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Walking the Plank
EIOPA's Guidelines Within the European System of Financial Supervision

The reinforcement of European integration in the field of financial supervision has brought about the advent of a rather novel regulatory tool. All European (Financial) Supervisory Authorities (ESA) – amongst which the European Insurance and Occupational Pensions Authority (EIOPA) – have been granted the power to issue guidelines.

Whilst it appears to be common wisdom that these guidelines have no binding effect (sensu stricto), it remains unclear what their legal nature might be. In view of the rather prolific use of this instrument by EIOPA, it seems de rigeur to establish the legal limits that EIOPA is subject to when issuing guidelines, their legal effects and possibilities of legal redress. ▸

Further reading:
J. Gal, Rechtsschutz gegen Maßnahmen von EIOPA, in: Dreher, Meinrad/Wandt, Manfred (eds.), Solvency II in der Rechtsanwendung 2014, Karlsruhe 2014, pp. 11–70.

J. Gal, Rechtsschutz gegen die Leitlinien der EIOPA, in: Koch, Robert (ed.), 100 Jahre Seminar für Versicherungswissenschaft und Versicherungswissenschaftlicher Verein in Hamburg e.V. (currently in print).

Difference Between Guidelines and Recommendations

Other than guidelines, art. 16 EIOPA-Reg. equally empowers EIOPA to issue recommendations. For the moment, it remains unsettled in how these two instruments differ from each other. The European Securities and Markets Authority (ESMA) – having issued many of its instruments passed under art. 16 ESMA-Reg. (which is verbatim to art. 16 EIOPA-Reg.) under the collective name "guidelines and recommendations", without differentiating between the two – appears to regard the linguistic pair to form a hendiadys, with the two synonymous terms in conjunction providing for the specific legal instrument of art. 16 ESMA-Reg. Such an understanding is, however, in contradiction to several provisions of the EIOPA Reg. that speak of "guidelines or recommendations" (see e.g. art. 16 [2] phrase 2, [3] subpara. 2 phrase 1, [3] subpara. 3 phrase 1 and 2, [3] subpara. 4 EIOPA Reg.).

Even if they are thus distinct legal instruments, it is unclear via which characteristics guidelines may be distinguished from recommendations. The only reasonable delimitation seems to be based on the level of abstractness and generality. While guidelines are abstract and general legal instruments thus resembling a European material law (without the binding effect, though), recommendations will either be more concrete or more individual in nature thus evoking a European administrative decision.

Competency to Issue Guidelines

EIOPA, as all European bodies, may only act in cases for which it has been empowered. This means that EIOPA may only issue guidelines in such areas for which it has been directly empowered (art. 1 [2] alt. 1 EIOPA Reg.) or which regard the legal acts enumerated by art. 1 (2) alt. 2 EIOPA Reg. Other subjects may only be addressed if they have a certain degree of connectivity to the legal acts enumerated (art. 1 [3] EIOPA Reg.). As can be seen with the Guidelines on Complaints-Handling, an issue

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that was not addressed by either the Solvency Directive or any other European act, EIOPA has adopted a problematically broad approach as to what falls within its purview. Additionally, pursuant to art. 16 (1) EIOPA Reg. EIOPA may issue guidelines only "with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law". In view that the criteria "establishing supervisory practices" and "ensuring application of Union law" are linked with the conjunction "and", guidelines may only be issued where both criteria are met cumulatively. Again, EIOPA seems to disagree by explicitly stating that the Guidelines on Complaints-Handling were issued in order to fill an "existing regulatory gap", thus in the absence of Union law. In essence, EIOPA should refrain from addressing issues that are the prerogative of the European or national legislator and should in the future only apply guidelines where such appears necessary to concretize existing European legislation instead of spearheading new legislation via this legal mechanism.

Legal Effect

Guidelines are not granted binding legal force and as such are neither (quasi-)legislative acts nor administrative decisions sensu stricto. Guidelines, however, constitute abstract general specifications made towards the national supervisory authorities (NSAs) and towards the supervised undertakings, which have an increased factual binding force thus approximating them to a material law. In relation to the supervised undertakings, the guidelines will basically take on the form of binding law because they are not addressed to them directly. By informing EIOPA that it intends to comply with the guidelines in question, the national supervisory authority will usually feel (morally) bound to apply the guidelines vis-à-vis all market participants without fail. Since almost all insurers adhere to a strategy of avoiding legal proceedings with ▸

the supervisory authority at all costs, to them the guidelines become a legal instrument that has to be regarded as binding.

Legal Redress

The factual power of the guidelines becomes even more pronounced if one considers the virtual lack of legal redress open to insurers (or the NSA) against them. The EIOPA Reg. does not grant the right of appeal against the guidelines (cp. art. 60 EIOPA Reg.). An action for annulment before the ECJ is (usually) equally unavailable, since art. 263 TFEU allows for such actions only against legal instruments with binding legal force. The same is true concerning legal actions before national courts: There the guidelines or the administrative measures passed by the NSA to comply with the guidelines cannot be attacked individually. An insurer would, thus, be forced to wait for an administrative decision to be taken against it, and could only raise the issue of illegality of the guidelines when requesting the annulment of said administrative decision. Since insurers want to avoid such legal disputes with their national supervisors, it is to be expected that guidelines will hardly ever be scrutinized by the courts. Since the guidelines are issued without the involvement of the legislator and are not tested by the judicial branch, the executive branch, i.e. EIOPA and the NSAs, can factually use guidelines to substitute itself for the legislator.

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Resume

Hitherto EIOPA has issued 34 bundles of guidelines (excluding the preparatory guidelines, which have ceased to be effective), adding up to 730 guidelines. On each of these guidelines, EIOPA has received 31 compliance-answers by the Member States and the EEA-States in summa 22,630 answers. Paying heed to this, and to the fact that many of the current guidelines tackled controversial matters, it is rather surprising that the total amount of non-comply-answers does not exceed 21 (!). During the preparatory phase, non-compliance was more common with a statistical average of 4% of the guidelines not being fully complied with by all Member States. Today, the amount of non-compliance with guidelines is below 1%. Insofar guidelines have factually created a more harmonized insurance supervision. Other than the above-mentioned theoretical and democratic concerns, one could ask if such a homogenous approach within the biggest global insurance market that is the EU might not only reap benefits but also create new problems. Especially, an automatically aligned response to certain regulatory questions by all national supervisors might create an increased systemic risk that would be avoided by leaving the ESAs more leeway to develop diverging approaches. Another possibility would be to grant the market participants more freedom of action. Since the goal of creating a principle-based regime was – at least originally – to foster a more flexible and more individual model of supervision, it would be a good idea not to fill out all principles with overly detailed guidelines. Reality looks different: The move away from rule-based law has resulted in an exponential increase of rules in the field of insurance supervision. And these rules – especially in the case of guidelines – are set by the same actors that are later to enforce these rules. This should be enough to make Montesquieu turn in his grave. ◆

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