

MEMORANDUM



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Implementation of the European supervisory authorities' guidelines and recommendations¹

Summary

Finansinspektionen finds that guidelines from the European supervisory authorities addressed to competent authorities or financial market participants are equivalent to Swedish general guidelines. The ESA regulations imply that competent authorities or financial market participants shall, directly due to the regulations, make every effort to comply with these guidelines. Since the regulations are directly effective, Finansinspektionen will not issue any general guidelines of its own. However, when Finansinspektionen deems it necessary, guidelines can be reworked into binding rules in the form of regulations. Already when a proposal for a new guideline is presented, Finansinspektionen intends to analyse whether the proposal is within the mandate of the European supervisory authorities and how the proposal stands in relation to Swedish law. Finansinspektionen intends to work actively both internationally and in Sweden in order for the procedure of preparing guidelines to be more transparent and predictable.

Introduction

In 2011, a new structure for supervising the financial sector was created within the EU. The purpose of the work has been to better manage the extensive cross-border activity in European financial markets, monitor and analyse developments and enable taking relevant measures to promote financial stability in the EU.

The new European supervision structure consists of two pillars, one of which aims to improve the supervision of individual institutions. Three new European supervisory authorities have been established – the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority

¹ What is written below about guidelines also pertains to recommendations.

(ESMA). They are jointly known as the European Supervisory Authorities (ESA).

These three new supervisory authorities have been given the task of ensuring that a single set of harmonised rules and uniform supervisory arrangements are applied by the national supervisory authorities. The authorities submit proposals for regulatory or implementing technical standards, which are then adopted by the EU Commission in the form of regulations or decisions. In addition, the authorities have the possibility of adopting guidelines and recommendations directed at competent authorities or financial market participants. The other pillar aims to secure efficient macroprudential policy in the EU by empowering the European Systemic Risk Board (ESRB) to issue recommendations and warnings. ESA, together with the national supervisory authorities and ESRB, forms the European System of Financial Supervision, ESFS. The current regulations establishing EBA, EIPOA and ESMA are 1093/2010, 1094/2010 and 1095/2010 (the ESA regulations).

An agreement has been reached in the EU to establish a joint supervisory system within ECB for the supervision primarily of certain banks. There is no decision about Sweden joining the so-called banking union. Insofar that Sweden does not participate, rules and guidelines that may be decided by ECB will not directly affect Swedish firms. Such rules and guidelines are therefore not addressed in this memorandum.

In the autumn of 2012, Finansinspektionen gave former Justice of the Supreme Court Johan Munck the assignment of preparing a memorandum on the implementation of the European supervisory authorities' guidelines and recommendations. The memorandum has been submitted and the views of Johan Munck's about the implementation of the guidelines and those of the consulted bodies are described below. Finally, proposals about how Finansinspektionen will deal with the guidelines are discussed and provided.

The conclusions of Johan Munck's memorandum

In the memorandum, Johan Munck commences by stating that the guidelines issued by the EU institutions have a legal significance reminiscent of what applies in the case of the term "General Guidelines" in Sweden, i.e. "rules instructing how a person may suitably proceed in certain respects, but according to which the individual may nevertheless freely choose another path in order to achieve the desired result" (prop. 1975/76:112 p. 66).

Furthermore, Johan Munck finds that, in the case of guidelines intended for financial institutions (either individually or together with competent authorities), it must be considered that the ESA regulations imply that financial institutions, directly due to the regulation, are subjected to an obligation to "make every effort to comply with" the guidelines and recommendations

issued by ESA because an EU regulation is always directly effective in Member States.

According to Johan Munck, this implies that no general guidelines or similar are required from Finansinspektionen in order for this obligation for financial institutions to be manifested. He finds that it might not even be duly consistent with EU law if Finansinspektionen were to issue general guidelines declaring that financial institutions should make every effort to comply with the guidelines that the European supervisory authorities may occasionally issue. A binding regulation from Finansinspektionen on a general obligation for financial institutions to comply with the guidelines would probably not be incontestable from that point of view either.

The content of the European supervisory authorities' guidelines is, however, non-binding legal instruments. The ban on dual regulations or expanding on the regulations does not apply to guidelines. According to Johan Munck, Finansinspektionen may therefore freely issue general guidelines or – insofar that it is authorised by the Swedish government – binding regulations in areas that touch on or are covered by the European supervisory authorities' guidelines and recommendations. However, Finansinspektionen's rules may not conflict with the rules of the European supervisory authorities (Finansinspektionen may, however, have notified of its intention not to comply with such a rule). According to Johan Munck, if Finansinspektionen were to issue binding rules on certain particular points for which the EU rules only contain a recommendation, this could not be considered to conflict with the EU rules either.

In terms of the methodology whereby Finansinspektionen would transpose all guidelines into Swedish general guidelines, Johan Munck finds that this method would involve a sort of “double banking” (which exists when EU regulations partially or fully address the same matter as national legislation, but where there may be differences between the EU regulations and the national legislation). The obligation of institutions to comply in principle with ESAs' guidelines and recommendations as they stand does not cease through the preparation of such general guidelines.

In terms of the status of the guidelines, Johan Munck states that Finansinspektionen, as a supervisory authority, cannot consider these to be formally binding for financial institutions. When a guideline takes a direct aim at a certain EU regulation or part thereof, a financial institution that does not comply with the recommendation must however be prepared to explain how the institution instead fulfils the purpose of the regulation. In all circumstances, it is clear that the EU rules must be observed in Finansinspektionen's supervision.

In cases where a European supervisory authority has been given the task of issuing guidelines pertaining to the application of a regulation, this cannot,

according to Johan Munck, imply outright that the regulation presupposes that the national authorities too may issue such rules. However, that does not prevent there perceivably being cases in which it is absolutely clear that national provisions are needed in order for the regulation to have the intended effect.

Johan Munck states, in the matter of Finansinspektionen's responsibility for implementing the guidelines, that Finansinspektionen has reason to first of all study if there is anything to suggest that it ought not to confirm Sweden's intention to comply. Such a circumstance could perceivably be that there is already another solution to the equivalent problem in Swedish law, which Sweden wants to keep. If it is clear that Sweden should confirm that the guideline will be complied with, Finansinspektionen has reason to look into whether there is a Swedish regulation that should be repealed or amended. A starting point is hence that "double banking" should be avoided in principle.

If a guideline includes a rule with a direct equivalent in a binding Swedish regulation issued either in law or ordinance, or in the Authority's regulations, there is, according to Johan Munck, no reason to repeal the regulation. Similarly, nor does he find anything to prevent Sweden from issuing a binding regulation on a subject which is in itself addressed in a guideline (which requires Finansinspektionen to be authorised). Should such an existing Swedish regulation prescribe a more far-reaching obligation for the institutions than the EU rule, but be consistent with the purposes of the rule, there would according to Johan Munck appear to be no need for the Swedish rule to be changed outright.

Viewpoints of the consulted bodies

The Legal Faculty Board at Lund University and the Gothenburg Administrative Court of Appeal have no objections to the conclusions of the memorandum. *The Swedish National Savings Banks Organisation* emphasises the importance of the order of reference groups being observed in future implementation work too.

The Association finds that it should be possible for the stated order, which Finansinspektionen is proposed to follow when a new guideline is to be issued, to form the basis of how Finansinspektionen will proceed in the future, with account taken of the wish for reference group participation.

The Association of Swedish Finance Houses states that Finansinspektionen should assume that the guidelines are directed at the Authority and not at the institutions, unless otherwise clearly stated. The association questions whether a guideline can form the basis of a sanction against an institution. The association finds it important that Finansinspektionen establishes a determined order in connection with the preparation and implementation of new guidelines. This order ought to imply that a reference group be formed early

on, in connection with the commencement of a new guideline. Finansinspektionen should always perform an impact assessment. Once a guideline has been adopted, Finansinspektionen should analyse whether there are reasons to suggest that the Authority ought not to confirm compliance with the guideline. It seems insufficient for Finansinspektionen to only refer to the guideline, because to whom guidelines are addressed is often unclear. The guidelines may also be inconsistent with Swedish laws and rules, which makes it more difficult or impossible to apply the guidelines. A particular problem is that the guidelines have not been translated into Swedish. According to the association, the starting point should therefore be that the Authority, where relevant, should implement or incorporate guidelines into its general guidelines, and that the general guidelines be prepared and published in the customary manner.

The Riksbank agrees with the analysis of the memorandum of the legal significance and effect of the European supervisory authorities' guidelines. The Riksbank points out that it is crucial that Finansinspektionen informs the Ministry of Finance of any conflicts between Swedish law and a guideline, in light of the fact that, as a general rule, Swedish authorities should seek to harmonise Swedish and European rules. Finansinspektionen's decision not to adopt a guideline should be made public.

The Swedish Bankers' Association finds that the target group for guidelines is unclear in certain cases, which creates problems for both banks and supervisory authorities. It should be incumbent upon Finansinspektionen to publish which parts of a guideline the institutions should observe. The position that Finansinspektionen cannot consider the guidelines to be formally binding for the institutions is important. A prerequisite for guidelines to become applicable in Member States should be that they are prepared in all official languages. It can be questioned whether guidelines issued by ESA can constitute grounds for a sanction against a Swedish institution when they are not formally binding for the institutions.

In terms of Finansinspektionen's responsibility for implementing the guidelines, the association finds that the procedure for preparing such guidelines should, as far as possible, follow the Swedish regulation process, particularly considering that diverging from the guidelines might apparently carry far-reaching consequences for individual participants. Finansinspektionen should therefore, already in connection with the work on a guideline commencing within ESA, have as a starting point active contribution to the work. It is justifiable for Finansinspektionen to reallocate resources to this area, or be provided with the means to enable contribution. Finansinspektionen should, when prioritising the projects to which it is to contribute, consult with the industry. In the projects to which Finansinspektionen contributes, it is crucial to hold a dialogue with affected stakeholders by forming reference groups. Finansinspektionen should, in connection with it referring to a guideline on its website, publish the consequence analysis performed. Therein

should also be described the guideline's consistency with Swedish rules, and which parts the Swedish institutions should observe.

The Swedish Securities Dealers Association shares the view that the guidelines from the European supervisory authorities constitute non-binding legal instruments. Based on what is said in Article 16 of the ESMA regulation, there can be no other opinion. The association advocates a more advanced, fully transparent process being introduced for implementation in Sweden of guidelines from the European supervisory authorities. This process should take place in a dialogue with the industry. The aim of this process should be that the introduction of a guideline in Sweden be routinely followed by a detailed analysis of the rules and the guideline's consistency with Swedish and EU law. This process should start as early on as possible. In Finansinspektionen's notification to ESMA on whether or not the Authority intends to apply a guideline, the legal grounds for the applicability of the guideline in Sweden should be clearly described.

The Association of Swedish Insurance Intermediaries shares the view that Finansinspektionen, as the supervisory authority, cannot consider the guidelines to be formally binding for financial institutions. The association advocates the avoidance of double banking as far as possible, and that the Authority gives as much help and support as possible to financial institutions, because small participants often find EU rules hard to interpret. Furthermore, a clarification of what can be considered to be an acceptable reason for non-compliance with a non-binding rule would make it easier for the industry.

Insurance Sweden agrees with the majority of the analysis presented and that the content of the guidelines is not binding. Thus, a firm that does not comply with the contents of a guideline cannot be considered either to have thereby neglected Article 16 of the current ESA regulation. However, Insurance Sweden does not find scope to consider that the firm has neglected the binding EU rule (Article 16) in a case of an institution breaching a guideline that was not issued with the support of express authorisation in a specific EU regulation. This would give the guidelines a legal effect that is neither consistent with their non-binding nature, nor consistent with the mandate of the European supervisory authorities. Insurance Sweden recommends, in order to achieve greater clarity, that Finansinspektionen publishes its analysis of new guidelines clearly stating how they relate to existing or proposed regulations, and the legal grounds for the guidelines. The views of those affected should be obtained early on in the process and, according to Insurance Sweden, it does not suffice for the European authorities to consult stakeholders. Both prevailing and proposed guidelines should be on Finansinspektionen's website.

The Swedish Investment Fund Association shares the fundamental view expressed in the memorandum of it being clear that ESMA guidelines are not binding. The guidelines are not always comparable with Swedish general guidelines. The memorandum apparently assumes that the guidelines are either attributable to rules of an EU regulation or of a directive. However, this is not always the case, which gives rise to a particular problem and can be questioned for several reasons. Often, ESMA's guidelines do not share the characteristics of general guidelines either. It is therefore important that, early on in the process in ESMA, Finansinspektionen critically reviews proposals for guidelines and analyses how they coincide with EU law, and which measures would be required to apply them in Swedish law. The status of the guidelines in terms of how they shall be considered to relate to financial market participants must be made clear in a case of Finansinspektionen notifying ESMA of its intention not to comply with the guidelines in question. When Finansinspektionen publishes on its website a statement regarding its intention to comply with certain guidelines, it is also important to make known the way in which the guidelines will be managed, e.g. if they will be implemented in regulations. The association cannot see any differentiation in EU law between guidelines issued with the support of an express authorisation in an EU regulation, and other guidelines. ESMA does not only issue guidelines and recommendations, but also opinions and Q&A. It would be good if these factors too were touched upon in future considerations.

Finansinspektionen's reasons

Status of the guidelines

Finansinspektionen shares Johan Munck's opinion that Finansinspektionen should not consider the ESA guidelines as formally binding for financial institutions. The guidelines have a legal significance reminiscent of what applies in terms of general guidelines in Sweden. The ESA regulations imply, however, that the competent authorities and financial institutions, directly due to the regulation, are subjected to an obligation to make every effort to comply with these guidelines and recommendations. In accordance with Johan Munck's opinion, Finansinspektionen will not issue any general guidelines or similar in order for this obligation for financial institutions to be manifested.

The obligation to provide ESA with an explanation regarding compliance or non-compliance with the guideline is a method to increase compliance, which is in line with ESAs' primary objective – a single set of rules. The European Council has defined “the single rule book” as a single set of EU rules and standards directly applicable to all financial institutions operating on the internal market. The area of application of such a set of rules is however still unclear. This provides a certain amount of room for interpretation for ESA. A common rule book would help reduce ambiguity in the financial legislation of Member States. In turn, this reduces supervisory arbitrage and gold-plating, i.e. using imbalances between markets and regulations, and national implementation of EU legislation, beyond that which a legal instrument requires.²

Johan Munck has previously, by assignment of certain industry organisations, performed a legal analysis of Finansinspektionen's general guidelines. In that memorandum, he expresses that a general guideline typically aims to recommend an application of a statutory regulation with which institutions, to which the guidelines are addressed, are obliged to comply.³ The Stockholm Administrative Court of Appeal expressed in a ruling on 5 March 2007 in case 1861-05, that general guidelines, which are not legally binding, can be said to constitute recommendations supporting how regulations governing the operations may be applied. They specify how the addressee might or should act, and aim to influence developments in a certain direction and promote uniform application of the law. An institution that complies with general guidelines cannot expect any criticism from Finansinspektionen in that specific regard. If an institution does not comply with general guidelines, it must

² Stijn Verhelst, *Renewed Financial Supervision in Europe – Final or transitory*, Egmont Paper 44, March 2011, p. 40-41.

³ Johan Munck, *Some questions about Finansinspektionen's general guidelines*, 12 February 2011, p. 8

however be specified that the institution is acting in another way that leads to the requirements of the underlying provisions being met.⁴

If Finansinspektionen so requests, firms must thus be prepared to explain how they believe they meet the statutory requirement. When a firm does not comply with a guideline or act in another way that leads to the requirements of the underlying provisions being met, Finansinspektionen may therefore intervene against the company.

When Finansinspektionen so deems necessary, it can implement a guideline through binding regulations, insofar that it has received authorisation from the government.

Before the European supervisory authorities were established, the national supervisory authorities cooperated in several committees: The Committee of European Banking Supervisors (CEBS), the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS) and the Committee of European Securities Regulators (CESR). In terms of the recommendations and so on issued by the committees, according to Articles 8.1 1 and 76.4 of the ESA regulations, the authorities shall take over, as appropriate, all existing and ongoing tasks from the committees.

The status of the documents is determined by the committees' regulations, and Finansinspektionen assumes that the material issued by the committees will remain in effect until it is re-adopted, replaced or revoked by ESA. The documents of the committees therefore do not automatically have the status of general guidelines through the entry into force of the ESA regulations, but remain valid as interpretation data unless Finansinspektionen has implemented a recommendation in a general guideline of its own.

Besides guidelines, ESA also publishes non-binding documents such as Q&A. These documents naturally express ESAs' view in various matters, but cannot be considered to apply as general guidelines. However, they can contribute to the interpretation of the general guidelines. Because such statements reflect ESAs' view, financial institutions have reason to attach importance to such statements. However, according to Finansinspektionen there can be no obligation to be informed of them in the same way as general guidelines.

Legal review

Finansinspektionen should, as pointed out by most of the consulted bodies, commence a legal review as soon as a proposal for a new guideline is presented. In this process, Finansinspektionen should work actively and, to the extent that is possible and appropriate, seek help from affected stakeholders. In

⁴ On 28 May 2009, the Supreme Administrative Court ruled not to issue review dispensation.

connection with Finansinspektionen notifying ESA, in accordance with Article 16.3, of whether it complies with or intends to comply with the guideline, or that it does not comply or intend to comply with the guideline in whole or in part, the legal review shall be fully completed. The legal review should be published, for instance in a sort of parallel arrangement on Finansinspektionen's website. In the case of Finansinspektionen stating that it does not comply with or intend to comply with the guidelines, the reasons for this shall be provided. In such a situation, Finansinspektionen shall consider if there is reason to inform the Ministry of Finance, because authorities in the EU should seek to attain harmonised practices. In the legal review, Finansinspektionen shall, besides investigating the consistency of the guideline with Swedish rules, investigate whether the guideline is consistent with ESAs' mandate. Finansinspektionen is of the view that a guideline must, as a general rule, be supported by higher-ranking legal instruments.⁵

This view is supported by the ESA regulations. Article 16.1 states that ESA shall, with a view to establishing consistent, efficient and effective supervisory practices within ESFS, and to ensure the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants. Reason 26 for the regulation further states 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.

Discussions are currently under way within ESA regarding ESAs' mandate. One view is that Article 16.1 enables ESA to issue guidelines in two cases. In the first case in order to establish consistent, efficient and effective supervisory practices, and in the second to ensure the common, uniform and consistent application of Union law. However, it has been acknowledged that it would in practice be difficult to issue guidelines without ensuring common, uniform and consistent application of Union law.

The other view is that the conditions in Article 16.1 are not alternative but cumulative – i.e. both conditions must be fulfilled. Such an interpretation is supported by the reasons for the regulation, which state 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 (reason 26).⁶

In accordance with Finansinspektionen's point of view, the Authority shall seek to ensure that ESAs' mandate is made clear in each guideline. While this does not require an express authorisation in a higher-ranking legal instrument,

⁵ As an example there are exceptions in Article 22. 3 and 9.2 in Regulation 1095/2010.

⁶ Note, ESMA/2013/BS12.

there must be a link to a higher-ranking legal instrument, and this link must be clear from the guideline.⁷

How will Finansinspektionen consult with affected stakeholders?

The consulted bodies have requested that affected stakeholders be invited at an early stage and be involved in the preparation of a guideline.

The procedure for preparing a guideline is owned by ESA. In practice, the Board of Supervisors decides on the Authority's work programme and schedule. The work programme, which is available on the website of the ESA in question, shows which guidelines the Authority intends to prepare, and the schedule involved.

Within ESA, there are also stakeholder groups (Article 37). Parties including industry representatives elected in by the Board of Supervisors upon proposal of relevant stakeholders participate in such groups. In EBA one Swedish industry representative is participating, two in EIOPA and one in ESMA. Finansinspektionen informs affected stakeholders, e.g. by publishing on its own website, about the possibility of participating in such stakeholder groups.

In accordance with Article 37, ESA consults on matters such as guidelines with the external stakeholder groups. ESA also consults with external stakeholders on guideline proposals through public consultations and also sometimes through meetings open to the parties concerned. These processes are adopted in the consultation processes of each Authority.⁸

Besides the possibilities of external stakeholders to submit viewpoints on preparing guidelines through ESA processes, Finansinspektionen has appointed provisional reference groups of Swedish stakeholders in a number of regulation projects with the purpose of discussing fundamentally important matters. One problem in the context is that it is often a case of tight deadlines. Another is the confidentiality problem that arises in sharing drafts. Such sharing can affect Finansinspektionen's influence in a work group negatively, because other participants in the work group might perceivably find that handing over drafts and proposals to external stakeholders is inappropriate and makes the work more difficult.

However, Finansinspektionen has a responsibility to be transparent in international work, but this must fall within the frameworks ensuing from Sweden's obligations towards ESA and Swedish rules about public access to information and secrecy. Finansinspektionen advocates the work method already applied today, i.e. that Finansinspektionen, as it deems appropriate,

⁷ See examples of exceptions in Article 22.3 and 9.2 in Regulation 1095/2010.

⁸ See ESAs' consultation processes: EBA's consultation process, EIOPA's consultation process and ESMA's consultation process.

consults with affected stakeholders. The procedure is usually that the Authority makes the documents anonymous and highlights in general terms the questions to which it wishes to obtain answers. In order to increase transparency and the possibility of stakeholder influence at an early stage, Finansinspektionen intends to publish on its website ESAs' work programme and collect the opinions of affected stakeholders on questions of prioritisation, etc. This will require greater proactiveness from both Finansinspektionen and stakeholders. Stakeholder opinions are valuable for Finansinspektionen to bring to negotiations, while at the same time the desire for transparency is partially fulfilled. Finansinspektionen finds that the affected stakeholders also have a responsibility of their own to actively participate in EU work. This can be done by, for instance, using the stakeholder groups already in place within ESA to a greater extent.

Translation of guidelines

ESA will translate the guidelines but so far not all guidelines have been translated for publishing. In Finansinspektionen's opinion, in order for them to be applicable in Sweden in a manner equivalent to general guidelines, the guidelines should be translated into Swedish. Hence, Finansinspektionen is of the opinion that the obligation for firms to, according to Article 16 of the ESA regulations, make every effort to seek to comply with the guideline, only applies if the guideline is in Swedish.

The procedure point by point

- Finansinspektionen publishes ESAs' work programme on its website and requests viewpoints from affected stakeholders.
- As soon as a proposal for a guideline is presented to the work group, Finansinspektionen shall seek to make clear which higher-ranking legal instrument grants ESA the mandate to issue a guideline.
- During the course of the work, Finansinspektionen shall analyse how the proposals coincide with Swedish law and perform a consequence analysis.
- Finansinspektionen shall, as it deems appropriate, consult with affected stakeholders.
- Finansinspektionen shall, when responding to ESA in accordance with Article 16.3 of the ESA regulations, publish the response together with the legal review and a consequence analysis.