EU soft law in Cyprus: In search of role and value

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1. Introduction

This chapter aims to identify and evaluate the use and effects of EU soft in two policy fields, namely competition law and financial regulation within the Cypriot legal order.[1] In carrying out this research, we apply a mixed methodology. With respect to competition law, we analyse the decisions of the national competition authority and the case law of the Cypriot courts. Furthermore, we draw on the Cypriot competition authority's own perceptions about EU soft law – as these were recorded in the authority's answer to a questionnaire – to evaluate the latter's normative and practical impact in the domestic administrative practice.[2] With respect to financial regulation, we carry out an empirical analysis of the published instruments issued by the competent Cypriot regulator and review the relevant case law.[3]

The chapter is structured as follows: In section 2, we briefly describe the basics of the Cypriot legal system, tracing the historical roots of its hybrid nature. In section 3, we explore the normative role of soft law. We focus on Cypriot 'circulars', the main instrument giving effect to EU soft law in the Cypriot administrative practice and analyse their legal effects and reviewability in light of the case law of Cypriot courts. Section 4 presents our two case studies. We begin by offering an overview of the interaction between EU soft law and the Cypriot public administration. Thereafter, we explore the use of EU soft law instruments by Cypriot public authorities in the fields of competition law and financial regulation and discuss our findings. We identify a lack of uniform approach to EU soft law within the Cypriot administrative practice in the two fields of policy and explore the respective implications in our concluding remarks.

2. Cyprus: A hybrid legal system

Built upon the dual foundations of common law and civil law, Cyprus is generally classified among the so-called 'mixed' legal systems.[4] Although Cyprus' constitutional and administrative law is dominated by the continental tradition, the rules and principles of private

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[1] Due to lack of space, environmental law and social policy are not covered.

[2] The questionnaire was based on the SoLaR's template, attached to the contribution by Hartlapp and Korkea-aho. Our analysis is largely focused on administrative practice, as there is limited case law on soft law in the fields of financial regulation and competition law.

[3] The Cypriot financial regulator declined to be interviewed.

[4] N Hatzimihail, 'Cyprus as a Mixed Legal System' 6(1) *Journal of Civil Law Studies* (2013) 37–96. By the term 'mixed legal system' we refer to 'political entities where two or more systems apply cumulatively or interactively, but also entities where the is a juxtaposition of systems as a result of more or less clearly defined fields of application' as defined in VV Palmer, 'Mixed legal systems', in M Bussani, U Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge, CUP, 2012), 379. See also V Palmer (ed), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2nd ed, Cambridge, CUP, 2012).

law are largely governed by the common law doctrine.[5] There is a strict hierarchy of norms, on top of which we find a Constitution in the form of a single written document. At the same time, the general principles of administrative law developed under the continental doctrine. Somewhat paradoxically, Cypriot courts today still receive guidance from pre-1960 English common law principles, even if these are no longer in force in the UK. Similarly, the case law of other common law jurisdictions is still regarded as persuasive authority in Cypriot litigation.[6]

The fusion of civil law and common law expands beyond the normative design of the Cypriot legal system, influencing its governance and institutional practice. The Cyprus Supreme Court endorses Greek-inspired administrative law principles whilst operating under common law based procedural rules. Judicial decisions enjoy strong precedential value, and the Cyprus Supreme Court retains the power to reverse its own judgments. This fusion of civil law and common law based authorities in judicial practice often obscures the method of interpretation of legal norms and leads to an inconsistent use of terms and concepts in judicial reasoning. Overall, the Cypriot legal system can be described as a dynamic amalgamation of different normative traditions, constantly interacting and transforming the legal landscape, with EU law playing an important role.

The EU membership of Cyprus brought a fundamental change to the domestic normative order.[7] Following the examples of other Member States, the Cypriot Constitution contains an explicit provision[8] recognising the primacy of Union law over domestic law, including national constitutional provisions, in line with the normative hierarchy signalled by the Court of Justice in *Costa v. Enel*.[9] The need to comply with EU law requirements has also led to the creation of many independent regulatory authorities, each responsible for different policy areas, such as consumer protection, personal data protection, competition, children's rights, energy, and state aid amongst others. For example, the Preamble to the Law that establishes the Cypriot Competition Authority[10] explicitly mentions that the Law is amended for the purposes of applying Regulation 1/2003 in Cyprus.[11]

A Guidance issued by the Legal Service of the Republic in 2017 on drafting and harmonising national legislation sheds light on the transposition of EU law in the national legal order.[12] The Guidance mainly deals with the transposition of EU Regulations and Directives and briefly refers to the transposition of Decisions and Framework Decisions.[13] Although this Guidance is informative about the transposition of EU law in the national legal order, it does not mention EU soft law. Moreover, to our knowledge, there is no overarching national transposition mechanism concerning EU soft law. Hence, even though the binding effect of 'hard' EU norms was never put into question within the Cypriot legal order, assessing the equivalent normative

[5] S Farran et al (eds), *A Study of Mixed Legal Systems: Endangers, Entrenched or Blended* (London, Routledge, 2016) 238.
[6] ibid, 89.
[7] For a general overview see, C Lycourgos, 'Cyprus public law as affected by accession to the EU', in C Kombos (ed.), *Studies in European Public Law* (Athens, Sakkoulas, 2010).
[8] Cyprus Constitution Art 1A.
[9] Case C-6/64 *Costa v E.N.E.L*, 1964] ECR 585.
[10] The Protection of Competition Law 13(I)/2008 as amended.
[11] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty (2003) OJL 1.
[12] Republic of Cyprus Legal Service, 'Guidelines on Drafting National and Harmonizing Legislation', 27-30, www.law.gov.cy/law/lawoffice.nsf/All/795A0B23299892BAC22580DE0029E003?OpenDocument.
[13] For example, the Guidance stipulates that the drafter should clarify any unclear provisions of a Directive by studying the Directive in other official languages, CJEU case law, relevant Commission guidelines, and by asking the Commission itself for clarification.

and practical influence of the so called 'soft law' instruments adopted by EU institutions is a more difficult exercise. We will discuss the transposition of EU soft law in the areas of competition law and financial regulation in section 4, as part of our case studies in these two policy areas.

3. Cypriot 'soft law' instruments: The case of 'circulars'

As such, soft law is not a recognised legal category in the Cypriot legal order. Judicial decisions do not refer to the term 'soft law' to describe national or Union instruments that may be normative in nature but do not have binding force. Equally, the Cypriot legal scholarship does not typically engage with the soft law discourse when analysing executive power. This is not to say that there are no soft law instruments in Cyprus. In carrying out its conferred powers, the Cypriot administration regularly adopts opinions, recommendations, policy frameworks, guidelines, and other types of instruments which do not have binding effects *per se*. However, following the classic continental legal tradition, courts and academic commentators generally prefer to analyse the effects of executive power by assessing their capacity to produce legal effects in the course of which they apply a substantive assessment. Hence, we first discuss how the courts conduct this substantive assessment in judicial review before discussing circulars in more detail.

3.1. Judicial review and the substantive assessment of legal effects

According to Article 146(1) of the Constitution of Cyprus, concerned persons can bring a direct annulment action against any decision, act or omission of any organ, authority or person, exercising executive or administrative authority. The consistent case law of Cypriot courts has interpreted this provision as introducing two cumulative criteria for determining whether an act falls under the scope of judicial review. First, the contested measure must be 'administrative' (*διοικητική*) in nature. In many cases, the courts investigate whether the measure entails a 'public objective'[14] that would enable it to belong to the domain of public law rather than private law.[15] Second, an act must be 'executable' or of 'executive character' (*εκτελεστή πράξη*), in the sense that it must be capable of producing binding legal effects. A measure is regarded as having binding legal force where it is found to impose an obligation or determine the rights of a person.[16]

Only administrative acts specifying and individualising the scope of generally applicable norms can be subject to judicial review directly in annulment actions. By contrast, regulatory acts fall outside the scope of judicial review because they normally create norms of general application and are not typically directed to specific persons. Being quasi-legislative in nature, the normative scope of regulatory acts is not exhausted to individual instances but can apply to innumerable present or future factual scenarios.[17] Unlike individual administrative acts, regulatory acts cannot be challenged directly before a court.[18] Their validity can, however, be

[14] *Savvas Yianni Valana and the Republic of Cyprus*, (Case No. 138/61), 9 April 1962; *Ναυτικός Όμιλος Πάφου v. Αρχής Λιμένων* (1992) 1 ΑΑΔ. 882, 893-894.
[15] *Achilleas Hadjikyriacou and Theologia Hadjiapostolou*, 3 RSCC. F, p 89. Also, *Antoniou and Others v. Republic* (1984) 3 C.L.R. 623, and *Machlouzarides v. Republic* (1985) 3 CLR 2342.
[16] *Κυπριακή Δημοκρατία v. Sunoil Bukering Limited*, (Appeal No. 1064), (1994) 3 ΑΑΔ 26, 21 January 1994.
[17] *Lanitis Farm Ltd v. Republic* (1982) 3 CLR 124.
[18] *Παπαφιλίππου v. Republic*, (Case No. 5/61), (1961), 1 RSCC. 62, 26 April 1961; *Police v. Hondrou*, (Case No. 133/61), (1962) 3 RSCC 82, 6 April 1962.

reviewed indirectly as an incidental matter, when raised in the course of an annulment action against a binding administrative act that was adopted by virtue of that regulatory act.

Cypriot courts endorse a substantive approach for determining whether an act is capable of producing binding legal effects *vis-à-vis* a person. This means that, rather than focusing on the label of an instrument, Cypriot courts are ready to examine the content of the act, in the light of its wording, subject matter and context.[19] An act is regarded as normative in nature, if it brings about a change in the legal position of a person, by either imposing duties or determining rights. The same methodology applies for assessing the legal effects of acts that can be described as 'soft law' instruments.

3.2. Circulars

The closest instrument in the Cypriot administrative practice that partially resembles the nature and function of what the literature broadly refers to as soft law is a 'circular' (Εγκύκλιοι). Circulars are measures which are commonly adopted by the Cypriot government and public service in the exercise of their conferred powers; in Cyprus they are typically associated with the Franco-Greek administrative culture but can be found in other jurisdictions (eg France and Italy).[20]

Circulars can be divided into two basic categories in terms of the manner via which they produce legal effects: 'internal circulars' and 'external circulars'. Internal circulars are the ones normally directed to subordinate administrative bodies; as such, they are regarded as 'internal' to the public service's function. Sometimes, the Cypriot legislator imposes a duty on a public authority to issue a circular on a specific subject matter, eg for the purpose of implementing and specifying a piece of legislation.[21] Other times, the legislator may empower a public authority to adopt an internal circular, without imposing a strict duty to do so.[22] Finally, a public authority may decide to adopt a circular in the absence of explicit powers, relying on the authority's broad discretionary powers in the exercise of executive power.[23] The objectives of internal circulars also differ. Some circulars intend to regulate the conduct and practice of public officials taking the form of instructions or warnings, whilst others are merely informative in nature.[24] Circulars are also used for clarifying the scope or application of certain norms, expressing opinions and recommendations pertaining to the manner in which the administration should perform its tasks, or outlining future course of action.[25]

Whether an 'internal' circular produces legal effects is determined by the Cypriot courts based on a substantive assessment, if and when the circular is challenged before the courts. Due to their 'internal' function, such circulars have an impact on the powers and duties of public bodies but not private persons. This means that they are unable to directly affect the legal

[19] An exhaustive analysis falls outside the scope of this contribution. For examples of the Cypriot courts' approach please see the case law cited below in fn 21-32.
[20] See in this volume, chapters by France and Italy.
[21] See eg, *Άριστος Αριστείδης v. Κυπριακής Δημοκρατίας*, (Appeal No. 848), (1991) 3 ΑΑΔ 588, 6 November 1991.
[22] See eg *C. P. Envirosystems Ltd v. Κυπριακής Δημοκρατίας*, (Case No. 322/96), (1997) 4 ΑΑΔ 3120, 12 December 1997.
[23] See eg *Σωτήρης Σωτηριάδης v. Κυπριακής Δημοκρατίας*, (Case No. 310/91), (1992) 4 ΑΑΔ 2599, 24 July 1992.
[24] See eg *Άριστος Αριστείδης v. Κυπριακής Δημοκρατίας*, (Appeal No. 848), (1991) 3 ΑΑΔ 588, 6 November 1991.
[25] *Dr. Andreas Vorkas and Others v. The Republic of Cyprus*, (Case No. 204/83), (1984) 3 ΑΑΔ 757, 22 June 1984.

position of persons external to the administration;[26] when these circulars do produce legal effects, these do not penetrate the walls of Cypriot bureaucracy. On this basis, the case law of the Cypriot courts has consistently held that persons outside the administration cannot contest the legality of internal circulars via direct annulment actions. This does not mean that circulars escape the principle of legality. Cypriot courts are empowered to review the validity of an internal circular indirectly, if the circular has led to the adoption of a subsequent act with binding effects *vis-à-vis* persons.[27]

Different consequences may result from a finding of invalidity of an internal circular. In most cases, the invalidity of internal circulars would automatically invalidate any other act subsequently adopted on the basis of that circular. An exception to this rule is where the adoption of the final act was based on some other lawful authority, in which case the Court would uphold the validity of the final act.[28] Moreover, even if a party acted in violation of a circular when concluding an agreement with another private party (whose legal position was not affected by that circular), the validity of such an agreement may remain unaffected.[29]

The second category of circulars covers instruments capable of producing external legal effects. Such circulars can change the legal position of persons that are outside the administration. In turn, there appear to be two types of circumstances that can give rise to external legal effects. Firstly, a court may conclude that an act issued in the form of 'circular' is, *de facto,* a decision with binding force. When this happens, the court would scrutinise the circular directly.[30] Secondly, a circular may be regarded as entailing self-imposed commitments on behalf of the issuing public authority. Such acts then arguably produce dual legal effects. From the perspective of the author of these circulars, they impose a duty on the issuing administrative authority to comply with the normative content of the circular. Sometimes, the scope of this self-imposed duty would require from that authority to either comply with its commitments or explain the reasons why departing from them is justifiable. From the perspective of other parties, these circulars trigger the right of affected persons to the protection of their legitimate expectations; namely an expectation that the public authority would fulfil its declared commitments.[31] Circulars with external legal effects that create norms of general application would be the same as Regulatory Acts.[32]

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[26] *Βάσος Σολωμού v. Κυπριακής Δημοκρατίας*, (Case No. 1080/91), (1995) 4 ΑΑΔ 2002, 3 October 1995.
[27] *S. Kyriakou Euromarket Ltd v. Κυπριακής Δημοκρατίας*, (Case No. 375/96), (1997) 4 ΑΑΔ 3191, 15 December 1997. See also, *Ανδρέας Σ. Κακουρή v. Κυπριακής Δημοκρατίας*, (Case No. 631/90), (1991) 4 ΑΑΔ 2762, 26 July 1991.
[28] See, *inter alia*, in this respect, *Pikis v. The Republic*, (Case No. 12/66), (1967) 3 CLR 562, 575, 22 September 1967; *Spyrou (No. 1) v. The Republic*, (Cases Nos. 80/71, 96/71, 100/71, 145/71-147/71, 164/71, 166/71, 195/71, 196/71, 203/71-205/71), (1973) 3 CLR 478, 484, 11 September 1973; *Akinita Anthoupolis Ltd v. The Republic*, (Case No. 362/78), (1980) 3 CLR 296, 303, 14 June 1980; *Paraskevopoulou v. The Republic*, (Case No. 374/78), (1980) 3 CLR, pp. 647, 661, 662, 4 December 1980.
[29] *Στέλιος Μαρκίδης v. Εθνική Τράπεζα της Ελλάδος (Κύπρου) Λτδ*, (Appeal No. 303/2008), (2012) 1 ΑΑΔ 324, 8 March 2012; *Μαρία Συρίμη v. Παγκυπριακή Χρηματοδοτήσεις Δημόσια Εταιρεία Λτδ*, (Appeal No. 315/2007), (2010) 1 ΑΑΔ 1131, 12 July 2010.
[30] *Άριστος Αριστείδη v. Δημοκρατίας*, (Appeal No. 848), (1991) 3 ΑΑΔ 588, 6 November 1991.
[31] *C. P. Envirosystems Ltd v. Κυπριακής Δημοκρατίας*, (Case No. 322/96), (1997) 4 ΑΑΔ 3120, 12 December 1997. This seems to have been also implied in *Σωτήρης Σωτηριάδης v. Κυπριακής Δημοκρατίας*, (Case No. 310/91), (1992) 4 ΑΑΔ 2599, 24 July 1992; *S. Kyriakou Euromarket Ltd v. Κυπριακής Δημοκρατίας*, (Case No. 375/96), (1997) 4 ΑΑΔ 3191, 15 December 1997.
[32] *China Wanbao Engineering Corporation v. Κυπριακής Δημοκρατίας*, (Case No. 794/95), (1997) 4 ΑΑΔ 2084, 11 September 1997.

The multiple functions of circulars in the Cypriot administrative practice makes it difficult to classify 'hard law' and 'soft law' measures within the Cypriot legal order. In addition to the above categorisation of 'internal' and 'external' circulars, one can add the circulars that have a quasi-binding effect on their addressees in terms of the consequences of non-compliance. An example can be found in the area of financial regulation, where the Cyprus Securities and Exchange Commission (CySec) is the competent authority. Article 25(1)(c)(ii) of CySec Law[33] gives the power to CySec to collect information from persons that fall within the competences of CySec for the purposes of statistical analyses and risk management. In order to facilitate the collection of this information, Article 25(1)(c)(iii) allows CySec to determine the applicable procedure through issuing a circular. In order to characterise such circular as soft law, we would have to argue that non-compliance with CySec's request for information as stipulated in the circular itself, bears no legal consequences. Yet, Article 37(5) gives CySec the power to impose administrative penalties to regulated entities that do not comply with a relevant circular. The power of an administrative body to impose penalties for not complying with a circular precludes an absolute categorisation of circulars as soft, non-binding measures. Instead, when put together with the above examples of circulars, it reinforces our understanding of a circular as a multi-purpose instrument, which only sometimes resembles what we generally perceive as soft law.

As such, the research of circulars issued by the competent national authorities was a key element of our attempt to understand the position and the role of EU soft law in the context of competition and financial regulation law in Cyprus. We now turn to the findings from our two case studies on EU soft law within the Cypriot administrative and judicial practice in the fields of competition law and financial regulation. The section that follows begins with some general remarks about EU soft law in Cypriot public administration, before focusing on the case studies.

4. EU Soft Law in Competition Law and Financial Regulation in Cyprus

4.1. General remarks

The Cypriot public administration does not seem to have a uniform approach towards EU soft law. The approach of the administrative bodies differs regarding the impact of soft law on the operations of the administration, as well as the implementation and communication of soft law to the public. The precise impact of EU soft law on the conduct of public officials in Cyprus remains relatively unknown and unexplored. As one commentator puts it, '[w]hether government actors have initiated regulatory changes because they are "appropriate", or due to the risk of reputational damage, is not possible to determine'.[34] In certain fields, EU soft law has been seen as a source of clarification and guidance, which – contrary to some national 'soft law' measures mentioned previously – does not create binding obligations on the authority itself.[35] Elsewhere, the choice of soft law for regulating employment affairs has resulted in high degree of compliance by the concerned parties who rarely deviate from its normative scope, even if no legal sanctions are in place.[36] There is also evidence that in certain policy areas, such

[33] Ο περί Επιτροπής Κεφαλαιαγοράς Κύπρου Νόμος του 2009 (Ν. 73(Ι)/2009).
[34] P Henriksen Ringstad 'Between soft law and a hard place - EU influence on taxation policies in Cyprus before, during and after the bank crisis', Master thesis, Department of Political Science, Faculty of Social Sciences, University of Oslo, Spring/April 2014 pp 54-55.
[35] Questionnaire answered by the Cyprus Commission for the Protection of Competition ('CPC').
[36] A Emilianides and C Ioannou, *Labour Law in Cyprus* (Kluwer, 2019), para 112.

as taxation, Cypriot officials treat specific EU soft law as a normative source that creates expectations of compliance.[37]

Regarding the way in which soft law is communicated to the public, the difference in the approach of the administration is apparent when we compare the practice of the Commission for the Protection of Competition ('CPC') to that of The Office of the Commissioner for State Aid Control (the 'Office'), which is an independent government official, and to that of CySeC. On the website of the Office, there are several soft law instruments in the field of State Aid, some of which take the form of circulars.[38] A number of those circulars aim to inform other public authorities (and, by virtue of their publication, the extended public) of new developments in EU soft law.[39] A similar practice is applied by CySec, which publishes circulars relating to soft law measures issued by the European Supervisory Agencies.[40] By way of contrast, the CPC has not made public any circular for the purpose of communicating or implementing EU soft law in the field of competition law. As we will see below, this does not mean that the CPC does not use such measures. An interesting question, which is yet to be explored, is whether the different approaches between Cypriot public authorities with respect to the implementation (or not) of EU soft law instruments in the form of Cypriot circulars, reflects a potential corresponding difference in the impact of EU soft law on the domestic administrative practice.

In the remaining chapter, we explore the impact of EU soft law instruments that are adopted in the field of competition law on the practice of the Cypriot competition authority (CPC), and in the field of financial regulation in the practice of CySec. Our analysis is largely focused on administrative practice, as there was limited relevant case law in these two fields. Before proceeding with the analysis, a note on methodology is necessary.

4.2. Methodology

In respect of competition law, our research drew upon four sources: First, we conducted desk-based research on the legal framework establishing the CPC. Second, we recorded the experiences and views of the CPC itself as expressed in the single, authorised, written response by the CPC to our questionnaire which was based on SoLaR's template for the face-to-face interviews.[41] Third, we analysed all the publicly available decisions of the CPC which refer to EU soft law instruments. Our entire dataset consisted of 496 decisions of the CPC from 2009 until 2019 that are recorded online, including decisions relating to Articles 101 and 102 TFEU (or the respective national law) and decisions relating to merger control.[42] Through this method of triangulation, we have sought to identify the role and value of EU soft law in the decision-making process of the CPC. Finally, we researched the jurisprudence of Cypriot courts referring to EU soft law in competition law. We should also note that, in Cyprus, the responsibility for State Aid does not belong to the CPC but to the Office for the Commissioner for State Aid Control. Although we contacted the Office, we never received a response, so our findings with respect to competition law below do not include EU soft law on State Aid.

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[37] P. Henriksen Ringstad, fn 30 p 55.

[38] www.publicaid.gov.cy/publicaid/publicaid.nsf/csac11_gr/csac11_gr?OpenDocument

[39] See, for example, 'Εγκύκλιος Αρ. 68 Νέες Κατευθυντήριες Γραμμές της Ευρωπαϊκής Επιτροπής για τις Κρατικές Ενισχύσεις Περιφερειακού Χαρακτήρα της περιόδου 2014-2020'.

[40] www.cysec.gov.cy/en-GB/home// See, 'Latest Circulars'.

[41] The CPC agreed to respond to our invitation to an interview by answering a written questionnaire as an institution, instead of having face-to-face interviews.

[42] The dataset includes all the published Decisions of the CPC, including those overruled by the Supreme Court www.competition.gov.cy/competition/competition.nsf/index_en/index_en?OpenDocument

Regarding financial regulation, we did not receive any response from CySec to our request to forward a questionnaire to relevant public officials or interview them in person. Hence, our findings derive from the research of the CySec practices, as available on the CySec website. The website includes circulars issued by CySec since 2003. We collected all these publicly available CySec circulars into a database and identified those circulars that refer to (i) EU binding instruments (eg Regulations, Directives, Delegated Regulations), (ii) any type of EU soft law (eg ESMA Guidelines, ESA Joint Committee Guidelines), including but not limited to the measures included in the SoLaR sample (iii) Cyprus national law, and (iv) International instruments (eg Financial Action Task Force Best Practices), including circulars mentioning measures from more than one of these categories. Finally, we researched the jurisprudence of Cypriot courts referring to EU soft law in financial regulation.

Out of 544 circulars that we recorded,[43] 70 refer to EU soft law, with 50 referring to Guidelines adopted by ESMA, EBA, or the ESAs Joint Committees,[44] Ten refer to ESMA's Public Statements, and the rest are other documents such as ESMA or EBA Opinions, Publications or Briefings.[45] Focusing on the 50 circulars that refer to Guidelines, we intend to provide insight into the relevance and role of such Guidelines – as EU soft law measures – in the practice of CySec. Our database allowed for comparisons of circulars referring to Guidelines with circulars referring to legally binding EU and national instruments.

Below we sketch the main findings in the fields of competition law and financial regulation. Our analysis shows that EU soft law increasingly strengthens its presence in the Cypriot administrative practice but has yet to establish itself in the reasoning process of Cypriot courts. Furthermore, there are qualitative differences in the approach of the targeted Cypriot authorities in the use of EU soft law. This divergence can be explained, at least in part, with reference to the functions of EU soft law in the examined policy areas.

4.3 EU Soft Law in Cypriot Competition Law

The main legislative basis for the application of competition law in Cyprus is the Protection of Competition Law 13(I)/2008 as amended by Law No. 41(I)/2014. It transposes Regulation 1/2003 into the domestic legal order and sets the powers of the CPC, as the national competent authority under the Regulation.[46] In its activity, the CPC is assisted by its internal administration (the 'Service'). The Service is responsible for collecting data, reporting complaints and submitting suggestions to the CPC. It facilitates the CPC in the exercise of its powers and duties, which includes preparing drafts of the CPC decisions, carrying out investigations and communicating with external parties on behalf of the CPC.

In its written response to our questionnaire, the CPC paints a picture of the use of soft law by the CPC that corresponds to the traditional understanding of soft law in the context of EU law, as instruments that provide guidance and clarification pertaining to the interpretation of norms

[43] We excluded CySec circulars that simply announced the results of qualifying exams that CySec organises. The dataset is valid as of 1 March 2020.

[44] This number includes circulars that invite the regulated entities to contribute to Public Consultations for the drafting of new Guidelines.

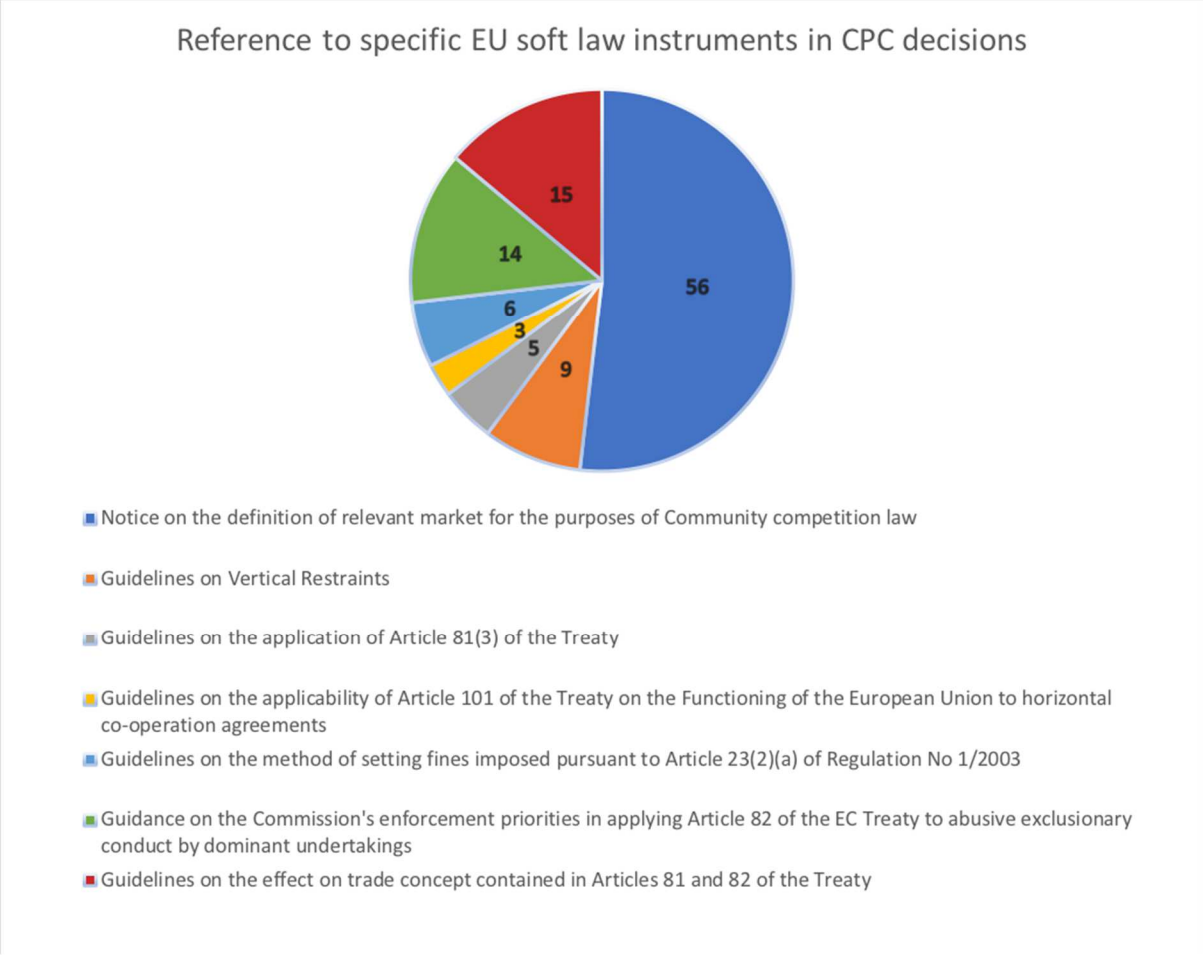
[45] In particular, the dataset includes one Joint Supervisory Statement, one Supervisory briefing, two ESMA Publications, two ESMA/EBA Opinions, one ESMA Briefing, and one Consultation Paper that is not about Guidelines.

[46] Art 23. The Competition Commission was established under the Law on the Protection of Competition of 1989 (repealed) and re-instituted under the 2008 Law on the Protection of Competition.

and the expected practices.[47] The organisation is often guided by EU soft law both during the investigation of submitted complaints and during ex officio investigations in relation to infringements of competition law. According to the CPC, the most frequently used instruments are the 'Guidelines on Vertical Restraints', the 'Guidelines on Horizontal Cooperation Agreements', and the 'Commission Communication in Applying Article 82'. The 'Guidelines on the Application of Article 81(3)' and the 'De Minimis Notice' have also been used over time, while it appears that the 'Commission Notice on Cooperation within the Network of Competition Authorities' is also used, in accordance with the organisation's obligations under Regulation 1/2003.

A look into the dataset of the CPC decisions reveals that, out of the total 108 references to EU soft law instruments that we identified, the 'Commission Notice on the Definition of the Relevant Market' is the most often-cited measure (51,8%), followed by the 'Guidelines on Vertical Restraints' (13,8%).

TABLE 1



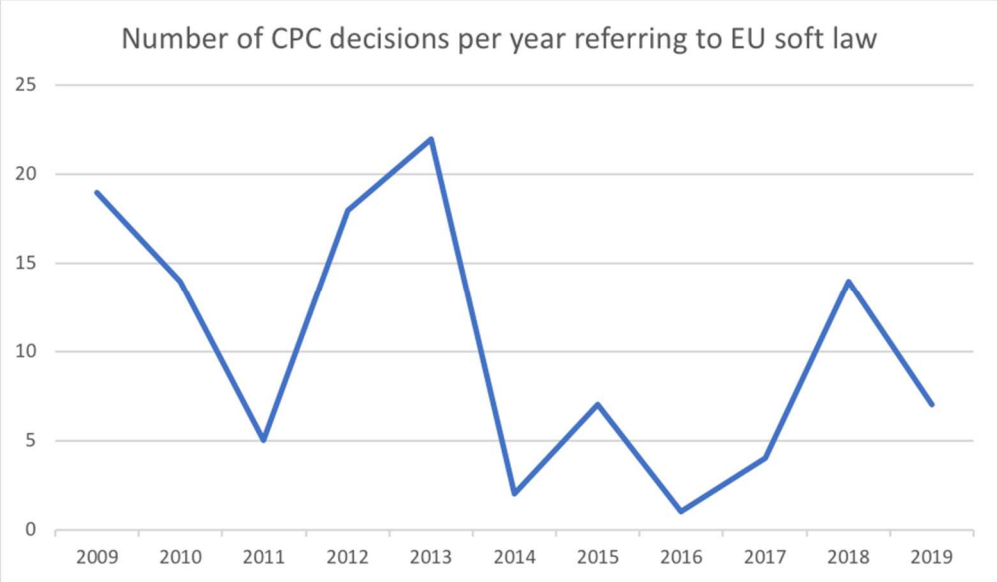
According to the CPC's replies to our questions, the choice of soft law instruments, however, as well as the intensity of their use, are not predetermined. Instead, the use of such measures is assessed on a case-by-case basis and depends on whether there is an actual need to resort to

[47] CPC's written response to our questionnaire (on file with authors). We received the response on 2 September 2019.

soft law. It is the investigating team of the CPC that will assess whether any of the EU Notices or Guidelines are relevant and whether they can offer useful guidance during the investigation process of a case at hand. Beyond the level of investigations, the decision-making body of the organisation may also be guided by soft law in formulating the substance of its decisions. In all circumstances, the decision as to whether to use soft law is taken objectively. When asked about the influences that motivate the use of EU soft law by the organisation, CPC replied that their decisions to resort to soft law instruments is not influenced by the manner in which the same instruments are treated in other jurisdictions or by the ideological or political underpinnings of individual officials involved with a case.[48]

As regards the frequency of the use of EU soft law in the CPC decisions, there appears to be no clear pattern. Table 2 shows that the number of CPC decisions per year where reference is made to EU soft law has decreased in the last years. A closer look in our dataset, however, revealed that, although the number of CPC decisions referring to soft law instruments has decreased, there is more variety to the EU soft law instrument to which the CPC refers to. Having said that, we would treat this finding with caution given that the choice of instrument also depends on the subject matter of the cases that CPC addresses at any given time.

TABLE 2



Overall, the CPC considers EU competition soft law as a useful normative component of the European competition policy and as an instrument that must be used in line with the application of the EU's wider policy framework. In the eyes of the CPC, EU soft law measures provide clarity and guidance and enhance transparency in the application of competition law, while ensuring a homogeneous application of competition policy across Member States. Furthermore, soft law has the capacity to act as a catalyst for successful international cooperation and it is well-suited to address the complexity and diversity of European affairs. Moreover, due to its ability to provide guidance and a level playing field for all parties concerned, soft law operates effectively in situations that mandate swift action.[49]

[48] CPC's written response to our questionnaire (on file with authors).

[49] CPC's written response to our questionnaire (on file with authors).

Interestingly, the CPC noted certain limits to the role and usefulness of EU soft law in the field of competition policy. For instance, the CPC's reply to the questionnaire clearly indicated that CPC sees EU hard law as taking precedence over any EU soft law instrument. In the view of the CPC, although soft law plays a useful role in clarifying EU or national norms and providing guidance both to the organisation and to the courts, it is less appropriate than hard law in regulating sensitive sectors. According to the CPC, EU soft law is not capable of affecting the rights or obligations of relevant stakeholders.[50] The position of EU soft law as serving a guiding role is reflected in the CPC decisions. Some of the expressions used in decisions referring to the Commission's Guidelines or Communications include: 'the [CPC], *drawing guidance* from the case law and the Commission Guidelines on Vertical Restraints (...)' 'the [CPC], *guided* from the Commission Communication on the Enforcement of Art. 81(3) (...)', and 'the [CPC], *taking into consideration* the Guidelines…'. Notably, in one of its decisions, the CPC clarifies that Guidelines issued by the European Commission do not bind the CPC but provide guidance as to the matter at hand.[51] By way of contrast, CPC has pointed out in their answer to our questionnaire that national soft law differs from EU soft law in that the former is binding on the administrative body that issues it.[52]

So far, no EU soft law instrument in the field of competition law has been incorporated into the Cypriot legal order in the form of national – hard or soft – instrument. As a result, whenever the CPC refers to EU soft law, it cites the original EU instrument. Moreover, it does not appear that soft law in the field of competition has created legal friction in Cyprus so far: there are no reasons to think that EU soft law works in favour of some actors to the detriment of others and there have not yet been cases where a national court reviewed or annulled the use of EU soft law.[53] We identified only two cases where EU soft law measures were mentioned in court rulings.[54]

Unlike the picture in administrative practice, EU soft law has yet to finds its place in the Cypriot case law. The lack of case law referring to competition soft law can be explained with reference to the jurisdiction of the Cypriot Administrative Courts (and the Supreme Court, on appeal) to review measures adopted by the CPC. The jurisdiction of the Courts in such administrative cases is limited to a procedural review of CPC decisions, as opposed to a substantive review of the merits of these decisions. As a result, the majority of the cases that arise before the Cypriot courts deal with issues such as the legality of the composition of the committee that adopted the decision, and whether the decision was taken in line with the principles of good administration.[55] Due to procedural limitations on the scope of judicial review, the cases that

[50] ibid.
[51] ΕΠΑ 54/2012.
[52] CPC's written response to our questionnaire (on file with authors).
[53] *Αρχή Τηλεπικοινωνιών Κύπρου εναντίον Επιτροπής Προστασίας Ανταγωνισμού* (Case No. 2004/2012), 29 September 2015; *Αρχή Τηλεπικοινωνιών Κύπρου εναντίον Επιτροπής Προστασίας του Ανταγωνισμού* (Case No. 2019/2012), 25 July 2016, *FISSLER GMBH εναντίον Επιτροπής Προστασίας του Ανταγωνισμού* (Case No. 2056/2012), 12 September 2016.
[54] *Αρχή Τηλεπικοινωνιών Κύπρου ν. Επιτροπής Προστασίας Ανταγωνισμού* (Case No. 2004/2012), 29 September 2015, making reference to the 'Notice on the application of the competition rules to access agreements in the telecommunications sector', OJ C 265/2 of 22.8.1998. Also note that in *Τηλεπικοινωνιών Κύπρου ν. Επιτροπής Προστασίας του Ανταγωνισμού* (Case No. 2019/2012), 25 July 2016, the Supreme Court of Cyprus made reference to the argument of the parties which was based amongst others on the 'Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services', OJ C 165/6 of 11.7.2002, without, however elaborating further.
[55] Decisions taken by public bodies should be in line with the Law governing the General Administrative Principles codified in Ο περί των Γενικών Αρχών του Διοικητικού Δικαίου Νόμος του 1999 (158(Ι)/1999).

typically arise before the Cypriot courts do not allow the establishment of judicial precedent with respect to the interpretation and application of competition law rules or clarification as to the use of EU soft law by the CPC. There is a chance that such issues will arise following the transposition of the Damages Directive in Cyprus law, which may trigger civil claims involving EU soft law measures. We have not identified any such cases during our research.[56]

4.4. EU Soft Law in Cypriot Financial Regulation

The Law governing the activities of CySec makes it clear that the ESMA Guidelines and Recommendations are considered to be non-binding.[57] Article 25(3) requires CySec to participate in ESMA's activities and to evaluate, when transposing EU law, 'the non-binding Guidelines and Recommendations of ESMA' (own translation). This is a notable provision when considered alongside observations from the practice of national authorities in other Member States according to which these authorities perceive ESA guidelines to be *de facto* binding and transpose them through binding national measures.[58] As such, Article 25(3) gives rise to the question of whether, and to what extent, the letter of the law is reflected in the practice of CySec.

The first step in examining the above question is to consider how ESMA Guidelines are incorporated in the national regulatory framework. A number of ESMA Guidelines are presented as part of the regulatory frameworks governing fields that fall under CySec's regulatory competence.[59] For example, where CySec sets out the regulatory framework on Short Selling Law, it states all the relevant EU Regulations, Commission Delegated Regulations, Commission Implementing Regulations, and the ESMA 'Guidelines on Exemption for market making activities and primary market operations'[60] with a direct link to the Guidelines. In other fields, the Guidelines are presented as part of a legal package containing not only EU laws but also national legislation.[61] The Central Bank of Cyprus (CBC), responsible for regulation dealing specifically with banks, also mentions ESA Guidelines within the applicable legal framework. The CBC online database offers a tool for searching Legislation, CBC Directives, and ESA Guidelines pertaining to licensing and supervision, financial stability, and other areas.[62] The database includes the Joint EBA and ESMA Guidelines on complaints-handling for the securities and banking sectors[63] for which the CBC website mentions: 'The abovementioned Guidelines have been issued jointly by ESMA and EBA and have been fully endorsed by the Central Bank of Cyprus (CBC)'.[64]

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[56] It should be noted here that the electronic database of Cyprus case law does not include the civil law cases below the level of the Supreme Court, so there is a chance that there have been some decisions dealing with damages claims.

[57] Ο περί Επιτροπής Κεφαλαιαγοράς Κύπρου Νόμος του 2009 (Ν. 73(Ι)/2009) Άρθρο 25(3).

[58] T Tridimas, 'Indeterminacy, Legal Uncertainty, and Discretion in EU Law' in J Mendes (ed) *EU Executive Discretion and the Limits of Law* (Oxford, Oxford University Press, 2019), 62; M Avbelj (ed), 'Soft Law Financial Regulation in the Selected Member States: Finland, France, Germany, Italy, the Netherlands, Slovenia and the UK', Second SoLaR Working Paper, available at: www.solar-network.eu/publications/solar-working-papers/.

[59] www.cysec.gov.cy/en-GB/legislation/services-markets/epey/.

[60] 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).

[61] See eg CySec's explanation of the regulatory framework governing Investment Services Law: www.cysec.gov.cy/en-GB/legislation/services-markets/epey/.

[62] www.centralbank.cy/en/legal-framework.

[63] 04/10/2018 JC 2018 35.

[64] Central Bank of Cyprus Announcement 6 February 2020,

On at least one occasion, a CySec Directive refers specifically to the ESA Joint Guidelines that relate to the scope of the particular legal instrument. Article 12.4 of the Directive of CySec for the Prevention and Suppression of Money Laundering and Terrorist Finding states that 'The Obliged Entities (sic) when assessing the money laundering and terrorist financing risks and when applying risk based measures and procedures, should take into account, among others, the Joint Guidelines and the Guidelines issued by the Financial Action Task Force (FATF)'. Our understanding is that this creates an obligation for the regulated entities to consider the Guidelines as opposed to an obligation to comply with them per se.

The second step is to examine how CySec takes into account these Guidelines in its practice. CySec communicates these Guidelines to the relevant stakeholders in different ways through the adoption and publication of circulars. In some instances, the Circulars serve the purpose of informing the regulated entities of the issuing of new Guidelines. In other occasions, the Circulars inform the addressees about existing Guidelines. Very often, the Circulars contain a clear statement that CySec adopts the Guidelines. For example, Circular C338[65] explicitly mentions that 'CySec adopts the guidelines by incorporating them into its supervisory practices' and reminds the addressees of their obligations, which are not based on the guidance itself but on the underlying regulation on complaints handling.[66]

In some occasions, the Circulars which refer to ESMA Guidelines state what they expect from the regulated entities as a result of these soft law measures. It should be noted that not all Circulars refer to the legal effects of the ESMA Guidelines. Those that do refer to legal effects, demonstrate a pattern of the wording used by CySec to communicate to the regulated entities the effects that arise from these soft law measures: most of the Circulars use expressions that are consistent with the wording of the ESAs Regulation. Article 16 of the ESMA Regulation states that: 'The competent authorities and financial market participants *shall make every effort to comply* (own emphasis) with those guidelines and recommendations'.[67] The most frequently-found wording in CySec's Circulars is that regulated entities 'shall / should make every effort to comply' with the Guidelines as those are adopted by CySec. Expressions connoting expectation of or encouragement by CySec towards the recipients to comply with the Guidelines – or at least to take them into consideration – are also used in the Circulars. Some examples are: 'CySec expects [the regulated entities] to fully comply'; 'CySeC urges the financial market participants to whom these Guidelines apply to make every effort to comply with the Guidelines'; 'CySec encourages the Cyprus Investment Firms to take measures to apply the Guidelines as soon as possible', or 'CySec expects persons responsible for the prospectus to consider these Guidelines when preparing a prospectus'.

The variation in the wording of CySec Circulars has implications with respect to the type of legal effects that these Circulars can produce. Since a concerned party is required to consider or make best efforts to comply with a Circular, it can be argued that this Circular is capable of producing a legally binding obligation – albeit limited and relatively imprecise – *vis-á-vis* these parties. In order to fulfil the scope of this obligation, a concerned party would either have to

www.centralbank.cy/en/announcements/complaints-by-customers-of-credit-acquiring-companies-cacs-06-02-2020.

[65] Repealing the guidelines published on 27th May 2014 on complaints-handling for the securities (ESMA) and banking (EBA) sectors (JC 2014 43).

[66] Art 26 of the Regulation 2017/5653.

[67] Circular "C231: Joint Guidelines on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sector".

take steps to be in line with the normative content of the Circular or justify their non-compliance with the same. Such an obligation appears to mirror what typically applies to the case of ESMA Guidelines under Article 16 ESMA Regulation. By contrast, where a CySec Circular includes prescriptive phrases that go so far as an 'expectation of full compliance', it is possible for concerned parties to perceive the CySec Circular in question as if it required unconditional compliance. In other words, it seems to produce binding legal effects similar to the ones typically seen in regulations, orders and decisions. By way of comparison, Circulars referring to CySec's obligations arising from EU hard law such as a Regulation, use expressions such as 'The Commission *must* strictly apply the provisions of the Regulation'[68] or 'The Regulations are binding in their entirety and directly applicable in all Member States. The Commission requests ALL Regulated Entities to comply with the Regulations'.[69]

At other times, the ESMA Guidelines constitute the basis on which CySec then builds its own guidance for the regulated entities. An example here is the ESMA Guidelines on remuneration policies and practices. In June 2013, with a Circular, the CySec informed the CIFs and the Fund Management Companies that ESMA had published the said Guidelines. The Circular provided the link to the Guidelines, and a brief description of their purpose, and stated that CySec would issue its own guidelines based on those of ESMA.[70] This can be connected to a subsequent circular, which contains CySec's Guidelines on remuneration policies and practices. This Circular is informative about the way in which CySec perceives guidelines that it publishes, as it states that: 'Guidelines do not reflect absolute obligations. For this reason, the word "should" is often used. However, the words "must" or "are required" are used when describing a requirement of the Law'.[71] It could, therefore, be argued, that national soft law in the form of Guidelines issued by CySec is understood by CySec not to be capable of giving rise to a legally binding obligation. The legal status of such national soft law would be ultimately determined by Cypriot courts on the basis of a substantive assessment if and when a relevant case arises.

CySec, therefore, uses the word 'should' with respect to the content of national Guidelines and the word 'must' for requirements deriving from national law. The difference in the wording of 'should' and 'must' that CySec makes between national Guidelines and national law can be parallelised with the difference in the wording of Circulars referring to 'EU hard law' and 'EU soft law'. By way of contrast to Circulars mentioning ESA Guidelines, as we described them above, Circulars that refer to EU Regulations (as an example of EU hard law) often include expressions such as: "The Commission requests all entities to comply", "CySec will not hesitate to use enforcement powers to uphold compliance", "Regulated entities / Cyprus Investment Firms not complying will encounter enforcement action", and "CySec emphasises that all regulated entities should comply with the Regulation". Similar expressions are used in Circulars referring to national hard laws.[72]

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[68] Circular "CI144-2014-22: Capital adequacy and exposures of the Cyprus Investment Firms".

[69] Circular "CI144-2014-29: Council Regulations (EU) No.959/2014, No.960/2014 and No.961/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine"; See also Circular "C279: Discretions of Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)" which states: "CySEC emphasizes that all regulated entities should comply with the Regulation and any legislative acts are issued in accordance to it".

[70] See eg Circular "CI144-2013-18: Guidelines on remuneration policies and practises".

[71] Circular "C031: Guidelines GD-IF-07 Guidelines on remuneration policies and practices" para 3.

[72] See eg Circular "C204: Freedom to provide investment and ancillary services and/or perform investment activities in a third country" which concerns compliance with The Investment Services and Activities and

Finally, regarding judicial practice, in a series of cases concerning the failure of one of the country's biggest banks in 2013 and the criminal liability of the bank's executives, the Cyprus Supreme Court referred to a Guidance issued by CERS (The Committee of European Securities Regulators), which was the predecessor of ESMA.[73] The Guidance, inter alia, provides examples of behaviour that constitutes market abuse. The Court refers to the Guidance in the process of defining the 'spreading false or misleading information' under the national law[74] adopted to transpose the EU Directive on insider dealing and market manipulation (market abuse).[75] The case is a clear example of Guidelines being used in judicial practice to assist with the interpretation of national legislation. At the same time, it is an exception to the dominant trend in judicial practice not to make substantial use of EU soft law in the examined areas. So far, in the three cases where the selected guidelines of ESMA were briefly referred to,[76] the Cypriot courts did not elaborate on their legal or factual significance, as these instruments were not central to the main disputed issues.

5. Concluding Remarks

Although Cypriot law has not reserved official space for the term 'soft law', the use of national and Union instruments of such nature in the Cypriot legal system is a reality. At the same time, EU soft law has yet to play a significant role in judicial decision-making in the examined policy areas. Although there may be more than one reason why Cypriot judges do not refer to EU soft law, it is clear that the limitations on the scope of judicial review make it difficult for the Cypriot courts to engage with and apply the substantive rules – hard and soft – governing the administrative decision the legality of which is put into question.

In the absence of a legal category of soft law in the Cypriot legal system, 'circulars' can be regarded as the most prominent example of national soft law. Although EU competition soft law has not yet affected judicial practice, the Cypriot competition authority frequently refers to EU soft law instruments. The responses of the CPC to our questionnaire indicate that it does not consider EU competition soft law to have binding normative force, and there is no evidence that it is treated as such in the CPC practice. EU competition soft law remains a normative source that informs and guides the CPC in the exercise of its conferred powers; yet, the CPC appears to prioritise retaining wide discretion as to whether or not it will be guided by such instruments and to what extent in individual cases.

Regulated Markets Law of 2007 and states: "CySEC therefore draws the attention to all CIFs, that the relevant legislation provides that CySEC, within its supervisory powers, may take the necessary supervisory decisions, including the imposition of appropriate administrative sanctions and/or the restriction of the CIF's access to provide investment and ancillary services and/or perform investment activities in a third country and/or other administrative measures; in case of noncompliance with this Circular."

[73] CERS Guidance to Market Abuse Directive Level 3 – first set of CESR guidance and information on the common operation of the Directive,
www.esma.europa.eu/sites/default/files/library/2015/11/04_505b.pdf; Cyprus Supreme Court Criminal Appeals No. 2/2018 και 3/2018) *Iliadi v Republic and Bank of Cyprus v Republic,* Decision of 12 September 2018.

[74] Art 20(1)(c) of Πράξεων Προσώπων που Κατέχουν Εμπιστευτικές Πληροφορίες και των Πράξεων χειραγώγησης της Αγοράς (Κατάχρηση Αγοράς) Νόμος του 2005, N.116(I)/2005. The Preamble to the Law mentions that it was partly adopted to transpose EU legislation.

[75] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) 2003 OJ L 96/1.

[76] See eg *Στυλιανίδης v. Επιτροπή Κεφαλαιαγοράς Κύπρου* (Case No. 905/2014), 22 November 2019; *Ξενοφώντος v. Τράπεζα Κύπρου Δημόσια Εταιρεία Λτδ και Κεντρική Τράπεζα Κύπρου* (Case No. 2503/2014), 11 July 2018; *Ελένης Χριστοδουλίδου v. Sea Star Capital PLC κ.α.* (Case No. 5852/2016), 14 October 2016.

The CPC follows a case-by-case approach, making a recourse to EU soft law in its decisions to the extent that this is appropriate and depending on the subject matter of the case at hand. By contrast, in the field of financial regulation, EU soft law has a more significant role. By using 'circulars', CySec integrates EU soft law within the Cypriot legal order and occasionally communicates the content of such EU instruments to concerned parties. These circulars expect the regulated entities to comply or to make a best effort to comply. Sometimes the wording used by CySec might lead the concerned parties to perceive these Guidelines as requiring full and unconditional compliance. To ease the risk of possible discrepancies between CySec's intended legal effects and respective perceptions of concerned parties, CySec could apply a more consistent approach to the terms used in its Guidelines. A more harmonised administrative practice in this respect can contribute to CySec's regulatory efficiency and promote legal certainty by enabling stakeholders to better identify their requirements under CySec's Guidelines.

There is no uniform approach to EU soft law within the Cypriot administrative practice. The absence of a harmonised approach towards EU soft law across the Cypriot public administration is not surprising. Divergence can be attributed to the different functions of EU soft law in the two policy areas. At EU level, financial regulation is highly centralised and regulated; by contrast, competition law remains relatively decentralised, leaving a significant degree of discretion to national authorities. In this sense, a different degree of divergence reflects the different regulatory models that characterise both policy fields. More importantly, such a disparity preserves flexibility in the exercise of administrative discretion by acknowledging the regulatory nuances between EU soft law instruments, reinforcing the view that EU soft law is not a unified legal category.

Naturally, this contribution has important limitations. Our findings relied heavily on the empirical analysis of the administrative instruments with respect to the CPC and even more, with respect to CySec. Despite the wealth of information that our analysis of CySec's circulars has offered, important questions remain unanswered. What is the rationale for CySec applying a differential approach between national and EU financial regulation soft law? What are the possible enforcement implications – if any – for regulated entities that do not make an effort to comply with ESMA Guidelines? And, what exactly is perceived by CySec as a 'best efforts' obligation? With respect to competition law, what is the reason underlying the CPC decision not to integrate EU soft law into the domestic legal order?

Future researchers could complement our effort by gaining insights from individual public officials on the perceptions and use of EU soft law in their daily administrative practice. Similarly, it would be useful to conduct interviews with Cypriot judges to acquire a better understanding on their readiness to be influenced by EU soft law, in what manner and under what conditions. Finally, researchers can draw comparisons between the approaches of Cypriot authorities to EU soft law in the policy fields that we examined and other policy fields.