15 H. Luijendijk & L. Senden, 'Preadvies NVER: De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', 2011 *SEW Tijdschrift voor Europees en economisch recht*, no. 7/8, p. 313.

16 R. Dehousse, 'Delegation of powers in the European Union: The Need for a Multi-principals Model', 2008 *West European Politics* 31, no. 4, p. 799. See also: L. Senden, *Soft Law in European Community Law*, 2004. See also: L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433.

17 A. Allott, 'The Effectiveness of Laws', 1981 *Valparaiso University Law Review* 15, no. 2, p. 233.

18 L. Senden, *Soft Law in European Community Law*, 2004, p. 26.

19 Ibid., p. 27.

20 E. Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment', 2013 *European Law Journal* 19, no. 1, p. 102.

21 Ibid. See also: Proposal for an inter-institutional agreement on the operating framework for the European regulatory agencies, COM(2005) 59 final. See also: Communication from the Commission to the European Parliament and the Council, 'European agencies – The way

most cases, the establishing regulations and the agencies' rules of procedure do not 'envisage any kind of procedural provision concerning the elaboration and adoption of soft law measures' and 'the information available on the websites does not suggest the existence of consolidated administrative practices' either.²² This is a problematic practice, since legitimacy requires that regulatory decision-making follows formal rules.²³ In fact, the current procedural framing of soft rule-making is of 'a very *ad hoc* nature' and resembles a 'patchwork blanket', where some agencies may have put into place far more sophisticated procedural rules than others.²⁴ Such a practice 'does not contribute to the predictability, consistency and coherence of EU action' and the 'reasons behind the differences in approach in this regard are not always evident'.²⁵

All in all, EU agencies, 'which on the basis of the law and for reasons of lack of democratic legitimacy should not have far-reaching general rule-making powers, increasingly obtain them *de facto*'.²⁶ Consequently, the current non-regulation of the delegation of regulatory powers to agencies in the Treaties and the restrictions in the case law of the CJEU 'increasingly appear out of step with the daily institutional and legal reality'.²⁷ Obviously, the enhancement of both the legitimacy and effectiveness of rule-making through agencies by having recourse to soft law instruments is difficult to achieve under these circumstances. Hence, given the risks this type of rule-making involves for the legitimacy and effectiveness of the EU, an adequate institutional and procedural response is called for.²⁸ Indeed, recent developments in specific areas of EU law demonstrate an 'increasing awareness in the Union's institutional practice of the need for procedural limits to soft post-legislative rulemaking',²⁹ even if still embryonic and haphazard.³⁰ Especially in comparison with older agencies, it has been found that the establishing regulations of a number of newer EU agencies proceed in the direction of a proceduralisation of soft law rulemaking.³¹ This is particularly the case for the European Supervisory Authorities (ESAs). Their procedures for issuing guidelines and recommendations addressed to national supervisory authorities or financial institutions are provided by their establishing regulations themselves.³²

Rather than providing answers to all questions, this article aims to contribute to the ongoing discussion on European agencies' regulatory powers by uncovering the problematic aspects the application and enforcement of soft law rules of EU agencies may induce at the national level, and argues that further procedural and good governance guarantees are required in order to ensure both the legitimacy and effectiveness of the soft regulatory powers of EU agencies. It does so by taking one of the ESAs, namely the European Securities and Markets Authority (ESMA), as an illustrative example of how the establishing regulations of newer EU agencies proceed in the direction of the institutionalisation and proceduralisation of soft law rule-making.

The article first introduces the current financial supervisory structure in which a transition of powers from the national to the European level has taken place, and explains the tasks and competences of ESMA, especially its role in the adoption of soft law instruments (Sections 2 and 3). Subsequently, the ambiguities regarding the legal basis (Section 4) and legal status (Section 5) of ESMA's soft law instruments are set out in order to demonstrate why the enforceability of these instruments at the national level presents a problem. As such, the article adds new elements to the wider reflection on the function and status of soft law within the EU. The next section devotes attention to the problems regarding the

forward', COM(2008) 135 final.

22 E. Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment', 2013 *European Law Journal* 19, no. 1, p. 102.

23 G. Majone, *Regulating Europe*, 1996, p. 291.

24 L. Senden, 'Soft post-legislative rulemaking in the EU: A Time for More Stringent Control', 2013 *European Law Journal* 19, no. 1, p. 70. See also: L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 67.

25 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 67, 72.

26 *Ibid.*, p. 65.

27 *Ibid.*

28 L. Senden, 'Soft post-legislative rulemaking in the EU: A Time for More Stringent Control', 2013 *European Law Journal* 19, no. 1, pp. 57-75. See also: L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 66.

29 L. Senden, 'Soft post-legislative rulemaking in the EU: A Time for More Stringent Control', 2013 *European Law Journal* 19, no. 1, p. 72.

30 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 71.

31 E. Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment', 2013 *European Law Journal* 19, no. 1, p. 102.

32 *Ibid.*, p. 103.

enforcement of ESMA's guidelines and recommendations in relation to the differences that exist at the national level (Section 6). The article finishes with a conclusion which advocates more proceduralisation in the adoption process of soft law measures (Sections 7 and 8).

2. The Europeanization of the financial supervisory structure

The Europeanization of the current architecture of financial market regulation has its origins in the so-called Financial Services Action Plan of 11 May 1999, which entailed an ambitious programme of legislative reform and intensified the presence of the European Union in financial law. On 15 February 2001, the Plan was accompanied by the Final Report of the Committee of Wise Men on the Regulation of European Securities Markets,³³ also known as the Lamfalussy Report as it was issued by the Committee of Wise Men under the direction of Baron Alexandre Lamfalussy. One of the major conclusions of the report was that the existing regulatory system at that time was too slow, too rigid, and too ambiguous. Therefore, 'a higher degree of convergence and greater Community presence in the field of enforcement' was thought to be necessary.³⁴ To this end, the Lamfalussy process introduced a new four-level law-making model in the area of financial services:

- Level 1: Adopting framework principles in specific areas of substantive law by directives or regulations under the ordinary legislative procedures of Article 294 TFEU.
- Level 2: Concretising framework principles by the European Commission by means of implementing measures adopted under Comitology procedures.
- Level 3: Advising the Commission on the feasibility of measures proposed at level 2 by the so-called 'level 3 committees' – Committee of European Securities Regulators (CESR), Committee of European Banking Supervisors (CEBS), Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).
- Level 4: Envisaging the timely and correct transposition of EU legislation into national law and taking action against Member States if transposition was not in compliance with European law.

While the Lamfalussy system has enhanced cooperation between EU Member States, the 2008 financial crisis challenged its foundations and revealed the necessity to reform the system by furthering integration. The follow-up De Larosière Report,³⁵ issued by a group of experts mandated by the European Commission under the chairmanship of Jacques de Larosière, demonstrated the weaknesses of the Lamfalussy architecture, such as low convergence and differences in enforcement laws and practices. Also, the lack of binding regulatory powers of the 'level 3 committees', i.e. CESR, CEBS and CEIOPS, was seen as a pressing problem, since stronger powers were considered to be necessary to address the inconsistencies and enforcement deficits at the national level.³⁶ This in its turn has led to the transformation of the 'level 3 committees' with non-binding powers into EU agencies with legally binding decision-making and supervisory powers.

The current European Supervisory Structure comprises the European Systemic Risk Board (ESRB) and the European System of Financial Supervision (ESFS). The ESRB is a new independent body for macro-prudential supervision without legal personality and legally binding powers,³⁷ but it does enjoy soft law powers by exerting influence through its warnings and recommendations.³⁸ The ESFS consists of the three European Supervisory Authorities – the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority – a Steering Committee and the national supervisory authorities.

33 Final Report of the Committee of Wise Men on the Regulation of European Securities Markets, Brussels, 15 February 2001.

34 T. Tridimas, 'EU Financial Regulation: Federalization, crisis management, and law reform', in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, 2011, pp. 783-786.

35 Report of the high-level group on financial supervision in the EU, chaired by Jacques de Larosière, Brussels, 25 February 2009.

36 A. Ottow, 'Europeanization of the Supervision of Competitive Markets', 2012 *European Public Law* 18, no. 1, pp. 191-221.

37 Communication from the Commission, European Financial Supervision, Brussels, 27 May 2009, COM(2009) 252 final, p. 5.

38 N. Moloney, 'Reform or Revolution? The Financial crisis, EU Financial Markets law and the European Securities and Markets Authority', 2011 *International and comparative law quarterly* 60, no. 2, p. 529.

ESMA is the formal successor of CESR. As such, it is created with the objective 'to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses'.³⁹ It may be considered as one of the strongest agencies in the EU as it enjoys far-reaching regulatory, decision-making⁴⁰, and (exclusive) supervisory powers,⁴¹ especially in comparison with the competences of all other EU agencies. ESMA assists the European Commission in formulating and adopting a single rulebook applicable to all EU financial institutions. For this purpose, ESMA is provided with the power to participate in procedures leading to the adoption of binding rules as it has the task of developing draft regulatory and implementing technical standards in accordance with Articles 290-291 TFEU. It submits its drafts to the Commission, which may then endorse them as delegated or implementing acts, reject them, or endorse them in part or with amendments after coordinating with ESMA itself.⁴² On the basis of Article 16 of its founding Regulation, ESMA is also entitled to issue soft law measures in the form of guidelines and recommendations to national supervisory authorities and financial market participants with a view to establishing consistent, efficient and effective supervisory practices and to ensuring the common, uniform and consistent application of EU law. These guidelines and recommendations are not legally binding. Yet, the competent authorities and financial institutions 'shall make every effort to comply with those guidelines and recommendations' and are called upon to provide reasons for non-compliance.⁴³ Hence, these soft law measures do not seem to be that 'soft' after all.

ESMA can thus be said to contribute to administrative rule-making by exercising two types of powers: *participation in the adoption of implementing rules* (through the drafting of regulatory and implementing technical standards) and *regulation by soft law* (through the adoption of guidelines and recommendations).⁴⁴

3. ESMA's soft law activity

In comparison with its forerunner CESR, the number of ESMA's soft law measures is rapidly growing. As of this writing, a total of 27 guidelines and recommendations have been issued by the agency, even though it has only been operative for about four years. This may be considered as a huge amount of soft law since, in comparison, CESR has issued only 41 soft law instruments over a period of ten years.⁴⁵ In the past, CESR always made a distinction between guidelines or guidance, on the one hand, and recommendations, on the other, without being clear on what the difference actually was. ESMA does not differ between guidelines and recommendations though, and refers to both terms in the titles of its documents. As such, there does not seem to be a difference regarding the use of and binding force between the two.

Regarding the addressees, according to Article 16(1) of the ESMA Regulation, the Authority addresses its guidelines and recommendations to competent authorities or financial market participants. Most of these instruments do indeed attend to the national competent authorities directly, and two of them also refer to sectoral competent authorities.⁴⁶ There is only one document in which competent authorities

39 Art. 1(5) of 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.

40 Breach of Union law (Art. 17 of Regulation (EU) No. 1095/2010), action in emergency situations (Art. 18) and the settlement of disagreements between competent authorities in cross-border situations (Art. 19). In some instances, ESMA's decisions may prevail over the previous decisions of national authorities.

41 Participation in and coordination of colleges of supervisors (Art. 21 of Regulation (EU) No. 1095/2010), identification and management of systemic risks and the development of resolution structures, in cooperation with the ESRB (Arts. 22-27), promotion of a common supervisory culture (Art. 29), peer review (Art. 30), supervisory coordination (Art. 31), market assessment (Art. 32), and information-gathering (Art. 35). Moreover, Regulation (EC) 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L 302, 17.11.2009, p. 1 has delegated very important exclusive supervisory powers over credit rating agencies to ESMA.

42 E. Chiti, 'European Agencies' Rule-making. Powers, Procedures, and Assessment', 2013 *European Law Journal* 19, no. 1, p. 96.

43 Ibid.

44 M. Busuioc, 'Rule-making by the European Financial Supervisory Authorities. Walking a Tight Rope', 2013 *European Law Journal* 19, no. 1, p. 119.

45 33 CESR guidelines and 8 CESR recommendations.

46 ESMA Guidelines and Recommendations on the Scope of the CRA Regulation, ESMA 2013/720. ESMA Guidelines and Recommendations on Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation

are not mentioned as addressees at all, but it refers to them in the section on compliance and reporting obligations with the following sentence: ‘Competent authorities to whom the guidelines apply should comply by incorporating them into their supervisory practices, including where particular guidelines are directed primarily at financial market participants.’⁴⁷ It follows that even though the authorities are not mentioned as addressees, they seem to be under an obligation to comply nonetheless. The financial market participants are not addressed in all the guidelines and recommendations. In some instances, they are referred to as financial market participants in general, but usually they are specified, for example as Alternative Investment Fund Managers (AIFMs), investment firms, credit institutions, third-country entities, firms or Credit Rating Agencies (CRAs). As of this writing, there is only one set of guidelines that applies to ESMA itself.⁴⁸

4. The legal basis of ESMA’s guidelines and recommendations

As was already mentioned in Section 1, there is no general legal framework for the adoption of soft law by EU agencies in the Treaties. There do exist, however, some specific secondary legislative provisions, which provide for the adoption of soft law, and as such for the legal basis thereof. With regard to ESMA, the question as to where to find the legal basis for its soft regulatory activity is also a relevant one, since it is not always clear in which situations it is empowered to issue guidelines and recommendations. Although at first glance ESMA seems to be able to issue such instruments, also on its own initiative, on whatever issue needs to be resolved in whatever area it deems this necessary and important, some subtle obstacles to its discretion to do so may present themselves.

According to Article 8(2) of the ESMA Regulation, the Authority has the power to develop draft regulatory technical standards in the specific cases referred to in Article 10; to develop draft implementing technical standards in the specific cases referred to in Article 15; and to issue guidelines and recommendations, as laid down in Article 16. The first two paragraphs of Article 8(2) limit the drafting of regulatory and implementing technical standards to ‘specific cases referred to in’ Articles 10 and 15.⁴⁹ Therefore, there is a need for the legislator to empower ESMA in securities legislation to draft such technical standards. Articles 10 to 15 of the ESMA Regulation only provide the procedural framework for drafting regulatory and implementing technical standards. In contrast, Article 16 of the founding Regulation empowers the agency directly and explicitly to issue soft law measures. This follows from Article 16 read together with the third paragraph of Article 8(2) of the ESMA Regulation, which does not limit the issuance of guidelines and recommendations to ‘specific cases referred to in’ Article 16. Therefore, there is no need for the legislator to empower ESMA in securities legislation to adopt guidelines and recommendations, although there do exist regulations and directives in which such empowerments may be encountered. Since the start of its operation in 2011, ESMA has made extensive use of its wide discretion and has shown an appetite for setting the standard-setting agenda through its own-initiative guidance.⁵⁰ From this development it is also becoming clear that ESMA guidance can indeed address areas not directly addressed in the legislative framework and thus it significantly expands ESMA’s sphere of influence.⁵¹

However, the freedom as provided for by Article 16 does not necessarily mean a *carte blanche* for ESMA simply to adopt soft law measures in any situation. First, Article 16(1) of the founding Regulation refers to two relevant objectives for which the agency may decide to issue guidelines and recommendations: to establish ‘consistent, efficient and effective supervisory practices’ and to ensure the ‘common, uniform

(EU) No. 513/2011 on credit rating agencies, ESMA 2011/188.

47 ESMA Guidelines on the Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA 2013/74.

48 ESMA Guidelines and Recommendations on Cooperation including delegation between ESMA, the competent authorities and the sectoral competent authorities under Regulation (EU) No. 513/2011 on credit rating agencies, ESMA 2011/188.

49 Art. 8 of Regulation (EU) No. 1095/2010.

50 N. Moloney, ‘The European Securities and Markets Authority: a perspective from one year on’, 2013 *Zeitschrift für öffentliches Recht* 68, p. 21.

51 *Ibid.*, p. 19.

and consistent application of Union law'.⁵² There is some uncertainty, also in practice, as to whether the instruments should always address both purposes, or whether instruments dealing with one purpose are also considered adequate. If both purposes need to be addressed at the same time, it will be more difficult for ESMA to find areas in and issues for which it may issue soft law measures. In its recent review of the operation of the European Supervisory Authorities, the European Commission expressed the view that the two objectives for issuing guidelines and recommendations have to be read cumulatively.⁵³ Secondly, it is necessary to consider Recital 26 of the Preamble to the ESMA Regulation which provides that 'in areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and recommendations on the application of Union law'.⁵⁴ On the one hand, this Recital may imply that ESMA is indeed free to issue guidelines and recommendations on whatever issue in whatever area it deems this to be necessary and important. On the other hand, however, the Recital may be interpreted as meaning that ESMA is not always free to adopt soft law measures. It seems that if securities legislation provides for the power to draft regulatory or implementing technical standards, ESMA may not use its power to issue guidelines and recommendations.

5. The legal status of ESMA's soft law instruments

Although ESMA's soft law instruments prove to be a flexible instrument for convergence, the concrete legal status of these measures is surrounded by uncertainty. Even though the soft law measures are not legally binding by definition, there seems to be at least an intention of legally binding force deriving from ESMA's guidelines and recommendations on the basis of its wording and terms. In addition, also the 'comply or explain' mechanism for national competent authorities and financial market participants is indicative of a certain intention of legally binding force.

5.1. The intention of legally binding force: wording and terms

Since ESMA generally adopts its soft law instruments under Article 16 of its founding Regulation, most documents in English, including those that cover both general and detailed guidelines and recommendations,⁵⁵ contain more or less the same phrases on the status of the measures. Most texts begin to refer to Article 16 by simply stating that 'this document contains Guidelines and Recommendations issued under Article 16 of the ESMA Regulation'. In general, the documents then continue with the following statement: 'In accordance with Article 16(3) of the ESMA Regulation, competent authorities and financial market participants *must* make every effort to comply with guidelines and recommendations'. In fact, the choice of this wording is very interesting, since Article 16(3) itself states that the competent authorities and financial market participants *shall* make every effort to comply with the guidelines and recommendations. There is in fact only one document that uses the words '*shall* make every effort to comply'.⁵⁶ This inconsistency may have an effect on how binding the soft law measures are supposed to be. As also follows from the case law of the CJEU, it is the wording which seems to create the binding character of the measure rather than the name of the document and the authority that has issued it.⁵⁷ The Court has asserted that 'not the chosen form of the act determines its legal nature, but rather the intention of the authors as this can be derived in particular from the actual contents of the act'.⁵⁸ Hence, if the terms of a soft law act are of an obligatory nature, 'it will be difficult to maintain that the act does not intend to impose any obligations'.⁵⁹

⁵² Art. 16 of Regulation (EU) No. 1095/2010.

⁵³ Report from the Commission to the European Parliament and the Council on the operation of the European Supervisory Authorities (ESAs) and the European System of Financial Supervision (ESFS) COM(2014) 509 final, p. 4.

⁵⁴ Recital 26 of the Preamble to Regulation (EU) No. 1095/2010.

⁵⁵ See for example: ESMA Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements, ESMA/2013/322.

⁵⁶ ESMA Guidelines on certain aspects of the MiFID suitability requirements, ESMA/2012/387.

⁵⁷ L. Senden, *Soft Law in European Community Law*, 2004, p. 253.

⁵⁸ *Ibid.*, p. 249. The Court already took this approach in its early case law, see i.e. Joined cases 1/57 and 14/57, *Usines à Tubes de la Sarre v. High Authority*, [1957] ECR 105; Joined cases 90-91/63, *Commission v. Luxemburg and Belgium*, [1964] ECR 625; and Case 22/70, *ERTA*, [1971] ECR 263.

⁵⁹ Linda Senden, *Soft law in European Community Law*, 2004, p. 253. See also: Case C-57/95, *France v. Commission*, [1997] ECR I-1640.

Subsequently, the documents seem to weaken this obligatory nature once again as they also provide that ‘competent authorities to whom the guidelines and recommendations apply *should comply* by incorporating them into their supervisory practices, including where particular guidelines are directed primarily at financial market participants’. There even exists one set of guidelines and recommendations which explicitly states that they do not reflect obligations and that therefore the word ‘should’ is used.⁶⁰ Two of the documents also state that ‘ESMA *expects* all relevant competent authorities and financial market participants to comply with guidelines unless otherwise stated’.⁶¹

On the one hand, the wording and terms of ESMA’s soft law measures seem to suggest a certain legally binding force by using words like ‘must’ and ‘shall’. On the other hand, words like ‘should’ and ‘expect’ seem to pull in the other (non-binding) direction.

5.2. The ‘comply or explain’ mechanism for national competent authorities and financial market participants

Formally speaking, as guidelines and recommendations are not strictly binding on their addressees, they are not enforceable.⁶² However, this does not mean that they are merely voluntary or without legal effect.⁶³ Indeed, on the basis of the so-called ‘comply or explain’ mechanism, the competent authorities and financial market participants *shall make every effort to comply* with the guidelines and recommendations. Whereas it is still quite unclear how binding this effort really is, it follows from Article 16(3) of the ESMA Regulation that, as a rule, all competent authorities to whom the guidelines and recommendations apply must notify ESMA whether they comply or intend to comply with the guidelines and recommendations within two months of the date of publication by ESMA (sometimes including an e-mail address, such as post-trading@esma.europa.eu⁶⁴ or info@esma.europa.eu⁶⁵). A template for such notification is available from the ESMA website.⁶⁶ In the absence of a response by this deadline, competent authorities will be considered as non-compliant. In the event that an authority does not comply or does not intend to comply, it shall inform ESMA, stating its reasons. ESMA will publish this fact and may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with the guidelines and recommendations. The competent authority shall receive advance notice of such publication. If required by a particular soft law instrument, financial market participants shall also report, in a clear and detailed way, whether they comply with the guidelines and recommendations. This is often reflected within the section on reporting requirements rather by excluding certain players in the field from the requirement to comply. Some examples: AIFMs,⁶⁷ financial market participants,⁶⁸ or UCITS Management Companies⁶⁹ are not required to report to ESMA whether they comply with the guidelines in question. The Board of Supervisors⁷⁰ of ESMA informs the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee, in its annual report, of the guidelines and recommendations that have been issued, stating which national

60 ESMA Guidelines on certain aspects of the MiFID compliance function requirements, ESMA 2012/388.

61 ESMA Guidelines on risk measurement and the calculation of global exposure for certain types of structured UCITS, ESMA/2012/197. ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA/2012/122.

62 P. Schammo, ‘The European Securities and Markets Authority: lifting the veil on the allocation of powers’, 2011 *Common Market Law Review* 48, no. 6, p. 1881.

63 E. Wymeersch, ‘The European Financial Supervisory Authorities or ESAs’, in E. Wymeersch et al. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, p. 276.

64 ESMA Guidelines and Recommendations regarding written agreements between members of CCP colleges, ESMA/2013/1390. ESMA Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements, ESMA/2013/322.

65 ESMA Guidelines and Recommendations on the Scope of the CRA Regulation, ESMA/2013/720.

66 Confirmation of compliance with guidelines, ESMA/2013/811.

67 Guidelines on key concepts of the AIFMD, ESMA 2013/611. ESMA Guidelines on sound remuneration policies under the AIFMD, ESMA 2013/232. ESMA Guidelines on sound remuneration policies under the AIFMD, Final Report, ESMA 2013/201.

68 ESMA Guidelines on the Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA 2013/74. ESMA Guidelines on certain aspects of the MiFID suitability requirements, ESMA 2012/387. ESMA Guidelines on certain aspects of the MiFID compliance function requirements, ESMA 2012/388. ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA 2011/456.

69 ESMA Guidelines on risk measurement and the calculation of global exposure for certain types of structured UCITS, ESMA 2012/197.

70 ESMA’s Board of Supervisors is composed of the heads of the relevant competent authorities in each Member State and is chaired by the Chairperson of ESMA. Representatives of the Commission, ESRB, EIOPA, and EBA participate as observers.

supervisory authority has not complied with them, and outlining how ESMA intends to ensure that the competent authority concerned follows its guidelines and recommendations in the future. This annual report is made public.⁷¹ The fact that the agency may outline how it intends to ensure compliance in the future is of particular concern as it makes one wonder whether ESMA's soft law measures are really as soft as is suggested. In addition, at this moment we do not know what the consequences of being non-compliant are and neither do we know in what ways ESMA aims to ensure compliance.

Following up on the 'comply or explain' mechanism, ESMA stimulates compliance with and the coherent application of its soft law measures by publishing so-called 'guidelines compliance tables' on its website.⁷² These tables literally state which competent authorities of which Member States comply or intend to comply with ESMA's guidelines by indicating a 'Yes' in green or a 'No' in red. The practice of labelling Member States' authorities red or green, however, raises serious doubts with regard to the non-binding character of the soft law measures, since it may entail some sort of 'naming and shaming' mechanism for enforcement which results in undesirable pressure on Member States to comply anyway. Clearly, no national authority is likely to be happy with being marked in red. Up to now, ESMA has published six compliance tables on its website,⁷³ even though twenty-seven guidelines and recommendations have been issued. In general, as follows from the tables, all competent authorities have indicated that they comply or have this intention, and therefore all boxes are coloured green. Regarding one of the compliance tables though, five competent authorities (Denmark, Germany, France, Sweden and the United Kingdom) did not confirm their compliance or their intention of doing so.⁷⁴ ESMA decided to publish their rather technical reasons for non-compliance in this document. In general, the five non-compliant Member States intend to comply with the majority of the guidelines; however, they have no such intention regarding certain parts or provisions of the guidelines. The French *Autorité des marchés financiers* (AMF) provides an interesting reason for non-compliance in this case:

'The AMF declared to ESMA that it intends to comply with the full provisions of the guidelines though the said guidelines shall only enter into force as soon as they are fully applied by all National Competent Authorities throughout the EU. This is in order to avoid competition distortion between the French financial industry and that of any EU Member States partially or not applying the Guidelines. Hence, a common level playing field based on converging supervisory and market practices across the EU shall be achieved.'⁷⁵

With this statement, France indicates the desire for consistent, efficient and effective supervisory practices and a coherent as well as common, uniform and consistent application of ESMA's soft law measures within the EU from the perspective of the Member States. It indirectly refers to the goals of the use of soft law as set out in Article 16(1) of ESMA's founding Regulation.

According to these compliance tables, Member States in general thus seem to be willing to comply with the guidelines and recommendations issued by ESMA, notwithstanding the doubts as to whether this occurs voluntarily or rather as a result of peer pressure caused by 'naming and shaming'. Hence,

71 Arts. 16(4) and 43(5) of Regulation (EU) No. 1095/2010. See also: P. Schammo, 'The European Securities and Markets Authority: lifting the veil on the allocation of powers', 2011 *Common Market Law Review* 48, no. 6, p. 1882.

72 For a more general account of the implementation tasks of EU agencies, see: M. Kaeding & E. Versluis, 'EU Agencies as a Solution to Pan-European Implementation Problems', in M. Everson et al. (eds.), *European Agencies in between Institutions and Member States*, 2014, pp. 73-86.

73 Guidelines Compliance Table regarding ESMA Guidelines on sound remuneration policies under the AIFMD, ESMA/2014/1213. Guidelines Compliance Table regarding ESMA Guidelines on the model MoU concerning consultation, cooperation and the exchange of information related to the supervision of AIFMD entities, ESMA/2014/264. Guidelines Compliance Table regarding ESMA Guidelines on certain aspects of the MiFID compliance function requirements, ESMA/2013/923. Guidelines Compliance Table regarding ESMA Guidelines on certain aspects of the MiFID suitability requirements, ESMA/2013/922. Guidelines Compliance Table regarding ESMA Guidelines on the Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA/2013/765. Guidelines Compliance Table regarding ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA/2012/332.

74 ESMA Guidelines on the Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA/2013/765.

75 ESMA Guidelines on the Exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps, ESMA/2013/765, p. 6.

enforcement does not seem to present any problems at first glance. However, it is very important to dwell on the inconsistencies that still occur at the national level as it is still not clear what the implementation duty of the guidelines and recommendations exactly is.

6. Enforcement of ESMA's soft law instruments at the national level: problems and possibilities

The fact that the implementation duty, and thus the concrete legal status, of the guidelines and recommendations is very unclear, follows from the many deviations in the official translations of the texts and may lead in its turn to many different obligations throughout the EU. It also results in great variances in the ways supervisory authorities implement and/or apply the soft law measures at the national level. For this latter issue, ESMA has the competence to conduct peer reviews, which may be regarded as soft enforcement mechanisms, in order to stimulate compliance with and the coherent application of its soft law measures.

6.1. Deviations in the translations of ESMA's guidelines and recommendations

There is a tendency to be discerned in the publication of ESMA's soft law measures on its website in all the official languages of the EU. However, since only twelve out of twenty-seven guidelines and recommendations have actually been translated and only some of them stated beforehand that the document would be published in all of the EU's official languages,⁷⁶ it is still not clear whether or not all soft law measures will be translated in the future. After a comparison of the translated versions on the website of ESMA, some interesting deviations in the translations come to the fore.

In most of the Dutch versions, the national competent authorities and financial market participants '*moeten* zich tot het uiterste inspannen om aan de richtsnoeren te voldoen' (*must* make every effort to comply with the guidelines and recommendations). There is only one exception where they '*dienen* zich tot het uiterste in te spannen om aan de richtsnoeren en aanbevelingen te voldoen' (*shall* make every effort to comply with the guidelines and recommendations).⁷⁷ Many more different wordings may then be encountered regarding the strictness of compliance: the national competent authorities and financial market participants '*zouden* aan deze richtsnoeren *moeten* voldoen' (*should* comply with these guidelines),⁷⁸ '*dienen* deze na te leven' (*shall* comply),⁷⁹ '*voldoen* aan deze richtsnoeren' (*comply* with these guidelines),⁸⁰ '*moeten* aan de richtsnoeren voldoen' (*must* comply with the guidelines),⁸¹ '*dienen* aan de richtsnoeren en aanbevelingen te voldoen' (*shall* comply with the guidelines and recommendations),⁸² or '*ESMA verwacht* dat alle betrokken bevoegde autoriteiten en financiële marktdeelnemers deze richtsnoeren naleven' (ESMA *expects* all competent authorities and financial market participants to comply with the guidelines).⁸³

When looking at the literal texts of the French versions, it may be noticed that in most cases the national competent authorities and financial market participants '*doivent* mettre tout en œuvre pour respecter ces orientations et recommandations' (*must* make every effort to comply with the guidelines and recommendations).⁸⁴ In other instances, it is stated that they '*mettent* tout en œuvre pour

76 For example: ESMA Guidelines and Recommendations on the Scope of the CRA Regulation, ESMA/2013/720. ESMA Guidelines on reporting obligations under Articles 3(3)(d) and 24(1), (2) and (4) of the AIFMD, ESMA/2014/869. ESMA Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties, ESMA/2014/869.

77 ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA/2012/122.

78 ESMA Richtsnoeren met betrekking tot bepaalde aspecten van de MiFID-geschiktheidseisen, ESMA/2012/387 (Dutch version).

79 ESMA Richtsnoeren betreffende ETF's en andere kwesties in verband met icbe's, ESMA/2012/832 (Dutch version). ESMA Richtsnoeren voor risicometing en de berekening van het totale risico voor bepaalde types gestructureerde icbe's, ESMA/2012/197 (Dutch version). ESMA Richtsnoeren voor een goed beloningsbeleid in het kader van de AIFMD, ESMA/2013/232 (Dutch version).

80 ESMA Richtsnoeren met betrekking tot bepaalde aspecten van de MiFID-eisen voor de compliancefunctie, ESMA/2012/388 (Dutch version).

81 ESMA Richtsnoeren betreffende vrijstelling voor activiteiten van marketmakers en handelingen op de primaire markt krachtens Verordening (EU) nr. 236/2012 van het Europees Parlement en de Raad betreffende short selling en bepaalde aspecten van kredietverzuimswaps, ESMA/2013/74 (Dutch version).

82 ESMA Richtsnoeren en aanbevelingen voor het opstellen van consistente, efficiënte en doeltreffende beoordeling van interoperabiliteitsregelingen, ESMA/2013/322 (Dutch version).

83 ESMA Richtsnoeren voor risicometing en de berekening van het totale risico voor bepaalde types gestructureerde icbe's, ESMA/2012/197 (Dutch version). ESMA Richtsnoeren betreffende interne beheersing in een geautomatiseerde handelsomgeving voor handelsplatformen, beleggingsondernemingen en bevoegde autoriteiten, ESMA/2012/122 (Dutch version).

84 ESMA Orientations concernant certains aspects de la directive MIF relatifs aux exigences de la fonction de vérification de la conformité, ESMA/2012/388 (French version). ESMA Orientations sur les fonds cotés et autres questions liées aux OPCVM, ESMA/2012/832 (French version).

respecter les orientations et recommandations' (*make every effort to comply with the guidelines and recommendations*).⁸⁵ It is also possible to observe many varieties regarding the intended legal force of the guidelines and recommendations: the national competent authorities and financial market participants '*devraient s'y conformer*' (*should comply with them*),⁸⁶ '*doivent les respecter*' (*must meet them*),⁸⁷ '*doivent s'y conformer*' (*must comply with them*),⁸⁸ '*sont tenus de s'y conformer*' (*are obliged to comply with them*),⁸⁹ '*sont tenues de les respecter*' (*are obliged to meet them*)⁹⁰ and '*AEMF s'attend les respecter*' (*ESMA expects to meet them*)⁹¹ / '*l'ESMA escompte se conformer*' (*ESMA expects to comply with them*).⁹²

The following two examples demonstrate the effects the differences in the translations may have:

	ESMA Guidelines on sound remuneration policies under the AIFMD*	ESMA Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements**
English version	Competent authorities to whom the guidelines apply <i>should comply</i> by incorporating them into their supervisory practices, including where particular guidelines within the document are directed primarily at financial market participants	NCAs to whom the Guidelines and Recommendations apply <i>should comply</i> by incorporating them into their supervisory practices
Dutch version	Bevoegde autoriteiten waarvoor de richtsnoeren gelden, <i>dienen deze na te leven</i> door de richtsnoeren op te nemen in hun toezichtpraktijken, met inbegrip van specifieke richtsnoeren in het document die primair gericht zijn op financiële marktdeelnemers.	Bevoegde nationale autoriteiten <i>dienen</i> aan de voor hen geldende richtsnoeren en aanbevelingen <i>te voldoen</i> door deze te integreren in hun toezichtpraktijk.
French version	Les autorités compétentes auxquelles les orientations s'appliquent <i>sont tenus</i> de s'y conformer en les incorporant dans leurs pratiques de surveillance, y compris lorsque des orientations particulières exposées dans le document visent principalement les acteurs des marchés financiers	Les ANC auxquelles s'adressent les présentes orientations <i>doivent</i> s'y conformer en les intégrant dans leurs pratiques de surveillance.

* ESMA Guidelines on sound remuneration policies under the AIFMD, ESMA 2013/232.

** ESMA Guidelines and Recommendations for establishing consistent, efficient and effective assessments of interoperability arrangements, ESMA/2013/322.

version). ESMA Orientations concernant certains aspects relatifs aux exigences d'adéquation de la directive MIF, ESMA/2012/387 (French version). ESMA Orientations sur systèmes et contrôles dans un environnement de négociation automatisé pour les plateformes de négociation, les entreprises d'investissement et les autorités compétentes, ESMA/2012/122 (French version). ESMA Orientations visant la mise en place d'évaluations cohérentes, efficaces et effectives des accords d'interopérabilité, ESMA/2013/322 (French version).

85 ESMA Orientations relatives à l'évaluation du risque et au calcul du risque global pour certains types d'OPCVM structurés, ESMA/2012/197 (French version). ESMA Orientations relatives aux politiques de rémunération applicables aux gestionnaires de fonds d'investissement alternatifs, ESMA/2013/232 (French version). ESMA Orientations sur l'exemption pour les activités de tenue de marché et les opérations de marché primaire au titre du Règlement (UE) n° 236/2012 du Parlement européen et du Conseil sur la vente à découvert et certains aspects des contrats d'échange sur risque de crédit, ESMA/2013/74 (French version).

86 ESMA Orientations concernant certains aspects de la directive MIF relatifs aux exigences de la fonction de vérification de la conformité, ESMA/2012/388 (French version). ESMA Orientations concernant certains aspects relatifs aux exigences d'adéquation de la directive MIF, ESMA/2012/387 (French version).

87 ESMA Orientations sur les fonds cotés et autres questions liées aux OPCVM, ESMA/2012/832 (French version). ESMA Orientations relatives à l'évaluation du risque et au calcul du risque global pour certains types d'OPCVM structurés, ESMA/2012/197 (French version).

88 ESMA Orientations visant la mise en place d'évaluations cohérentes, efficaces et effectives des accords d'interopérabilité, ESMA/2013/322 (French version).

89 ESMA Orientations relatives aux politiques de rémunération applicables aux gestionnaires de fonds d'investissement alternatifs, ESMA/2013/232 (French version).

90 ESMA Orientations sur l'exemption pour les activités de tenue de marché et les opérations de marché primaire au titre du Règlement (UE) n° 236/2012 du Parlement européen et du Conseil sur la vente à découvert et certains aspects des contrats d'échange sur risque de crédit, ESMA/2013/74 (French version).

91 ESMA Orientations relatives à l'évaluation du risque et au calcul du risque global pour certains types d'OPCVM structurés, ESMA/2012/197 (French version).

92 ESMA Orientations sur Systèmes et contrôles dans un environnement de négociation automatisé pour les plateformes de négociation, les entreprises d'investissement et les autorités compétentes, ESMA/2012/122 (French version).

As appears from these two examples, the English versions demand from competent authorities that they should comply with the guidelines, the Dutch versions require the same level of compliance by stating that the national authorities ‘*de richtsnoeren dienen na te leven*’ (should comply with the guidelines), but the French versions seem to be far stricter by stating that the national competent authorities ‘*sont tenus de s’y conformer*’ (are obliged to comply with the guidelines) and ‘*doivent s’y conformer*’ (must comply with the guidelines) respectively. As a result, the soft law measures seem to be much ‘harder’ for the French supervisor and market participants than for the Dutch and English players in the field. Although such differences cannot be observed in relation to all the guidelines and recommendations, it is already a very serious matter that they do exist in some instances, because they create a fair degree of uncertainty as to the *obligations* the instruments impose on national supervisory authorities and financial market participants. It seems that one national authority or market player could be subject to a stricter regime than another one. Hence, the question regarding who translates the guidelines and recommendations becomes relevant. Are the texts translated by the national supervisory authorities themselves, by a translation centre within ESMA or by the general translation services of the EU? In the latter two cases, the differences may be the result of negligence or inattention by the translators. But if the competent authorities are the ones to translate the texts, they might alter the wording of a particular set of guidelines and recommendations and opt for a more or less binding choice whenever it suits them. This is obviously undesirable, as in some instances a soft law instrument may impose far more binding obligations on one Member State than on another. Such a practice would not only lead to great inequality before the law, but also to great difficulties in achieving the objectives of consistent, efficient and effective supervisory practices and ensuring the common, uniform and consistent application of EU law as set out in Article 16(1) of the ESMA Regulation. The questions therefore remain whether such variances are deliberately in place or are only just arbitrary. Are the differences a result of the unclear legal status and implementation duty of the guidelines and recommendations? Is it possible that one soft law instrument is more binding in one Member State than in another? These questions become even more relevant if one considers the different types of obligations that the foregoing comparison seems to demonstrate: the wording ‘must comply’ may hint at a *result obligation* whereas the terms ‘must make every effort to comply’ rather seem to imply an *effort obligation*. Therefore, the above-mentioned issues regarding the legal status and implementation obligation of ESMA’s soft law instruments require further attention in future research.

6.2. *The role of national supervisory authorities in the implementation of ESMA’s guidelines and recommendations*

The lack of clarity as to the legal status of ESMA’s soft law acts may also create problems for legal unity within the EU.⁹³ It creates uncertainty for the national supervisory authorities that are involved in the implementation of these rules. Therefore, Member States give their own interpretation to the implementation duty with regard to ESMA’s guidelines and recommendations and many different implementation instruments are being used by national supervisory authorities. The following comparison of the Dutch, French and English implementation tools demonstrates which important differences come to the fore.

The Netherlands presents a unique case in the sense that it is the only Member State that applies ESMA’s guidelines and recommendations directly in its own supervisory practices. If it decides to do so, the Netherlands Authority for the Financial Markets (*Autoriteit Financiële markten, AFM*) publishes this fact on its website. In its publication, the AFM indicates in relation to what laws and regulations – both European and national – it will take account of ESMA’s guidelines and recommendations in monitoring the compliance thereof.⁹⁴ If applicable, the AFM also identifies the companies to which the soft law applies. As such, the AFM does not implement ESMA’s soft law measures, but rather applies them when monitoring

93 L. Senden & T. Van den Brink, ‘Checks and balances of Soft EU Rule-Making’, 2012 Study for the European Parliament, Policy Department C: Citizens’ Rights and Constitutional Affairs, PE 462.433, p. 17.

94 Autoriteit Financiële Markten, ‘Wat zijn ESA richtsnoeren en aanbevelingen?’, <www.afm.nl/nl/professionals/regelgeving/europees/beleidsuitingen-esa.aspx> (last visited 16 October 2014).

compliance with national law e.g. the relevant rules of conduct of the Dutch Financial Supervision Act (*Wet op het financieel toezicht, Wft*),⁹⁵ or with European law, e.g. Regulation (EU) No. 36/2012 on short selling and certain aspects of credit default swaps.⁹⁶

In the United Kingdom, the Financial Conduct Authority (FCA) most often chooses to integrate the guidelines and recommendations of ESMA in a section of its Handbook of Rules and Guidance. It does so by making explicit reference to the soft law instruments⁹⁷ or by including a link to them.⁹⁸ The FCA Handbook consists of rules that do not all have the same legal value.⁹⁹ There is a categorization of the rules whose status is indicated by icons containing the letters R, E, G, D, P and C.¹⁰⁰ Legally binding rules are marked with an R, whilst sections marked with a G are only a guidance to aid interpretation and indicate the FCA's legal understanding.¹⁰¹ Even though in general the FCA Handbook is presented as a non-binding integration instrument, it is considered by financial market participants as entailing rules that are binding upon them.

In France, the Authority for Financial Markets (*Autorité des marchés financiers, AMF*) has tried to incorporate all guidelines and recommendations of ESMA in its own legal framework over the years. These are presented in a table on its website.¹⁰² As follows from this table, in most cases AMF adopts its own non-binding *positions* in order to integrate ESMA's soft law instruments. But sometimes guidelines and recommendations are issued by ESMA on topics already dealt with by AMF, for example in *instructions*. In that case, AMF does not adopt a 'position', but continues to refer to the 'instruction'.¹⁰³

Considering the above, there is no guarantee that rules will always be uniformly applied, since important differences in the ways ESMA's soft law acts are implemented present themselves. Consequently, the common, uniform and consistent application of EU law throughout the Member States cannot always be guaranteed by soft law measures and it is not inconceivable that in this way soft law achieves the opposite result of what it intends to realize.¹⁰⁴ Depending on the national follow-up given to soft law acts, rights and obligations or costs and benefits derived therefrom may thus vary from one Member State to another.¹⁰⁵

6.3. Peer review

In order to ensure a more coherent application of its soft law measures at the national level, ESMA has the competence to conduct peer reviews by virtue of Article 30 of its founding Regulation. Reviewing the way the recommendations and guidelines have been implemented in the national jurisdictions has always been on the agenda of CESR.¹⁰⁶ Therefore, peer reviews are now an official task of ESMA. On the basis of Article 30, ESMA periodically organises and conducts peer reviews of some or all of the activities

95 Autoriteit Financiële Markten, 'ESMA Richtsnoeren voor een goed beloningsbeleid in het kader van de AIFMD', <www.afm.nl/nl/professionals/regelgeving/europees/beleidsuitingen-esa/esma-beloningsbeleid-aifmd.aspx> (last visited 16 October 2014).

96 Autoriteit Financiële Markten, 'ESMA Richtsnoeren met betrekking tot de vrijstelling voor activiteiten van market makers en handelingen op de primaire markt', <www.afm.nl/nl/professionals/regelgeving/europees/beleidsuitingen-esa/esma-vrijstelling-market-makers.aspx> (last visited 16 October 2014).

97 Financial Conduct Authority, 'Handbook Notice no. 13', July 2014, p. 11, <<http://www.fca.org.uk/static/documents/handbook-notices/fca-handbook-notice-013.pdf>> (last visited 16 October 2014).

98 Financial Conduct Authority, 'Quarterly Consultation no. 2', September 2013, p. 36, Consultation Paper CP13/9, <<http://www.fca.org.uk/static/documents/consultation-papers/cp13-09.pdf>> (last visited 16 October 2014).

99 R. Veil, *European Capital Markets Law*, 2013, p. 52.

100 Financial Conduct Authority, 'Reader's Guide: an introduction to the Handbook', Version 3.0, December 2013, p. 25, <<http://www.fca.org.uk/static/documents/handbook/readers-guide.pdf>> (last visited 16 October 2014).

101 R. Veil, *European Capital Markets Law*, 2013, p. 52.

102 Autorité des Marchés Financiers, 'Orientations ESMA appliquées par l'AMF', <<http://www.amf-france.org/Reglementation/Textes-europeens/Orientations-ESMA.html>> (last visited 16 October 2014).

103 This is the case with regard to ESMA Guidelines on risk measurement and the calculation of global exposure for certain types of structured UCITS, ESMA/2011/112. See: Instruction AMF n° 2011-15, 'Modalités de calcul du risque global des OPCVM et des FIA agréés', <<http://www.amf-france.org/Reglementation/Doctrine/Doctrine-list/Doctrine.html?category=II+-+Produits+de+placement&docId=workspace%3A%2F%2FspacesStore%2Fda037ec7-cd0a-45d4-8b06-348030852da4>> (last visited 16 October 2014).

104 H. Luijendijk & L. Senden, 'Preadvies NVER: De gelaagde doorwerking van Europese administratieve soft law in de nationale rechtsorde', 2011 *SEW Tijdschrift voor Europees en economisch recht*, no. 7/8, p. 319.

105 M. Acceto & S. Zleptnig, 'The principle of Effectiveness: Rethinking Its Role in Community Law', 2005 *European Public Law* 11, no. 3, p. 380. See also: L. Senden, *Soft Law in European Community Law*, 2004, p. 28.

106 E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs', in E. Wymeersch et al. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, p. 280.

of the competent authorities. They are essential instruments on the road to regulatory convergence aiming at consistent supervisory outcomes. A peer review includes, but is not limited to, an assessment of the adequacy of the resources and governance arrangements of the competent authority; best practices; and the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law.¹⁰⁷ In addition, it considers the degree of convergence reached in the application of Union law and in supervisory practice, including regulatory and implementing technical standards, guidelines and recommendations, and the extent to which the supervisory practice achieves the objectives set out in Union law.¹⁰⁸ On the basis of a peer review, ESMA may issue guidelines and recommendations and it takes the outcome of a peer review into account when developing its draft technical standards.¹⁰⁹ In this sense, the peer review process is very much linked to ESMA's quasi-rulemaking activities.¹¹⁰ The outcomes of peer review are multiple: they may contribute to a better understanding of the differences between the different regulatory systems, urge lagging national supervisory authorities to perform better, give rise to initiatives in terms of regulation, guidelines or recommendations, and generally constitute a monitoring device for the state of regulation in the Member States.¹¹¹ ESMA adopts the best practices that can be identified from peer reviews publicly available, but the weaknesses and shortcomings may only be disclosed subject to the agreement of the competent authority involved.¹¹² This makes the use of peer reviews as a mechanism for naming and shaming very difficult as the jurisdictions identified as non-complying will strongly object.¹¹³

7. Towards more procedural guarantees?

Next to the uncertain legal status of soft law instruments and the many differences at the national level resulting therefrom, EU soft law suffers from the lack of an adoption procedure in the current legal framework. Nevertheless, ESMA's establishing Regulation includes rather elaborate provisions on consultation and participation in regulatory procedures, which demonstrates the 'correlation between the scope of rule-making powers allocated to EU agencies and the level of proceduralisation'.¹¹⁴ ESMA is always under the obligation to conduct open public consultations, perform cost-benefit analyses and request opinions or advice from the Securities and Markets Stakeholder Group (MSG) when it drafts binding technical standards, but it is at ESMA's own discretion to do so when issuing guidelines and recommendations.¹¹⁵ The idea behind the differences in the optional or compulsory nature of these requirements is that 'the more rule-making powers are granted to agencies, the more stringent procedural requirements need to be put into place'.¹¹⁶ Besides, this confirms the increasing awareness in the Union's institutional practice of the need for procedural limits to soft rulemaking activities.¹¹⁷

On the basis of the arrangements for guidelines and recommendations in Article 16(2) of the ESMA Regulation, even though they are discretionary, it is observed that the actual documents may contain several elements that could positively contribute to the legitimacy of the soft law instruments. First of all, the guidelines and recommendations may include a feedback statement from the stakeholders to the open consultation held by ESMA. The feedback statement generally includes the following elements: the

107 Art. 30(2) of Regulation (EU) No. 1095/2010.

108 Art. 30(2) of Regulation (EU) No. 1095/2010.

109 Art. 30(3) of Regulation (EU) No. 1095/2010.

110 N. Moloney, 'Supervision in the wake of the financial crisis: achieving effective 'law in action' – a challenge for the EU', in E. Wymeersch et al. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, p. 102.

111 E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs', in E. Wymeersch et al. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, pp. 280-281.

112 Art. 30(4) of Regulation (EU) No. 1095/2010.

113 E. Wymeersch, 'The European Financial Supervisory Authorities or ESAs', in E. Wymeersch et al. (eds.), *Financial Regulation and Supervision. A Post-Crisis Analysis*, 2012, p. 281.

114 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 67.

115 M. Busuioc, 'Rule-making by the European Financial Supervisory Authorities. Walking a Tight Rope', 2013 *European Law Journal* 19, no. 1, p. 118.

116 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 67.

117 L. Senden, 'Soft post-legislative rulemaking: a time for more stringent control', 2013 *European Law Journal* 19, no. 1, p. 72.

number of responsive stakeholders, the questions asked by the agency, a summary of the answers of the stakeholders as well as the responses of ESMA thereto. Secondly, the document may include the opinion or advice of the SMSG. The Group either answers the questions that were asked to the stakeholders from its own perspective, or focuses on certain key points or paragraphs of the text of the guidelines and recommendations concerned. The advice is then published on the SMSG section of ESMA's website. It is not clear, however, when or on what basis the SMSG is asked to issue its 'advice' or 'opinion' nor is it certain whether there is a difference as to the legal status thereof. Thirdly, Article 16(2) also allows ESMA to analyse the potential costs and benefits related to the guidelines and recommendations. This results in a cost-benefit analysis annexed to the actual document which so far has only happened in three instances.¹¹⁸

At this moment in time six out of twenty-seven guidelines and recommendations have comprised a feedback statement and five of them an opinion or advice from the SMSG.¹¹⁹ This is obviously a result of the fact that the Authority shall conduct, only where appropriate, open public consultations and request opinions or advice from the stakeholder group, but the fact that ESMA has only used these possibilities in a couple of instances is regrettable from the point of view of legitimacy. The feedback statements, advice and opinions namely provide a great contribution to the transparency of ESMA's rulemaking procedures. The addressees obtain an insight into which considerations have been important for ESMA and to what extent it has provided a follow-up to the issues brought forward by the stakeholders as well as an overview of what issues the SMSG considers important and to what extent ESMA has dealt with them. In terms of legitimacy, both mechanisms are to be welcomed as they clearly enhance stakeholder participation. The SMSG itself serves as a permanent body of carefully selected and highly specialized stakeholders, which increases the quality of participation even more so.¹²⁰ At this point it therefore seems interesting to turn the open public consultations, cost-benefit analyses and opinions or advice from the SMSG into mandatory steps in the adoption procedure for ESMA's guidelines and recommendations. However, even though this could increase the legitimacy of soft law measures, it may possibly decrease the effectiveness thereof by making the process too rigid and rather lengthy.¹²¹ Hence, although it can be said to put more emphasis on *ex ante* and *ex post* control mechanisms of the rulemaking process, it is important to keep the right balance.¹²²

8. Conclusion

Enhancing both the legitimacy and effectiveness of EU action by having recourse to soft law instruments seems difficult to realize if the nature, function and legal status of these instruments are far from clear.¹²³

118 ESMA Guidelines and Recommendations regarding the implementation of the CPSS-IOSCO Principles for Financial Market Infrastructures in respect of Central Counterparties, ESMA/2014/1009. Revision of the provisions on diversification of collateral in ESMA's Guidelines on ETFs and other UCITS issues, ESMA/2014/294. ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities (Final Report), ESMA/2011/456.

119 Feedback Statement: Revision of the provisions on diversification of collateral in ESMA's Guidelines on ETFs and other UCITS issues, ESMA/2014/294. ESMA Guidelines and Recommendations on the Scope of the CRA Regulation, ESMA 2013/720. ESMA Guidelines on sound remuneration policies under the AIFMD, ESMA/2013/201. ESMA Guidelines on certain aspects of the MiFID suitability requirements, ESMA/2012/387. ESMA Guidelines on certain aspects of the MiFID compliance function requirements, ESMA/2012/388. ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA 2011/456. Opinion of the SMSG: ESMA Guidelines on sound remuneration policies under the AIFMD, ESMA/2013/201. ESMA Guidelines on systems and controls in an automated trading environment for trading platforms, investment firms and competent authorities, ESMA 2011/456. Advice from the SMSG: ESMA Guidelines and Recommendations on the Scope of the CRA Regulation, ESMA 2013/720. ESMA Guidelines on certain aspects of the MiFID suitability requirements, ESMA/2012/387. ESMA Guidelines on certain aspects of the MiFID compliance function requirements, ESMA/2012/388.

120 The Group is composed of 30 members, representing in balanced proportions financial market participants operating in the European Union, their employees' representatives as well as consumers, users of financial services and representatives of Small and Medium-sized Enterprises. At least five of its members have to be independent top-ranking academics and ten of its members must represent financial market participants.

121 According to Scholten, 'authorization by means of participation vs. efficiency in output' can exist only at each other's cost. See: M. Scholten, 'The democratic legitimacy of IRAs: assessing against a proper level', paper presented at the ECPR Conference on Regulatory Governance between Global and Local, 25-27 June 2014.

122 L. Senden, 'Soft post-legislative rulemaking in the EU: A Time for More Stringent Control', 2013 *European Law Journal* 19, no. 1, p. 58.

123 L. Senden, *Soft Law in European Community Law*, 2004, p. 29.

This problem is not only relevant in relation to soft law by the European Commission and the Council, but, as demonstrated in this article by the issues of ESMA, it also weighs heavily upon EU agencies.

The legal basis for ESMA's guidelines and recommendations leaves us with quite some questions regarding the issues which the Agency may regulate with the help of soft law. Article 16 of the founding Regulation does not seem to provide a *carte blanche*, but it is not clear what its limits are either. Furthermore, there are several ambiguities in relation to the legal status of ESMA's soft law. The wording and terms of the documents provide considerable controversy as some words seem to suggest a certain legally binding force, but other words may pull in completely the opposite (non-binding) direction. In addition, the 'comply or explain' mechanism also seems to indicate a certain legally binding force of the guidelines and recommendations.

The uncertainties regarding the legal basis and legal status of the guidelines and recommendations lead to incoherence at the national level. Due to the different translations of the measures, the obligations stemming therefrom are formulated in different ways throughout the Member States. Moreover, national supervisory authorities use a wide variety of instruments for the implementation of the soft law measures. This ultimately very much complicates the enforcement thereof. Although ESMA has the competence to conduct peer reviews in order to stimulate compliance, this instrument is rather to be regarded as a soft enforcement mechanism which does not necessarily take away all the differences at the national level.

All these ambiguities seriously affect the consistency, efficiency and effectiveness of supervisory practices throughout the EU and do not help in ensuring the common, uniform and consistent application of EU law either. As a result, the goals of the use of soft law as set out in Article 16(1) of ESMA's founding Regulation cannot be achieved by the Agency and the expectations as regards effectiveness cannot be realised. Adding to this the lack of a solid procedure for the adoption of soft law measures, we may also conclude that the legitimacy issues are far from resolved.

All in all, more clarity on the legal basis and legal status of EU agencies' soft law is essential in order to contribute to the legitimacy and effectiveness of policy-making through agencies. The realization that 'the more rule-making powers are granted to agencies, the more stringent procedural requirements need to be put into place' is especially important if soft law indeed has a certain legally binding force.¹²⁴ Hence, next to a clarification of the basis, function and status of EU agencies' soft law measures, the question for future research is what stronger procedural and good governance guarantees should be put into place that would reflect a more adequate balancing of both legitimacy and effectiveness concerns. ¶

124 L. Senden & T. Van den Brink, 'Checks and balances of Soft EU Rule-Making', 2012 Study for the European Parliament, Policy Department C: Citizens' Rights and Constitutional Affairs, PE 462.433, p. 67.