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# *SOFT LEX, SED LEX*? ON NEW REGULATORY INSTRUMENTS FOR THE EU FINANCIAL MARKET

One of the most important elements in the process of European integration has been EU law. Such law was needed to implement the European project and create the EU. At every stage its main role has been to consolidate European structures. The dynamism of European integration has forced EU legislative institutions to face new challenges and seek appropriate solutions. This tendency is visible also today. To understand and analyse the role of EU law, it may be helpful to take the EU financial market as an example and to review the process of its gradual integration since the 1980s. It can be argued that this process has now reached a stage previously unknown. Its main characteristic is the significant activity of EU legislative institutions. This activity has resulted in dozens of new legal acts covering the most important segments of the financial market and creating new pan-European structures, including the European System of Financial Supervision (ESFS). The ESFS has been equipped with new instruments referred to as *soft law*. Soft law is not a novelty in international law; however, until recently it was not used outside it, and certainly not in financial market legislation.[1]

The soft law option has been much debated recently as a result of the possible breadth and depth of its application and its potential use to intervene in the internal affairs of EU member states, especially those concerning their national administrative bodies, courts and also financial market actors. The assumption has been that soft law will contribute to a more profound integration process; however, in practice the process described here must be considered a challenge. This challenge is not often accentuated, but in my view its practical significance is huge, because of the segment of the economy in which soft law is to operate. The financial market must be seen as

[1] Financial market law is part of financial law. Recent EU legislative activity has caused many researchers to take an interest in this area. Polish publications on the subject include: E. Fojcik-Mastalska, *Prawo rynku finansowego w systemie prawa*, in: A. Jurowska-Zeidler, M. Olszak (eds.), *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warsaw 2016, pp. 19-26; C. Kosikowski, *Nowe prawo rynku finansowego Unii Europejskiej*, in: A. Jurowska-Zeidler, M. Olszak (eds.), *Prawo rynku finansowego*, *op. cit*., pp. 27-38; C. Kosikowski, M. Olszak, *Od prawa bankowego do prawa rynku finansowego*, in: J. Głuchowski (ed.), *System prawa finansowego*, Vol. IV, Warsaw 2010, pp. 224-250.

an element of a larger structure, namely the social system. This has been confirmed by the recent financial crisis, which caused the erosion of the foundations of modern societies and their loss of trust in the financial sector. This sector is usually perceived negatively; however, it is a significant element of the economy, and for that reason is kept under close supervision by government bodies.

This supervision may take various forms depending on the adopted philosophy of market regulation.[2] However, its prevailing forms are either direct regulations characteristic of a *command and control* approach, or indirect control identified with *self-regulation*.[3] Soft law is used in both approaches. However, at present EU legislative institutions aim to influence the EU financial market directly, and for that reason, examples of regulations which directly intervene in the mechanisms of that market will be discussed below. The examples will be analysed in search of answers to questions about the effectiveness of new soft law measures and the soundness of the choice of soft instruments regulating the EU financial market.

Firstly, essential facts about the EU financial market will be presented as an indispensable introduction to the discussion of *soft lex*.

## THE EU FINANCIAL MARKET IN ESSENCE

In 2017, the EU celebrated its 60$^{th}$ anniversary. The history of the organisation so far has been interesting if not turbulent. The EU as a political, economic and social project has its roots in shared history, culture and common values. Common historical experiences, as well as the challenges of globalisation, made leaders of European states see the need to unite. Their first goal was economic cooperation. This cooperation was essential in Europe's transformation into one of the three most important players (together with the US and the Asian region) in world economic markets. Concurrently, the affluence of European societies grew. The next stages of the EU's economic integration perfectly reflect the Balassa framework of institutional integration and its five stages: a Free Trade Area, a Customs Union, a Common Market, an Economic Union, and Total Economic Integration. The fifth stage is sometimes called political integration. The usefulness of this framework follows from the fact that all of the five stages can be identified in the case of the EU, even if the fifth stage, political union, is present only to a limited degree.

In the financial market context, the most important (and completed) stages of EU integration are the common market and economic union, with a significant degree of coordination of national economic policies and/or harmonisation of relevant national laws. Neither the common market nor the economic union could function without a developed financial market, whose important functions include capital formation,

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[2] M. Lemonnier, *Rola badań porównawczych i interdyscyplinarnych w kwestiach rynku i nadzoru finansowego*, in: A. Jurowska-Zeidler, M. Olszak (eds.), *Prawo rynku finansowego*, *op. cit*., pp. 43-45.

[3] D. Wojtczak, Soft law i mechanizmy nielegislacyjne jako instrumenty integracji rynku usług bankowych Unii Europejskiej, *Monitor Prawa Bankowego,* no. 1, 2012, pp. 61-71.

currency price determination (intermediation between demand and supply) and the settlement function.[4] It would be difficult to imagine an efficient economy without a well-developed financial market. Thus, the economic integration of EU member states required some integration of their financial markets. Three issues need to be discussed in more detail: the concept of the EU financial market as a part of the European Single Market (Internal Market), the promotion of maximum rather than minimum harmonisation, and the creation of new pan-European structures which control and supervise the EU financial market using new forms of law, including soft law.

The EU financial market is one of the most important elements of the European Single Market, and is only superficially subject to the same organisational and functional principles as the latter.[5] The EU financial market is distinct because of its assigned functions and the multi-vector nature of its operations. Article 26.2 of the *Treaty on the Functioning of the European Union*[6] states that the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. The question is which of these freedoms is the closest to the financial market. The answer is not straightforward. Financial market instruments and entities are involved in the free movement of both goods and capital. Within the EU, a sale of goods involves payment, and most commonly a bank transfer is used. For the bank transfer it is necessary that the free movement of capital (payment) be ensured. This is also the case with cross-border transfer of services and payments for them. These examples demonstrate the need for structures facilitating the unimpeded transfer of money, which is very important for economic growth.

In the subject literature, money is usually seen as a good, traded on the financial market.[7] The structure of such a market should provide for the smooth, and thus also secure movement of money. It is also desirable that the financial market take the same form for all of the markets that it serves. In the EU, this last postulate has been partly realised, and materialised when the euro came into existence. Not all EU member states belong to the euro area, and this obviously does not serve European integration well. However, the question is whether the common currency project is fully justified in a situation where national economies differ – for cultural and historical reasons – and where the differences are reflected in the economic policies of some EU member states.[8] Such dilemmas also arose when the concept of the EU single financial market was born, and this, in my view, happened in the 1980s. After the "eurosclerosis" and

[4] A. Szyszka, Behawioralne aspekty kryzysu finansowego, *Bank i Kredyt,* no. 40 (4), 2009, pp. 13-14.

[5] C. Kosikowski, *Finanse i prawo finansowe Unii Europejskiej*, Warsaw 2014, p. 70.

[6] Consolidated version of the *Treaty on the Functioning of the European Union*, Official Journal C 326, 26/10/2012 P. 0001 – 0390, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT (henceforth TFEU).

[7] A. Sławiński, *Rynki finansowe*, Warsaw 2006, pp. 12-19.

[8] A. Sławiński, *Przyczyny globalnego kryzysu finansowego*, in: J. Osiński, S. Sztaba (eds.), *Nauki społeczne wobec kryzysu na rynkach finansowych*, Warsaw 2009, pp. 44-59.

economic stagnation, it became obvious that changes were needed and the idea of the EU internal market had to be revitalised.

Attention is often drawn to the fact that the changes needed were first voiced by the market itself, or rather by European firms, which – seeing the weakness of national governments and their reluctance to embrace the European ideal – began to demand changes.[9] Their point was that without changes they would lose their markets, which were becoming progressively globalised, and that Europe had already begun to lose out not only to the US, but also to the Far East. Under this pressure the EU institutions reacted, launching the *New Approach* in 1985.[10] This approach required standardisation and legislation at European level. At the following meeting of the European Council in Milan (June 1985), the European Commission presented its White Paper "Completing the Internal Market",[11] which set down the philosophy to be followed. The White Paper followed a new concept of harmonisation based on a *minimum coordination of rules* in relation to financial services, the *mutual recognition* of the different national rules, and the principle of *home country control*. These were to be supported by the free movement of capital.[12]

The triad of *minimum coordination*, *mutual recognition* and *home country control* regulating the EU financial market guided its development for over 10 years, during which projects related to the creation of that market were implemented. Examples are:[13] 1) the Lisbon strategy[14] and – within its framework – the Financial Services Action Plan (FSAP) created in 1999, which was to revolutionise thinking about the functioning of

[9] This initiative is attributed to actions taken by Pehr Gyllenhammar – chairman of Volvo, and supported by Gianni Agnelli – president of Fiat, Wisse Dekker – CEO of Phillips and Étienne Davignon – European Commissioner for Industrial Affairs and Energy, which led to the creation of the European Round Table of Industrialists in the early 1980s. The goal of this group of leading European industrial leaders has been to revitalise and reform European structures. Cf. L. W. Gormley, The internal market: history and evolution, in: N. N. Shuibhne (ed.), *Regulating the Internal Market*, Cheltenham 2006, p. 15.

[10] Cf. T. Nieborak, *Aspekty prawne funkcjonowania rynku finansowego Unii Europejskiej*, Warsaw 2008, pp. 70-87.

[11] Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28–29 June 1985) /* COM/85/0310 FINAL */, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:1985:0310:FIN.

[12] A. Samborski, Integracja rynków finansowych w Europie, *Przegląd Ustawodawstwa Gospodarczego*, no. 3, 2005, p. 2.

[13] These are some examples of projects. Others are being implemented, most importantly the banking union. Cf. J. Monkiewicz, *Unia bankowa jako zmiana architektury regulacyjnej i nadzorczej rynku finansowego z perspektywy ekonomicznej*, in: A. Jurowska-Zeidler, M. Olszak (eds.), *Prawo rynku finansowego. Doktryna, instytucje, praktyka*, Warsaw 2016, pp. 59-73; P. Stanisławiszyn, *Unia Bankowa – blaski i cienie nowego mechanizmu rynku finansowego*, in: Z. Ofiarski (ed.), *XXV lat przeobrażeń w prawie finansowym i prawie podatkowym – ocena dokonań i wnioski na przyszłość*, Szczecin 2014, pp. 851-860; M. Fedorowicz, Nowe zadania i funkcje Europejskiego Banku Centralnego w zapewnianiu stabilności finansowej w świetle regulacji Europejskiej Unii Bankowej, *Zeszyty Natolińskie*, no. 62, 2016, pp. 16-34.

[14] Lisbon Extraordinary European Council, 23–24 March 2000, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm (accessed 3 January 2017).

a European financial market and give a new impetus to its development;[15] 2) the Green Paper on Financial Services Policy (2005–2010),[16] published by the Commission in 2005, in which the priorities of the Commission's financial services policy for the next five years were presented,[17] and the White Paper on Financial Services Policy 2005–2010,[18] which included the most important elements of the new European financial market strategy, the potential of which had not been fully explored; 3) the de Larosière Group, mandated in 2008 to make proposals and recommendations for reform of European financial market supervision and regulation. The Group produced its report in February 2009,[19] and its recommendations were presented to the European Council in the following month.

The timing of the above initiatives overlapped with the crisis that affected the financial markets and also the public finances of EU member states. The financial crisis was certainly a catalyst for further actions aimed at the implementation of the de Larosière Group's recommendations. This refers in particular to the need for a systematic prudential approach to supervision and regulation. Both macro-prudential and micro-prudential supervision were needed. The former was to be achieved through existing institutions, including the European System of Central Banks. The macro-prudential supervision system was to ensure the stability of the financial system as a whole, while micro-prudential supervision was to limit the risks of individual financial institutions.[20] The preparations were to be made in 2010–2012; however, the economic and political situation motivated the European Commission to accelerate the process. On 27 May 2009, the Commission adopted a Communication on Financial Supervision in Europe. The proposal was based on the de Larosière Group's Report and included timetabled steps to be taken.[21]

The project included the creation of a new European System of Financial Supervision (ESFS), the legal and organisational architecture of which was to include a European Systemic Risk Board (ESRB). The ESRB is responsible for macro-prudential supervision of the financial system in the EU. The European Central Bank

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[15] Communication from the Commission Implementing the Framework for Financial Markets: Action Plan, COM (99) 232 final, 11 May 1999.

[16] Green Paper on Financial Services Policy (2005–2010), COM (2005) 177 final, 3 May 2005, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52005DC0177

[17] G. Pauwels, Sector inquiries: financial services under siege?, *Euredia*, No. 1, 2006, pp. 110-129.

[18] White Paper, Financial Services Policy 2005-2010, COM (2005) 629, 5 December 2005, http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0629_/com_com(2005)0629_en.pdf; see also J. Łańcucki, Regulacyjne i nadzorcze elementy w Planie Działania w Zakresie Usług Finansowych (FSAP) (2005-2010), *Prawo Asekuracyjne*, no. 3, 2006, pp. 4ff.; M. Iwanicz-Drozdowska, *Reforma rynku finansowego w Unii Europejskiej*, in L. Pawłowicz (ed.), *Polska wobec wyzwań integracji rynku finansowego w Unii Europejskiej*, Instytut Badań nad Gospodarką Rynkową, Transformacja Gospodarki no. 112, Gdańsk 2006, p. 59.

[19] The High-Level Group on Financial Supervision in the EU, Brussels, 25 February 2009, http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf (accessed 3 January 2017).

[20] M. Fedorowicz, Główne zasady organizacyjne nowego europejskiego nadzoru finansowego, na przykładzie Europejskiej Rady Ryzyka Systemowego oraz Europejskiego Organu Nadzoru Bankowego, *Przegląd Ustawodawstwa Gospodarczego*, no. 7, 2011, pp. 2-9.

[21] Commission Communication of 27 May 2009 on European Financial Supervision, Brussels, 27/05/2009. COM(2009) 252 final. SEK(2009) 715, SEK(2009) 716.

(ECB) plays a dominant role and closely cooperates with three European Supervisory Authorities (ESAs), which are part of the ESRB: the European Banking Authority (EBA)[22], the European Insurance and Occupational Pensions Authority (EIOPA)[23] and the European Securities and Markets Authority (ESMA)[24]. The ESRB brings together representatives of the national central banks of EU countries and the Chairs of the three European Supervisory Authorities. The ECB, ESAs and financial market supervision bodies of the Member States have formed a *quasi*-federal structure for micro-prudential supervision. The structure of the ESFS is well grounded in EU primary and secondary law.[25] Most importantly, Article 114.1 of the *Treaty on the Functioning of the European Union* states the following:

> Save where otherwise provided in the Treaties, the following provisions shall apply for the achievement of the objectives set out in Article 26. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.[26]

The establishment of pan-European supervising institutions had the aim of ensuring the better functioning of the internal market. However, Magdalena Fedorowicz has rightly pointed out that integrating supervision clauses in the regulations on the functioning of the ESFS may be potentially risky. This refers to the micro-prudential competences of the ESAs. Fedorowicz writes that this way of authorising ESA supervision raises doubts about the normative soundness of this solution. These doubts primarily concern EU primary law and the reference to Article 114.1 of the *Treaty on the Functioning of the European Union*, which must be recalled while reading the regulations establishing ESAs[27]. An example is Regulation (EU) No 1093/2010. This amended regulation has changed the structure and competences of the EBA, and also its instruments, including those categorised as soft law.

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[22] 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1093. Henceforth Regulation (EU) No 1093/2010.

[23] Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R1094.

[24] 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32010R1095.

[25] This issue has been analysed in depth by M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, Warsaw 2013, pp. 112-130.

[26] *Treaty on the Functioning of the European Union*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

[27] M. Federowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, *op. cit*., s. 113-114.

In the subject literature, legal instruments are divided into binding and non-binding, and both apply in the case of the EBA[28]. An example of binding law is Regulation (EU) No 1093/2010. Its Article 10 on Regulatory Technical Standards (RTS) and Articles 8, 9, 17, 18, 19 and 21 on decisions of the EBA are of special interest. The EBA submits its draft binding regulatory technical standards to the European Commission for endorsement. The European Parliament and the Council have delegated power to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Articles 290 and 291 TFEU[29]. Commission Delegated Regulations and Implementing Acts supplement other legislative acts (Regulations and Directives). Adopted RTS are examples of delegated Regulations which are binding, i.e. Binding (regulatory) Technical Standards (BTS). This and the EBA's supervisory powers are a new solution in terms of instruments used to make and implement European law. For example, Regulation (EU) No 1093/2010, Article 19.4, states that if a component national authority does not comply with the decision of the EBA and fails to ensure that a financial institution complies with requirements directly applicable to it, the EBA "may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice". A "decision" is binding on those to whom it is addressed (e.g. an EU country or an individual financial institution) and is directly applicable. This means that the EBA's decision may "bypass" the national authority whatever consequences in the inner order of the affected Member State.[30]

The instruments available to the EBA include also non-binding Guidelines, Recommendations and Opinions, qualified as soft law; however, caution is needed when calling them "law". The question is whether something that is not legally binding can be considered law.[31]

## SOFT LAW AND EU FINANCIAL MARKET REGULATION

Article 16 of Regulation 1093/2010 establishing the EBA may be viewed as one exemplifying the essence of soft law and its role in international law. Article 16 is titled "Guidelines and recommendations". First of all, the question is to determine the actual objective justifying guidelines and recommendations as legal measures.

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[28] *Ibidem*, pp. 150 ff.

[29] J. Barcz, Akty delegowane i akty wykonawcze – pojęcie i kryteria rozróżnienia, *Europejski Przegląd Sądowy*, No 3, 2012, s. 6-16; A. Piesiak, Główne problemy w negocjacjach i we wprowadzaniu w życie nowego systemu aktów delegowanych i wykonawczych zgodnie z art. 290 i art. 291 TFUE, *Europejski Przegląd Sądów*, No. 3, 2012, p. 17-22; J. Bast, New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law, *Common Market Law Review*, No. 3, 2012, p. 885-927.

[30] Article 18.5 states that "Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter". Compare M. Fedorowicz, A. Michór, O charakterze prawnym decyzji nowych europejskich organów nadzoru nad rynkiem finansowym UE, *Europejski Przegląd Sądowy*, no. 11, 2011, pp. 24-35; T. Nieborak, *Decyzja jako szczególna forma działań podejmowanych przez Europejski Organ Nadzoru Bankowego*, in: A. Pomorska, P. Smoleń, J. Stelmasiak, A. Gorgol (eds.), *Prawo finansowe w warunkach członkostwa Polski w Unii Europejskiej. Księga Jubileuszowa dedykowana Profesor Wandzie Wójtowicz*, Lublin 2011, pp. 321-332.

[31] See also J. Jabłońska-Bońca, "Soft law" as Contemporary "Open" Norms, *Studies in the Theory and Philosophy of Law*, Vol. 4, 1998, pp. 67ff.

The guidelines and recommendations are addressed to competent national authorities or financial institutions 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 (Article 16.1). The EBA, where appropriate, conducts open public consultations regarding the guidelines and recommendations and analyses the related potential costs and benefits (Article 16.2). The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations (Article 16.3). Article 16.3 in a very diplomatic and soft way "suggests" that it is better to comply with a guideline or recommendation written by the European Banking Authority. EU legislation also contains other measures serving to exert pressure and thus strengthen the authority of the EBA. Within two months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons (Article 16.3). The EBA is a supervisory authority and it may publish the fact that a competent authority does not comply or does not intend to comply with a guideline or recommendation. The EBA may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation (Article 16.3). This is a *naming and shaming* approach and a telling example of applying persuasion to cause (someone) to do something by asking, arguing, or giving reasons. Persuasion is frequently used in negotiations which aim at reaching a consensus. However, persuasion is aimed at the acceptance of a set goal, good or value. In the case of the financial market, goods include stability and security.[32] The financial stability narrative is the leitmotif of actions taken by the institutions responsible for legal regulation of financial markets.[33] The application of soft law measures follows from the assumption that the addressees of soft law will respect it because of the authority of the institution which creates it and that authority's potential sanctions. At this point the question is whether disrespect for borderline law can lead to sanctions. In other words, is there a principle of *soft lex, sed lex*?

To answer this question it is necessary to recall some essential facts about soft law. Soft law was first used in international law. Issues in international relations are sensitive, and compromises between sovereign states are needed. Consequently, there is a need to introduce solutions that lie in between the compulsion of law and freedom to decide. The term *soft law* was probably coined by Lord McNair. His name is the one most frequently mentioned in the soft law debate among international lawyers.[34] This debate is

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[32] Stability and security of the financial market need to be recognised as protected goods. Their protection encourages trust, which in my view is the fundamental value of the financial market. More in: T. Nieborak, *Creation and enforcement of financial market law in the light of the economisation of law*, Poznań 2016, pp. 91ff.

[33] W. Szpringer, *Prawo i ekonomia stabilności finansowej*, Warsaw 2015, pp. 13-26; M. Andenas, I. H.-Y. Chiu, *The Foundation and the Future of Financial Regulation*, London 2013, pp. 18-38.

[34] R. Bierzanek, „Miękkie" prawo międzynarodowe, *Sprawy Międzynarodowe*, no. 1, 1987, p. 92.

multi-faceted and concerns several issues, among them whether soft law is really law and its regulations binding, and whether soft law results in legally binding obligations and consequently whether sanctions for noncompliance are practically possible.[35] It appears that what is not disputed is a deep division between supporters and opponents of soft law in legal doctrine[36] and the possibility of contrasting soft law with *hard law*, which is traditionally identified with defined sources of law, established according to the rules accepted in a given legal system.

The fundamental problem, however, is how to define *soft law*. Wyrozumska aptly writes that the term is perceived as confusing:

> If soft law is an *infra legem* (beneath the law, Level 2) measure, it should not be called law, not even soft law. If, on the other hand, such measures are related to law (for example resolutions of an international organisation which due to the organisation's constitutive agreement do not have a binding character) and produce legal effects, they are legal provisions and calling them "soft" is confusing.[37]

In the light of these words, the EBA's guidelines discussed above are surely related to law and non-compliance may invoke legal effects. At this point Fedorowicz's interpretation of the non-binding measures of the ESFS authorities is valid in the light of EU law:

> […] if so far *soft law* has been applied mostly because of the high rank of institutions which draft it and their share in the practical interpretation of EU provisions, now the effectiveness of soft law is more ensured by normative "compelling" measures which impose sanctions for the non-implementation of recommendations and guidelines.[38]

If "*soft law* means measures determined in EU law which legally and non-bindingly impact EU member states, their national authorities and entities, although they may produce indirect legal effects or practical effects",[39] the question is what the nature of these measures is and how to link this concept to the category of "binding law".

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[35] It is impossible to present all of the threads of the discussion on *soft law* in any detail here. Cf. M. Stępień, Zagadnienie soft law w prawie europejskim, *Acta Universitatis Wratislaviensis*, No. 2748, 2005, pp. 279-302; M. Pieprzyk, Soft law w procesie europeizacji prawa administracyjnego, *Administracja. Teoria. Dydaktyka. Praktyka*, no. 2, 2012, pp. 156-160; A. Wyrozumska, Instrumenty międzynarodowe niewiążące prawnie (soft law lub flexible law), in: A. Lazanowsky, R. Ostrihansky (eds.), *Współczesne wyzwania europejskiej przestrzeni prawnej. Księga pamiątkowa dla uczczenia 70. urodzin Profesora Eugeniusza Piontka*, Kraków 2005, pp. 607-618.

[36] A. Wyrozumska, Instrumenty międzynarodowe niewiążące prawnie (soft law lub flexible law), *op. cit.*, pp. 607-618.

[37] *Ibidem*, p. 611.

[38] M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, *op. cit.*, p. 163.

[39] *Ibidem*, p. 152. See also: L. Senden, Soft law, Self-regulation and Co-regulation in European Law. Where do they meet?, *Electronic Journal of Comparative Law*, Vol. 9, 2005; D. M. Trubek, P. Cottrell, M. Nance, *"Soft law", "hard law", and European integration: toward a theory of hybridity*, Wisconsin Law School Legal Studies Research Paper Series, No. 1002, 2005.

It may be helpful to point out that the concept of *soft law* may apply to two different things: the form and the substance. The form refers to a situation where the norms have a form not recognised to be a form (source) of law. The side effect is that the norms are perceived as legally non-binding. The substance refers to the situation where a norm complies with a recognised legal form, but due to its communicative content and thus undetermined "force", the substance is equivocal about what the obligations of its addressees are.[40] In the case of EBA guidelines and recommendations, both of these aspects are combined. Surely, they take a determined form; however, the "soft" substance indicates duties of the addressees in a non-binding way. Can they nonetheless be said to be binding in some way? Are sanctions necessary to make soft laws binding? Is the prestige of the authorities which draft and accept the standards enough? And is it that in some situations soft law may be a more powerful measure than binding legal forms?[41] Surely *soft law* means measures which carry defined norms. This category of defined norms is to be located between the traditional dichotomy where norms of conduct are either legal or non-legal.[42] In a wider perspective, law is a set of norms of conduct which may take many forms, and thus law may be an outcome of various law-making facts.[43] It follows that soft law combines elements of legal norms and norms which are not legislative measures. Pointing to the binding force of soft law will require an interpretation which might identify a source of law. This means that the solution chosen will be justified within a chosen model of regulations and by the concept of the validity of a norm.

If the EBA's guidelines are to be taken as a pattern, they should be recognised to be a special form of financial market regulation, which is to be interpreted broadly and include law-making, enforcement, and also values, premises and objectives. Law creation is a multithreaded process in which economic, social and political factors must be considered. In the case of the financial market, its proper functioning requires specific institutions (the state, administration, specialised agencies) to act in various ways. Institutions control and quite often interfere with activities that are essential from the perspective of a given group. However, taking action requires adherence to assumptions which follow from defined values. The result of such action are norms of conduct in the form of legal norms (rules, principles). The norms are set or applied by the institution wishing to achieve the predefined objectives.[44] A norm of conduct imposes a certain conduct or behaviour on its addressees, ordering or prohibiting them

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[40] A. Wyrozumska, *Instrumenty międzynarodowe niewiążące prawnie (soft law lub flexible law)*, *op. cit.*, p. 612.

[41] M. Menkes, *Soft law i jego tworzenie w relacjach międzynarodowych*, in: P. Chmielnicki (ed.), *Pochodzenie, tworzenie i efektywność prawa*, Warsaw 2014, p. 314. See also: M. Menkes, *Governance gospodarczy – studium prawnomiędzynarodowe*, Warsaw 2016, pp. 57-72.

[42] M. Menkes, Soft law i jego tworzenie w relacjach międzynarodowych, *op. cit.*, p. 312 and M. Stępień, *Zagadnienie soft law w prawie europejskim*, *op. cit.*, pp. 280-282 for a discussion on soft law in the light of open norms and normative closed systems.

[43] S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, p. 140.

[44] T. Nieborak, *Tworzenie i stosowanie prawa rynku finansowego a proces ekonomizacji prawa*, Poznań 2016, pp. 88-91.

a certain way of proceeding in given circumstances. Such a norm is binding either because of its thetic rationale (the will of its creator will be obeyed) or axiological values, i.e. values that allow a given subject (addressee) adhering to the norm to recognise good and bad practices. A norm may also be binding in the behavioural sense, as manifested in a situation in which the addressees of a norm adhere to it because there exists a potential inconvenience or unpleasant consequence should it not be respected.[45]

The rationale for a norm presented above is also valid in the case of the norms of conduct which follow from soft law in the form of guidelines or recommendations. Firstly, it should be recognised that they guide the conduct of financial market participants (financial institutions, authorities of EU member states) within a framework created by the European legislature. This framework includes relevant provisions of regulations enshrined in EU primary law (Articles 26 and 114 of TFEU). It follows that the norms in question are formulated by the authorised institution (EBA) and this makes them close to being accepted as legal norms. Secondly, axiological and behavioural reasons will also be decisive for adherence to such norms. The binding force of norms set out by way of soft law will primarily follow from respect for their creator (obedience; thetic justification). In the case of the EU financial market, some importance will also attach to certain values (axiological justification) as well as potential inconveniences which may occur if a norm is not implemented by the addressee (behavioural justification). The axiological and behavioural justifications have a threshold value where the good will of the soft law's addresses and persuasive measures meet. At this threshold the most important characteristic of soft law is to be found, one which precludes calling it "law" without voicing the reservations discussed above. This characteristic is its binding character derived from the grounding of the institution authorised to create soft law in the binding EU primary law, i.e. the source of law, and also the possibility of applying sanctions if a recommended conduct identified in soft law is not respected. Compelling normative measures are indispensable to ensure that soft law is effective. This efficacy is to be understood in its legal sense, where it refers to the objective of the legislator, and in its economic sense (efficiency), i.e. achievement of the maximum possible outputs with the minimum possible inputs.

## CONCLUSIONS

A thorough analysis of the measures (regulations) in the acts of law which enshrine the functioning of the ESFS demonstrates, in my view, that it is possible to create a legal arrangement necessitating a given conduct on the part of the addressees of soft law. This is because soft law may be normative. Consequently, the presented analysis tends to lead to a positive answer to the question in the title: *Soft lex, sed lex?*, and allow soft law to be categorised as an intermediate source of law whose legal ef-

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[45] S. Wronkowska, *Podstawowe pojęcia prawa i prawoznawstwa*, Poznań 2005, pp. 11ff.

fects are related to the sources of law.[46] It needs to be underlined, however, that norms of conduct enshrined in soft law or the efficacy of soft law in relation to the financial market are among many issues which need further investigation, including the effectiveness of soft law, the responsibilities of the institutions creating it, and whether soft law can be subject to the control of the courts.[47] This investigation must be preceded by a thorough analysis of soft law measures applied to the EU financial market. The reason is that financial market soft law differs much from traditional soft law in other areas of the legal system. The characteristics of the financial market and its regulation, in particular its progressive economisation, make it necessary to work to develop a coherent concept of soft law in this area.

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**Key words:** European Union, financial market regulation, soft law, European System of Financial Supervision

*ABSTRACT*

*The aim of this article is to analyse new forms of EU financial market regulation, with particular attention to what is called soft law. Although it has long been in use in international law regulations, soft law continues to spark heated debate among legal theorists, who differ on such issues as whether soft law can be recognised as law at all, the extent to which it may be considered binding, and the effectiveness of its implementation. The specific nature of the financial market and its regulations make the use of soft law into a "third way" that, alongside legal and extra-legal norms, can allow the authorities and participants in the market to develop optimal solutions resulting in the security and stability of the financial sector.*

[46] R. Kaszubski, *Funkcjonalne źródła prawa bankowego publicznego*, Warsaw 2006, p. 33.

[47] Some initial research has been undertaken. Cf. M. Fedorowicz, *Nadzór nad rynkiem finansowym Unii Europejskiej*, *op. cit.*, pp. 151-165; M. Menkes, *op. cit.*, p. 73.