

**THE ROLE OF EBA GUIDELINES IN PRIVATE  
LAW DISPUTES: ASSESSING CIVIL FAULT IN  
THE LEGAL FRAMEWORK OF BELGIUM**  
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Niels Rogge

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## The Role of EBA Guidelines in Private Law Disputes: Assessing Civil Fault in the Legal Framework of Belgium

### Abstract

*In Belgium, it is well established that banks, when granting credit, have a duty to assess the borrower's creditworthiness. Failure to conduct a prudent assessment of a borrower's creditworthiness is considered a fault in a civil law context. Historically, there have been cases wherein banks were held liable by third parties when credit was granted to companies who were virtually bankrupt. Traditionally, the evaluation of a credit applicant's creditworthiness exclusively scrutinized their capacity for repayment. The European Banking Authority (EBA), in its Guideline of May 29, 2020, concerning Loan Initiation and Monitoring, mandates that banks, in the process of granting credit, must assess the borrower's exposure to Environmental, Social, and Governance (ESG) risks. This prompts an intriguing inquiry into the potential role of these guidelines within the context of private law disputes. Specifically, this prompts the question of whether external entities possess the capacity to impute civil liability upon a bank in scenarios where credit is granted in breach of the EBA Guidelines.*

*The present research explores whether a failure to comply with EBA Guidelines, with a specific focus on the ESG-related obligations introduced by the EBA Guideline governing the initiation and monitoring of loans, could lead to a civil fault within the legal framework of Belgium. According to Belgian law, a civil fault arises if the behaviour in question (I) contravenes a particular statutory provision or (II) deviates from the conduct expected of a reasonably prudent person placed in the same circumstances.*

*Considering the non-binding nature of the EBA Guidelines, there is no doubt that non-compliance with these guidelines does not constitute a violation of a specific statutory provision, and therefore does not automatically result in a civil fault. Consequently, under Belgian law, the determination of a civil fault necessitates an evaluation of whether the conduct in question deviates with the behaviour expected of a reasonably prudent bank, operating under the same circumstances.*

*This paper argues that due consideration should always be given to the underlying purpose of the EBA Guidelines when assessing prudent conduct. In other words, a breach of the EBA Guidelines does not invariably lead to a breach of a bank's duty of care within the context of a private law dispute. The contention is that if the EBA Guidelines are not intended to confer rights upon banking customers, it would be inappropriate to presume that a breach of these guidelines automatically constitutes a violation of a bank's duty of care in a private law dispute between the bank and its customer.*

*By examining the interplay between EBA Guidelines and Belgian civil fault criteria, this research aims to contribute valuable insights to the legal assessment of financial institutions' conduct in the context of private law disputes. The findings of this study could provide guidance to policymakers, legal practitioners, and financial institutions in understanding the nuanced relationship between soft law instruments, such as EBA Guidelines, and their potential implications in the domain of private law.*



The author welcomes your comments at [Niels.Rogge@ugent.be](mailto:Niels.Rogge@ugent.be)

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## 1. Introduction

1. In Belgium, it is well established that when banks grant credit, they have a duty to assess the borrower's creditworthiness.<sup>1</sup> The lender should – based on its analysis of the borrower's needs, financial situation and ability to repay – ensure that it does not grant credit that is manifestly disproportionate to, and in excess of, the borrower's ability to repay.<sup>2-3</sup> Within the Belgium framework, the way in which this solvency assessment is to be carried out has been further clarified for consumer credit<sup>4</sup>, mortgage credit<sup>5</sup> and credit granted to SME's<sup>6</sup>.

Failure to conduct a prudent assessment of a borrower's creditworthiness is considered a fault in a civil law context. In the past, banks have been held liable by third parties in cases where credit was granted to companies already on the path to bankruptcy<sup>7</sup> or in situations wherein granting credit led to a continuous and insurmountable increase in the financial burden, with no prospect of improvement<sup>8, 9</sup>. The underlying rationale in these instances is that third parties perceive a borrower as creditworthy due to the credit granted by the bank. Consequently, these third parties engage in transactions with the borrower based on this perceived creditworthiness. The banker's fault consists in the improper decision

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<sup>1</sup> Cf. *Infra* footnote 2.

<sup>2</sup> D. BLOMMAERT en D. BRACKE, *De aansprakelijkheid van de bankier als kredietverlener in het gemeen en bijzonder kredietrecht*, Gent, Larcier, 2015, 115 – 116; E. WYMEERSCH, R. STEENNOT en M. TISON, “Overzicht van rechtspraak. Privaat bankrecht (1999-2007)”, *TPR* 2008, 1053, nr. 10; E. WYMEERSCH, M. DAMBRE en K. TROCH, “Overzicht van rechtspraak. Privaat bankrecht (1992-1998)”, *TPR* 1999, 1797 *et seq.*; See *i.a.*: Bergen 12 juni 2006, *JLMB* 2007, 146; Luik 29 juni 2001, *JT* 2001, 864; Gent, 3 oktober 2018, *RABG* 2019, 438, noot J. BENOOT; Gent, 26 juni 2019, *TBH* 2020, 344, nr. 7, noot E. DE BAERE; Kh. Tongeren 16 november 2013, *RABG* 2014, 1121; Rb. Aarlen 13 maart 2003, *DAOR* 2003, 78, noot D. BLOMMAERT; Rb. Luik 4 april 1990, *JLMB* 1990, 1291; Gent 19 september 2012, *RABG* 2014, 1098, noot D. BLOMMAERT; Brussel 28 april 2008, *RABG* 2009, 1031, noot D. BRACKE, D. BLOMMAERT; Gent 19 oktober 2011, *RABG* 2012, 1189; Antwerpen 8 september 2020, *HOR* 2021, nr. 140, 112-114; G. LAGUESSE en P. PROESMANS, “Baromètre de jurisprudence en droit bancaire: 2019”, *DAOR* 2021, nr. 137, (2-44), 13-14, nr. 23-24.

<sup>3</sup> However, certain case law emphasizes the role of the borrower (see for example the judgment of the Court of Appeal of Antwerp of 21 November 2002, where the borrower's own duty of investigation and primary responsibility were strongly emphasized. According to the Court, it is primarily for the borrower to assess the appropriateness of applying for credit. Cf. Antwerpen 21 november 2002, *DAOR* 2003/66, 69). D. BLOMMAERT en D. BRACKE, *De aansprakelijkheid van de bankier als kredietverlener in het gemeen en bijzonder kredietrecht*, Gent, Larcier, 2015, 115.

<sup>4</sup> Article VII. 69, §1 WER & VII.77, §1 WER. Cf. D. BLOMMAERT, F. BONNARENS, J. VANNEROM, “Art. VII.77 WER”, *Bijzondere overeenkomsten. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer, II. Andere benoemde overeenkomsten, Consumentenkrediet*, 2016, 1 *et seq.*; Cass. 7 januari 2008, *T.Vred.* 2009, 281, noot C. BIQUET-MAHIEU.

<sup>5</sup> Article VII.133, §1 WER.

<sup>6</sup> Article 5 - 7 Wet betreffende diverse bepalingen inzake de financiering voor kleine en middelgrote ondernemingen  
<sup>7</sup> G. SCHRANS en R. STEENNOT, *Algemeen deel van het Financieel recht*, Antwerpen, Intersentia, 2003, 469, 615, with reference to: Bergen 20 september 1999, *JLMB* 2000, 1684; Luik 10 november 1998, *RRD* 1999, 31; Kh. Brussel 2 juni 1998, *Rev. Rég. Dr.* 1998, 195; A. ZENNER en L.M. HENRION, “La responsabilite du banquier dispensateur de credit en droit belge”, *JT*, 1984, 477.

<sup>8</sup> G. SCHRANS en R. STEENNOT, *Algemeen deel van het Financieel recht*, Antwerpen, Intersentia, 2003, 469, 615.

<sup>9</sup> G. SCHRANS en R. STEENNOT, *Algemeen deel van het Financieel recht*, Antwerpen, Intersentia, 2003, 469. Particular obligations are incumbent on a banker who intends to grant credit to a company in financial difficulties. G. SCHRANS en R. STEENNOT, *Algemeen deel van het Financieel recht*, Antwerpen, Intersentia, 2003, 470, nr. 617.



to grant (or maintain)<sup>10</sup> credit,<sup>11</sup> as a result of which an appearance of creditworthiness (*apparence de solvabilité*) is established (or maintained)<sup>12</sup> with third parties.<sup>13-14</sup>

2. In its Guideline of May 29, 2020 on Loan Initiation and Monitoring<sup>15</sup>, the EBA states that when granting credit, the bank will have to assess the borrower's exposure to so-called Environmental, Social, and Governance (ESG) - Risks.

Significantly, banks will no longer solely have to focus on the borrower's financial viability, but will also be required to assess potential ESG-risks linked to the credit provision. In instances where granting credit poses ESG risks (which ultimately impacts the credit-applicant's solvency), the bank will be required to take action, including the potential denial of credit in certain cases.<sup>16</sup> The question arises whether external third parties could hold a bank civilly liability in the event it grants credit in breach of the EBA Guidelines.

In the subsequent sections, a concise overview of the ESG-obligations set forth by the EBA Guideline on Loan Initiation and Monitoring will be provided (Section II), followed by an analysis of the potential implications of breaching EBA Guidelines and their potential classification as a "fault" within the framework of civil law disputes (Section III).

## 2. ESG obligations stemming from EBA guidelines on loan initiation and monitoring

### 2.1. Introduction

3. After the 2007-2008 financial crisis, the European Union, amongst many reforms, equipped itself with a new administrative structure – the European System of Financial Supervision (ESFS). As part of this European System of Financial Supervision, the European Banking Authority (EBA) was established as one of the three European Supervisory Authorities on 1 January 2011,<sup>17</sup> together with the European

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<sup>10</sup> D. BLOMMAERT en D. BRACKE, *De aansprakelijkheid van de bankier als kredietverlener in het gemeen en bijzonder kredietrecht*, Gent, Larcier, 2015, 255, nr. 201.

<sup>11</sup> This improper decision could be due, for example, to insufficient research concerning the creditworthiness of the credit applicant or, applying a risk assessment that exceeds the limit a normal, reasonable banker would respect. Cf. E. WYMEERSCH, "Bank liability for improper credit decisions in the civil law", in R. CRANSTON (ed.) *Banks, Liability ad Risk*, Lloyd's of London Press, London, 1995, 186 - 187; K. BYTTEBIER, "Ondernemingsfinanciering door kredietinstellingen", *TPR* 1994, 1522 - 1523, nr. 35

<sup>12</sup> The fault of the bank can occur both during the granting and the duration of the credit agreement.

<sup>13</sup> E. WYMEERSCH, R. STEENNOT en M. TISON, "Overzicht van rechtspraak. Privaat bankrecht (1999-2007)", *TPR* 2008, 1058, nr. 13; Rb. Antwerpen 28 november 2000, *RW* 2001-2002, 1072; Kh. Brussel 3 april 2001, *TBH* 2003, 21; Antwerpen, 25 maart 1987, *T.B.H.*, 1989, 77; D. BLOMMAERT en D. BRACKE, *De aansprakelijkheid van de bankier als kredietverlener in het gemeen en bijzonder kredietrecht*, Gent, Larcier, 2015, 255 - 256. See also: E. WYMEERSCH, "Bank liability for improper credit decisions in the civil law", in R. CRANSTON (ed.) *Banks, Liability ad Risk*, Lloyd's of London Press, London, 1995, 186 - 187.

<sup>14</sup> It is not the appearance of the borrower's creditworthiness that is attributed to the bank as a fault. The fault of the banker lies in his decision to provide or maintain the credit, even though a normally prudent and reasonable banker, placed in the same circumstances, would not have granted the credit or would have terminated it. Cf. L. CORNELIS, "De aansprakelijkheid van de bankier bij kredietverlening", *TPR* 1986, 375. The legal basis for the bank's fault is article 1382 BW, whereby the granting (or maintenance) of credit will be judged as a fault if it does not correspond to the conduct that might be expected of a normal prudent bank placed in the same circumstances. Cf. L. CORNELIS, "De aansprakelijkheid van de bankier bij kredietverlening", *TPR* 1986, 375. See for example Antwerpen, 25 maart 1987, *T.B.H.*, 1989, 77. Ook in Frankrijk werd het principe van de aansprakelijkheid van de bank vis-a-vis derden gestoeld op 1382 BW. Cf. D. BLOMMAERT en D. BRACKE, *De aansprakelijkheid van de bankier als kredietverlener in het gemeen en bijzonder kredietrecht*, Gent, Larcier, 2015, 255.

<sup>15</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06).

<sup>16</sup> Cf. *infra*.

<sup>17</sup> Regulation (EU) No. 1093/2010 on 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.



Insurance and Occupational Pensions Authority (EIOPA)<sup>18</sup> and the European Securities and Markets Authority (ESMA)<sup>19</sup>. To achieve its objective – which is to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses<sup>20</sup> – the EBA is empowered to draft regulatory<sup>21</sup> and implementing technical<sup>22</sup> standards (binding regulatory acts),<sup>23</sup> as well as issue guidelines and recommendations addressed to competent authorities or financial institutions (soft law)<sup>24, 25</sup>

4. In accordance with Article 16 of Regulation (EU) No 1093/2010,<sup>26</sup> the EBA has issued Guidelines on loan initiation and monitoring in response to the European Council's request to address so-called "non-performing loans" and prevent their build-up.<sup>27</sup> "Non-performing loans" are essentially loans that are subject to late repayment or are unlikely to be repaid in full by the borrower. The Guidelines impose a variety of obligations on credit institutions,<sup>28</sup> essentially aiming to ensure that newly issued loans are of high quality (meaning preventing newly originated performing loans from becoming non-performing in the future), while respecting and protecting the interests of consumers<sup>29, 30</sup>

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<sup>18</sup> 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

<sup>19</sup> 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.

<sup>20</sup> Art. 1(5) Regulation (EU) No. 1093/2010.

<sup>21</sup> Cf. Art. 290(1) TFEU.

<sup>22</sup> Cf. Art. 15(1) of the Regulation n° 1093/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Banking Authority).

<sup>23</sup> Article 8(1)(a) of the Regulation n° 1093/2010 of the European Parliament and of the Council of 24 Nov. 2010 establishing a European Supervisory Authority (European Banking Authority).

<sup>24</sup> As part of its task to establish consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, the EBA may issue guidelines and recommendations addressed to competent authorities or financial institutions in its field of competence. Cf. Art. 16(1) Regulation (EU) No. 1093/2010. Regulation (EU) No 1093/2010 requires that the competent authorities and financial institutions shall make every effort to comply with the EBA guidelines and recommendations. Cf. Art. 16(3) Regulation (EU) No. 1093/2010. For more on "soft law" see for example: M. ELIANTONIO, E. KORKEA-AHO, & O. STEFAN, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, Oxford, Hart, 2021, 11.

<sup>25</sup> D. MARIJA, "The Broadening 'Soft Law' Powers of the European Banking Authority", *European Company Law Journal*, 2022, 19, no. 1, (22-26), 22-23. DOMINA and SCHEMMEL argue that these instruments have become "one of the central tools in the regulation of European financial markets". Cf. D. MARIJA, "The Broadening 'Soft Law' Powers of the European Banking Authority", *European Company Law Journal*, 2022, 19, no. 1, (22-26), 22; J. SCHEMMEL, "The ESA Guidelines: Soft Law and Subjectivity in the European Financial Market – Capturing the Administrative Influence", *Indiana J. Global Legal Stud*, 2016, 23(2), 455, 457.

<sup>26</sup> 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.

<sup>27</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 4.

<sup>28</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 3. See art. Art. 4 (1), point 3, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

<sup>29</sup> In this regard, see also binding regulations to assess consumer creditworthiness. Cf. Art. 18 and 20(1) Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (Mortgage Credit Directive) and Art. 8 of Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC (Consumer Credit Directive).

For small and medium-sized enterprises, there is no duty at European level for credit institutions to assess creditworthiness, but this duty is imposed at national level. Cf. Art. 5 Act of 21 December 2013 on various provisions on financing for small and medium-sized enterprises, BS 31.12.2013 (SME Financing Law).

<sup>30</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 5-6 & 77.



A detailed review of the EBA guidelines on Loan Initiation and Monitoring is beyond the scope of our research. Instead, as mentioned, we will focus our attention to the introduced obligations regarding the obligation of credit institutions to (generally speaking) "consider the impact" of "ESG factors" when providing credit.

## 2.2. *The duty of the credit institutions to consider ESG factors*

5. The EBA Guidelines specify that credit institutions should, in general terms,<sup>31</sup> take into account "ESG factors": (I) in the development of their credit risk culture,<sup>32</sup> (II) in their credit risk policies and procedures,<sup>33</sup> (III) when assessing a borrower's creditworthiness<sup>34</sup>, (IV) when making a credit decision,<sup>35</sup> as well as (V) when valuing collateral<sup>36</sup>.

Two aspects seem to be essential, namely: (I) what is exactly meant by "ESG factors" and (II) what obligations do credit institutions now face.

6. Regarding the meaning of "ESG factors", the EBA Guidelines on Loan Initiation and Monitoring, remarkably, do not contain a definition. However, a definition of "ESG factors" is present in the EBA report dated June 23, 2021.<sup>37</sup> Said report defines "ESG factors" as: "*Environmental, social or governance matters that may have a positive or negative impact on the financial performance or solvency of an entity, sovereign or individual*".<sup>38</sup> These "social matters", or better "social factors"<sup>39</sup> (as part of ESG factors), according to the report, are related to the rights, well-being and interests of people and communities, and include factors such as (in)equality, health, inclusiveness, labour relations, workplace health and safety, human capital and communities.<sup>40</sup> The EBA acknowledges that, compared to environmental factors, establishing clear definitions for social factors at the European level has proven more challenging.<sup>41</sup> Nevertheless, according to the EBA, investors, asset managers or rating agencies normally refer to social criteria such as human rights violations, relationships with employees, labour practices, customer interactions and poverty, which they consider for the 'S' part of their ESG-analysis.<sup>42</sup>

What is important is that, according to the definition included in the report, there will only be an "ESG Factor" when there is a potential positive or negative impact on the financial results or solvency of an

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<sup>31</sup> The exact wording varies depending on the obligation imposed. For example, the text does not always stipulate that ESG Factors "should be taken into account", but other wording, depending on the obligation, also occurs, such as: "*consider the impact*", "*assess the borrower's exposure to*", "*identify borrowers that are exposed to*" or "*to document*". Cf. EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), nr. 27, 57, 126-127, 146, 149, 196 & 208.

<sup>32</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 20, nr. 27.

<sup>33</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 26, nr. 57.

<sup>34</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 39, nr. 126 - 127; 42, nr. 146; 42, nr. 149.

<sup>35</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 50, nr. 196.

<sup>36</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 53, nr. 208.

<sup>37</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18).

<sup>38</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), p. 6. Vrij vertaald van: "*Environmental, social or governance matters that may have a positive or negative impact on the financial performance or solvency of an entity, sovereign or individual*".

<sup>39</sup> Which, according to the report, has its own but substantively similar definition: "*Social matters that may have a positive or negative impact on the financial performance or solvency of an entity, sovereign or individual*". Cf. EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 7.

<sup>40</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 43, nr. 75.

<sup>41</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 43, nr. 77.

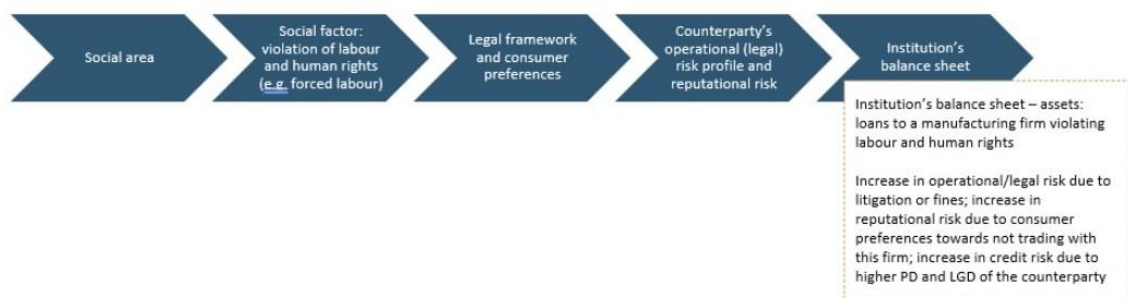
<sup>42</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 43, nr. 77.



entity, a government or an individual. Thus, to be clear, according to this definition, an ESG factor will not *de facto* be present when a (potential) borrower engages in economic activities that (may) violate, for example, environmental regulation or human rights. It is only to the extent that this (environmental, social or government) matter may have a (positive or) negative impact on the financial performance or solvency of an entity, sovereign or individual, should it be considered an ESG-Factor. However, it is crucial to consider that the failure to respect environmental regulations or human rights may give rise to administrative sanctions, thereby creating the possibility of a negative impact on the financial performance or solvency of an entity. Furthermore, the EBA makes clear that a potential adverse impact can be decided fairly quickly. The report illustrates how a borrower's disregard for "social matters" (let's say human rights <sup>43</sup>) could cause a negative impact for both the borrower and the lending institution. For example, a borrower's disregard of human rights could give rise to legal and reputational risks for the borrower, which could impact the credit institution's balance sheet if the realization of these risks resulted in the borrower being unable to meet the loan repayments. Moreover, credit institutions that are associated with their borrower's activities through granting (or maintaining) credit run the risk of suffering (reputational) damage themselves, for example if clients take offence at such policies and decide to change credit institutions.

Figure 7 of the report summarizes the potential negative impact of social factors (e.g., human rights violation) on credit institutions' balance sheets as follows:

Figure 7 Theoretical example of the ESG cycle: impact of social factors on institutions' balance sheets



Source: EBA<sup>44</sup>

7. The EBA Guidelines require essentially that credit institutions take said "ESG Factors" into account. More specifically, the Guidelines require credit institutions to develop a credit risk culture that ensures that credit is granted to borrowers who, to the best of the institution's knowledge at the time of granting the credit, will be able to meet the terms of the credit agreement. In assessing this, the credit institution must "consider" the impact on the institution's capital position and profitability and sustainability and related ESG factors. Credit institutions should "take into account" the risks associated with ESG factors on the financial conditions of borrowers, and in particular the potential impact of environmental factors and climate change, in their credit risk appetite, policies and procedures. Risks associated with ESG factors must be mitigated.

<sup>43</sup> The fact that human rights fall under "ESG factors" is confirmed by the fact that they are included in the non-exhaustive list of social factors proposed by the report. Cf. EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 160.

<sup>44</sup> EBA, "On management and supervision of ESG-risks for credit institutions and investment firms" (EBA/REP/2021/18), 47, nr. 82. The original figure also includes the potential impact on the balance sheet of investment firms.





We already explained that lending to a company that uses the credit to finance an activity that has an adverse impact on human rights could cause (among other things) legal and reputational risks, which can have a negative effect on the financial situation of the borrower and consequently on its ability to repay the loan. Before granting credit, a financial institution could ask itself whether there are risks related to ESG factors and, if so, whether the realization of that risk could result in the borrower no longer being able to meet the conditions of the credit agreement. In the affirmative case, it seems to me that, in order to comply with the Guidelines, the credit institution's policy should mitigate such risk, which can be done on the one hand by refusing to grant credit, or on the other hand by remedying the risk (associated with ESG factors) (perhaps by using leverage). Note that sufficient collateral should not be a decisive argument for loan approval.<sup>45 - 46</sup>

#### 2.4. Date of application

8. The guidelines were in principle applicable as of June 30, 2021 for new loans, advances<sup>47</sup> and credit facilities<sup>48</sup>. However, the National Bank of Belgium (NBB) has indicated through a circular letter that - due to exceptional operational efforts that institutions have had to make as a result of the COVID-19 crisis - it will apply a 6-month margin of tolerance, giving institutions time until December 31, 2021 to comply in practice with the new obligations.<sup>49</sup> Section 5 of the EBA Guidelines (which deals with loan origination procedures) applies to loans and advances already in existence on June 30, 2021 if their terms and conditions are changed after June 30, 2022,<sup>50</sup> provided the changes are approved by a specific credit decision approval, and if their implementation requires a new loan agreement with the borrower or an addendum to the existing agreement.<sup>51</sup> For loans granted before June 30, 2021, missing data and information may be collected until June 30, 2024.<sup>52</sup>

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<sup>45</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 35, nr. 97; 38, nr. 120, 42, nr. 143.

<sup>46</sup> Such a principle is also found in Belgian legal doctrine and case law. See, for example: Gent, 3 oktober 2018, RABG 2019, 438, noot J. BENOOT; Gent, 26 juni 2019, TBH 2020, 335, noot E. DE BAERE; E. WYMEERSCH, M. DAMBRE en K. TROCH, "Overzicht van rechtspraak. Privaat bankrecht (1992-1998)", TPR 1999, 1802 et seq.; Kh. Brussel 8 november 2002, TBH 2004, 170; E. DE BAERE, "De aansprakelijkheid van de bank bij de kredietverlening naar gemeen recht: over (wederzijdse) informatieverplichtingen en ontevreden borgen", TBH 2020, 347, nr. 17; Gent 19 oktober 2011, RABG 2012, 1189; Luik, 16 mei 2006, *Jaarboek Kredietrecht*, 2006, 3.

<sup>47</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 18, nr. 19.

<sup>48</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 18, nr. 21.

<sup>49</sup> NBB, "EBA-richtsnoeren inzake de initiëring en monitoring van leningen (EBA/GL/2020/06)", Circulaire, 20 juli 2021, 2.

<sup>50</sup> The Dutch text mentions June 30, 2021, but the English text mentions June 30, 2022. The National Bank of Belgium follows the English text for the entry into force. See in this regard: NBB, "EBA-richtsnoeren inzake de initiëring en monitoring van leningen (EBA/GL/2020/06)", Circulaire, 20 juli 2021, 2.

<sup>51</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 18, nr. 19.

<sup>52</sup> EBA, "Guidelines On Loan Origination And Monitoring", 29/05/2020, (EBA/GL/2020/06), 18, nr. 22.



### 3. Civil liability for breach of EBA Guidelines

#### 3.1. Introduction

9. The inquiry emerges as to the extent to which financial institutions can incur civil liability when they: (I) fail to adhere to the prescribed obligations outlined in the loan origination and monitoring guidelines established by the European Banking Authority (EBA), but (II) simultaneously do not contravene any specific provisions of private law within the domain of credit legislation.

More specifically, consider the scenario wherein a bank, operating within the legal framework of Belgium, is solicited by an enterprise in the petroleum industry to grant credit. The financial institution will be required to:

- Firstly, scrutinize and ensure that the credit granted is not manifestly disproportionate to, and in excess of, the borrower's ability to repay. This obligation finds its basis within the established precedents of Belgian legal jurisprudence.<sup>53</sup>
- Secondly, consider ESG-factors into its assessment process, in accordance with the guidelines stipulated by the EBA pertaining to Loan Origination and Monitoring.<sup>54</sup>

As delineated, in instances where the financial institution is found to have contravened its primary obligation, it becomes susceptible to potential third party civil liability in specific circumstances.<sup>55</sup> This prompts the inquiry into whether analogous civil liability can be ascribed to the financial institution in cases where it has fallen short of fulfilling the latter obligation regarding ESG considerations.

In the following, we examine the legal value of EBA Guidelines, as well as whether a failure to comply could lead to a fault in the context of a private law dispute. Recently, the legal value of EBA Guidelines was extensively addressed in the case *Fédération bancaire française (FBF) v Autorité de contrôle prudentiel et de résolution (ACPR) – C-911/19* (hereafter : *FBF v. ACPR*).

#### 3.2. *Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de Résolution (ACPR)*

##### 3.2.1. Factual Background

10. The facts of the *FBF v. ACPR* case are relatively straightforward. In 2017, the EBA issued Guidelines on product oversight and governance arrangements for retail banking products.<sup>56</sup> After publication, the French *Autorité de contrôle prudentiel et de résolution* (Authority for Prudential Supervision and Resolution) ('the ACPR') announced in a notice ('*Avis*') that it would comply with those guidelines, thus making them applicable to all financial institutions under its supervision. Consequently, these institutions had to make every effort to comply with these Guidelines and to also ensure that their distributors complied with them. The *Fédération Bancaire Française* (French Banking Federation – 'FBF'), a body that represents all French banks, sought the annulment of that notice before the Council of State, the French high administrative court, claiming that the EBA did not have the power to issue such guidelines without exceeding its competence. In other words, the French banking Federation "attacked" the notice of the French supervisory authority's by arguing that the source, i.e. the EBA's guidelines, should be annulled.

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<sup>53</sup> Cf. Supra

<sup>54</sup> Cf. Supra

<sup>55</sup> Cf. Supra

<sup>56</sup> Cf. Guidelines from 22 March 2016 (EBA/GL/2015/18).



Before deciding the dispute on its merits, the French Council of State referred the matter to the CJEU for a preliminary ruling concerning the compliance of the Guidelines with EU law.

The French High administrative court addressed the following questions to the CJEU for a preliminary ruling:

(1) *May an action be brought under Article 263 [TFEU] for annulment of guidelines issued by a European supervisory authority? If so, is it open to a professional federation to challenge, by means of an action for annulment, the validity of guidelines intended for the members whose interests it protects but which are not of direct or individual concern to it?*

(2) *In the event of a negative answer to either of the questions raised in [the first question], may guidelines issued by a European supervisory authority be the subject of a reference for a preliminary ruling under Article 267 [TFEU]? If so, is it open to a professional federation to challenge, by means of a plea of invalidity, guidelines intended for the members whose interests it protects and which are not of direct or individual concern to it?*

(3) *In the event that it is open to the Fédération bancaire française to challenge, by means of a plea of invalidity, the [contested guidelines], did [the EBA], in issuing those guidelines, exceed the powers conferred on it under Regulation No 1093/2010 ...?'<sup>57</sup>*

### 3.2.2. The Court's decision

11. Regarding the first preliminary question, whether Article 263 TFEU has to be interpreted in the sense that acts such as the EBA Guidelines on product governance can be the object of an action for annulment according to that article, the CJEU commences, in its decision of July 15 2021, with recalling that it is settled case-law of the Court that actions for annulment, provided for under Article 263 TFEU, are available in the case of all measures adopted by the institutions, bodies, offices and agencies of the European Union, whatever their form, which are intended to have *binding legal effects*.<sup>58</sup> Consequently, the first preliminary question led the CJEU to rule on the question of whether the EBA guidelines have such legal effect.<sup>59 - 60</sup>

The Court considered that in order to determine whether an act produces binding legal effects, it is necessary, in accordance with the settled case-law of the Court, to examine the substance of that act and to assess its effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the EU institution, body, office or agency which adopted it.<sup>61</sup>

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<sup>57</sup> Case C-911/19 *Fédération Bancaire Française (FBF) v Autorité de Contrôle Prudentiel et de Résolution (ACPR)*, nr. 34.

<sup>58</sup> Case C-911/19 *FBF v ACPR*, nr. 36, with reference to judgments of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 31, and of 26 March 2019, *Commission v Italy*, C-621/16 P, EU:C:2019:251, paragraph 44 and the case-law cited

<sup>59</sup> HARLEY explains that legal effects can be defined as “the capacity of EU legal instruments to change the rights and obligations of actors”. Cf. T. HARLEY, *The foundations of European Community Law* 354 (7<sup>th</sup> ed., OUP 2010).

<sup>60</sup> Under the TFEU, acts can be challenged either directly, via an action for annulment (Articles 263 and 265 TFEU), or indirectly via preliminary ruling (Article 267 TFEU) and incidental review (Article 277 TFEU). Cf. F. ANNUNZIATA, “The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni” *EBI Working Paper Series*, 2021, n. 106, (1-57) 5.

<sup>61</sup> Case C-911/19 *FBF v ACPR*, nr. 38, with reference to judgments of 25 October 2017, *Romania v Commission*, C-599/15 P, EU:C:2017:801, paragraph 48, and of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 32). See also the *IBM* Case where the CJEU explained that legal effects are deemed to exist where the measure is ‘binding on, and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position’. Cf. Case C-60/81 *IBM v Commission* [1981] EU:C:1981:264, para 9. For more details, see for



In the current case, the Court, after evaluation (cf. *infra*),<sup>62</sup> was of the opinion that the guidelines issued by the EBA cannot be regarded as producing binding legal effects vis-à-vis the competent authorities<sup>63</sup>, nor vis-à-vis financial institutions<sup>64</sup>. Consequently, the answer to the first part of the first question is that Article 263 TFEU must be interpreted as meaning that acts such as the contested guidelines cannot be the subject of an action for annulment under article 263 TFEU.<sup>65</sup>

12. The CJEU then takes position on whether the CJEU is competent to assess the validity of acts such as the contested guidelines. The Court considers that even though the contested guidelines do not have binding legal effects, the Court may, pursuant to Article 267 TFEU, assess the validity of such acts when it gives a preliminary ruling.<sup>66</sup> This decision goes against what was suggested by Advocate General Bobek in his conclusion, namely that the national court itself could declare the guidelines invalid.<sup>67</sup> It seems that by refusing that the validity of EBA Guidelines should be evaluated at the national level, the CJEU aims to fight the fragmentation that might result from potentially diverse interpretations on the validity of ESAs' guidelines by national courts.<sup>68</sup>

Whether or not FBF, rather than a financial institution, is entitled to request the assessment of the validity of the EBA Guidelines, the CJEU refers to the domestic legal system of each Member State, in absence of European Union rules governing the matter.<sup>69</sup> The Court, however, concludes that EU law does not require the admissibility, before a national court, of a plea of illegality raised against a European Union act to be subject to the condition that that act is of direct and individual concern to the individual relying on that plea.<sup>70-71</sup>

13. Regarding the validity of the relevant EBA Guidelines, the CJEU – considering the objectives and aims that the EBA is pursuing<sup>72</sup> – determined that the EBA has acted within its competences and that there is no element that would affect the validity of the relevant guidelines.<sup>73</sup> It is interesting to note that, in *Balgarska Narodna Banka* (C-501/18), the CJEU held that an EBA recommendation should be declared invalid for contradicting the proper interpretation of Directive 94/19 (cf. *infra* nr. 24).<sup>74</sup>

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example: M. ELIANTONIO, E. KORKEA-AHO, & O. STEFAN, *EU Soft Law in the Member States: Theoretical Findings and Empirical Evidence*, Oxford, Hart, 2021, 263.

<sup>62</sup> Cf. Case C-911/19 FBF v ACPR, 39-44.

<sup>63</sup> Cf. Case C-911/19 FBF v ACPR, 45.

<sup>64</sup> Cf. Case C-911/19 FBF v ACPR, 46.

<sup>65</sup> Cf. Case C-911/19 FBF v ACPR, 50. See also for example: F. ANNUNZIATA, "The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni" *EBI Working Paper Series*, 2021, n. 106, (1-57) 29.

<sup>66</sup> Cf. Case C-911/19 FBF v ACPR, 54, with reference to judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 44.

<sup>67</sup> Opinion of Advocate General Bobek, 15 April 2021, Case C-911/19, FBF v. ACPR, §105.

<sup>68</sup> D. QUELHAS, "The relative normativity of European Supervisory Authorities' guidelines and their judicial review: A look at the FBF v. ACPR Case before the CJEU", *RISF* 2021, nr. 4, (100-107), 103.

<sup>69</sup> Case C-911/19 FBF v ACPR, 62.

<sup>70</sup> Case C-911/19 FBF v ACPR, 65.

<sup>71</sup> In this same line, the CJEU had already ruled in *British American Tobacco (Investments) and Imperial Tobacco*, Case C-491/01, 10 December 2002, par. 40; *Pillbox*, Case C-477/14, judgement of the Court, Second Chamber, 4 May 2016, par. 19; *Gauweiler*, Case C-62/14, Judgement of the Court, Grand Chamber, 16 June 2015, par. 29; *American Express*, Case C-643-16, Judgement of the Court, First Chamber, 7 February 2018, par. 30; See also F. ANNUNZIATA, "The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni" *EBI Working Paper Series*, 2021, n. 106, (1-57), 46 - 48.

<sup>72</sup> For more on the validity of the Guidelines, see for example the excellent analysis of F. ANNUNZIATA, "The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni" *EBI Working Paper Series*, 2021, n. 106, (1-57) 20 - 29.

<sup>73</sup> Case C-911/19 FBF v ACPR, 66 et. Seq.

<sup>74</sup> *Balgarska Narodna Banka* (C-501/18), 25 March 2021.



### 3.3. The Value of EBA Guidelines

#### 3.3.1. The EBA Guidelines do not produce a binding legal effect

14. Considering the *FBF case*, we must conclude that EBA Guidelines – even though they are addressed to competent national authorities and financial institutions<sup>75</sup> – cannot be regarded as producing *binding* legal effects vis-à-vis the competent authorities<sup>76</sup>, nor vis-à-vis financial institutions<sup>77</sup>.

More specifically, the ECJ considered that in order to determine whether an act produces binding legal effects, it is necessary, in accordance with the settled case-law of the Court,<sup>78</sup> to examine the substance of that act and to assess its effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the EU institution, body, office or agency which adopted it.<sup>79 - 80</sup>

In evaluating the *content* of the EBA Guidelines on product oversight and governance arrangements for retail banking products, the ECJ considered that (I) the wording of those guidelines merely set ‘*the EBA view of appropriate supervisory practices within the [ESFS] or of how Union law should be applied in a particular area*’,<sup>81</sup> (II) the wording of the guidelines is generally in non-mandatory terms,<sup>82</sup> and (III) the EBA Guidelines – referring to Article 16(3) of Regulation No 1093/2010 – mention that competent authorities must notify the EBA as to whether they comply or intend to comply with these guidelines, or failing that, state the reasons for non-compliance with those guidelines<sup>83</sup>.

With regard to the *context*, the ECJ considered first of all that guidelines issued by the EBA are subject to the same rules of law as ‘recommendations’ issued by the EBA, which are not binding upon those to whom they are addressed, in accordance with the fifth paragraph of Article 288 TFEU, and therefore, in principle, have no binding force.<sup>84</sup> Next, the ECJ considers that while it is true that Article 16(3) of regulation 1093/2010 (EBA Regulation) provides that the competent authorities and financial institutions are to make every effort to comply with the guidelines issued by the EBA, that provision states, nevertheless, that those authorities are to indicate whether they comply or intend to comply with

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<sup>75</sup> See for example the Opinion of 15 April 2021 of Advocate General M. BOBEK in the *FBF Case*. BOBEK states that even if the contested guidelines are formally addressed to competent authorities *and* to financial institutions (while Article 16(1) of Regulation No 1093/2010 provides that the EBA shall issue guidelines addressed to competent authorities *or* financial institutions), it is clear that the financial institutions are those that will end up having to comply with the obligations and, as such, are the genuine addressees (para. 47). He continues saying that: “*In systemic terms, the guidelines closely resemble directives: although formally addressed to the Member State, their provisions are in due course meant to govern the conduct of individuals, with the latter having no choice but to apply them. Competent authorities are not the real addressees of those obligations; their task is simply to opt in or to opt out. However, once that decision is made, the initially non-binding nature becomes very much binding, as the ‘nominal addressee’ (the competent supervisory authority) becomes an effective ‘enforcer’. Thus, there is very little choice, or rather none at all, on the part of the real addressees of the guidelines, namely the financial institutions, on whether to comply with them (para. 48)*”.

<sup>76</sup> Cf. Case C-911/19 *FBF v ACPR*, 45.

<sup>77</sup> Cf. Case C-911/19 *FBF v ACPR*, 46.

<sup>78</sup> See, to that effect, judgments of 25 October 2017, *Romania v Commission*, C-599/15 P, EU:C:2017:801, paragraph 48, and of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 32.

<sup>79</sup> Case C-911/19 *FBF v ACPR*, 38.

<sup>80</sup> ANNUNZIATA explains that the Court uses different requirements in each specific situation, including: content, wording, context, intention of the author of a certain measure, the perception of the parties concerned, and the powers of the author itself. The Court does not necessarily rely on all these criteria at the same time. Cf. F. ANNUNZIATA, “The Remains of the Day: EU Financial Agencies, Soft Law and the Relics of Meroni” *EBI Working Paper Series*, 2021, n. 106, (1-57) 9.

<sup>81</sup> Case C-911/19 *FBF v ACPR*, 39.

<sup>82</sup> Case C-911/19 *FBF v ACPR*, 40.

<sup>83</sup> Case C-911/19 *FBF v ACPR*, 41.

<sup>84</sup> Case C-911/19 *FBF v ACPR*, 42. See, to that effect, judgment of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 30.



those guidelines and that, if that is not the case, they are to inform the EBA of their choice, stating their reasons.<sup>85</sup> The ECJ continues that “*It therefore follows from that provision that those authorities are not required to comply with those guidelines, but that [...] those authorities have the power to depart from them, in which case they must state the reasons for their position*”.<sup>86</sup>

Based on the above, the ECJ concludes that the EBA Guidelines cannot be regarded as producing binding legal effects vis-à-vis the competent authorities<sup>87</sup>, nor vis-à-vis financial institutions<sup>88</sup>. Bearing in mind the reasoning used by the ECJ, it is very reasonable to conclude that all EBA Guidelines (and thus also the Guidelines on Loan origination and monitoring) should be considered as being absent of producing binding legal effects.

15. Consequently, given that the EBA Guidelines do not produce a binding legal effect, a failure to comply with EBA Guidelines cannot lead to a *fault* in a Belgian private law dispute, merely on the grounds that a statutory provision has been violated.

### 3.3.2. If EBA Guidelines do not produce a binding legal effect, then what is their role?

16. What consequence can a failure to comply with the EBA Guidelines have if they do not have any binding legal effect? An answer to this question would appear to be found again in the considerations of the FBF Case.

The ECJ considered that although the EBA Guidelines do not produce a binding legal effects, they may lead the competent authorities to adopt acts of national law exhorting financial institutions to alter their practices significantly or to take account of compliance with EBA Guidelines when examining the individual situation of those institutions.<sup>89</sup> While it is true that Article 16(3) of Regulation No 1093/2010 provides that the competent authorities and financial institutions are to make every effort to comply with the guidelines issued by the EBA, that provision states, nevertheless, that those authorities are to indicate whether they comply or intend to comply with those guidelines. As thus, as correctly noted by QUELHAS, EBA Guidelines do greatly influence their addressees, but effects only can come to life at the member state level.<sup>90</sup> Once EBA Guidelines are complied with, they become mandatory for the concerned institutions in the member state that decided to comply with the Guidelines.<sup>91</sup>

17. Since the NBB, on July 20, 2021 – in accordance with the so-called “comply or explain” procedure –<sup>92</sup> expressed through a circular that institutions must take the appropriate measures to comply with the EBA Guidelines on Loan origination and monitoring,<sup>93</sup> it cannot be disputed that banks<sup>94</sup> must make

<sup>85</sup> Case C-911/19 FBF v ACPR, 43.

<sup>86</sup> Case C-911/19 FBF v ACPR, 44.

<sup>87</sup> Cf. Case C-911/19 FBF v ACPR, 45.

<sup>88</sup> Cf. Case C-911/19 FBF v ACPR, 46.

<sup>89</sup> Case C-911/19 FBF v ACPR, 70; see also: D. QUELHAS, “The relative normativity of European Supervisory Authorities’ guidelines and their judicial review: A look at the FBF v. ACPR Case before the CJEU”, *RISF* 2021, nr. 4, (100-107), 102.

<sup>90</sup> See also: D. QUELHAS, “The relative normativity of European Supervisory Authorities’ guidelines and their judicial review: A look at the FBF v. ACPR Case before the CJEU”, *RISF* 2021, nr. 4, (100-107), 102.

<sup>91</sup> D. MARIJA, “The Broadening ‘Soft Law’ Powers of the European Banking Authority”, *European Company Law Journal*, 2022, 19, no. 1, (22-26), 26.

<sup>92</sup> Within two months of a Guideline’s issuance, each competent authority must confirm whether it intends to comply with that Guideline or not. If it does not intend to comply, it must inform the EBA, stating its reasons (explain). When EBA receives the reasons provided by the competent authority for not complying, EBA must publish the decision and may decide, on a case-by-case basis, to publish the reasons provided by the competent authority.

<sup>93</sup> NBB, “EBA-richtsnoeren inzake de initiëring en monitoring van leningen (EBA/GL/2020/06)”, *Circulaire*, 20 juli 2021, 4.

<sup>94</sup> By which I mean banks under supervision of the NBB.



every effort to comply with these guidelines. However, the question remains whether a bank's failure to comply with the EBA Guidelines could qualify as a fault in the context of a private law dispute.

### 3.4. The effects of EBA Guidelines at the Member State level

#### 3.4.1. Circular letter as law

18. According to Belgian law, a bank can be at fault by either violating statutory law, or by engaging in conduct contrary to that which could be expected of a normal, prudent banker, placed in the same circumstances.<sup>95</sup> As the decision to comply with the EBA Guidelines was taken in Belgium through the issuance of a circular letter by the NBB, the question arises as to the legal value of a circular letter issued by the NBB. More specifically, the question could be asked whether a breach of a circular letter should be considered a breach of statutory law.

19. The Law of 22 February 1998 establishing the organic status of the National Bank of Belgium, assigns various powers to the NBB and lists various measures it can take to perform its tasks.<sup>96</sup> Measures or decisions taken by the NBB can take various forms (regulations, advice, circulars, etc.). Some of these decisions, such as the issuing of a regulation, aim to establish new rules (e.g. regulations on money laundering)<sup>97</sup> and become effective only after approval by the legislator and publication in the Belgian Official Journal.<sup>98</sup> This way the legislator meets the objection that it is impossible to delegate regulatory powers to authorities other than the King (and the Minister for secondary matters). The ratification of regulations by the legislator entails that decisions taken by the NBB via this procedure acquire a binding value and that, consequently, in the event of a failure to comply with these regulations, there will be *ipso facto* a fault in private law dispute.

Other decisions, such as a circular letter – who are, in principle, not intended to lay down new rules – , are not ratified. The highest administrative court in Belgium, the Council of State, previously confirmed the non-binding value of these circular letters. Indeed, in the case A. 212,418/XIV-35,624 of June 19, 2018, the Council of State ruled, among other things, on the value of a circular letter issued by the 'Financial Services and Markets Authority' (FSMA)<sup>99</sup>, which was intended to provide more clarification on the interpretation and application of legislation.<sup>100</sup> The Council of State considered that only statutory and regulatory texts are binding and that the judge is not bound by a circular letter issued by the FSMA. Nevertheless, such a circular can provide insight into how certain provisions will be applied by the public authorities.

*"In addition, the FSMA has included guidelines in a circular on the interpretation and application of the relevant regulations. Although only the statutory and regulatory texts are binding and the courts are not bound by the FSMA's interpretation, such a circular letter can provide insight into how the provisions*

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<sup>95</sup> P. VAN OMMESLAGHE en L. SIMONT, "De aansprakelijkheid van de bankier-kredietverlener in het Belgische recht", *TPR* 1986, 1095, nr. 5. See also: S. STIJNS en I. SAMOY, *Leerboek verbintenissenrecht - Boek 1bis*, Brugge, die Keure / la Chartre, 2020, 52 et. seq. After the reform of the law of extra-contractual liability it remains that a fault constitutes a violation of a specific legal rule or a failure to comply with a duty of care. See in this regard art. 5.146-5.147 of the Act of 6 August 2018 inserting the provisions on extra-contractual liability in the new Civil Code. For an analysis of these new provisions, see for example: GROTIUS-POTHIER ONDERZOEKSGROEP, "Een rechtsvergelijkende analyse van de Belgische hervorming van het buitencontractuele aansprakelijkheidsrecht: enkele suggesties voor wetgever en rechter", *TBBR* 2020, nr. 3, (122-159), 133-137.

<sup>96</sup> Cf. Wet van 22 februari 1998 tot vaststelling van het organiek statuut van de nationale bank van België.

<sup>97</sup> Reglement van de Nationale Bank van België van 21 november 2017 betreffende de voorkoming van het witwassen van geld en de financiering van terrorisme, *BS* 22.12.2017

<sup>98</sup> Art. 12bis, §2, lid 3.

<sup>99</sup> The FSMA is the regulatory authority responsible for overseeing and regulating various aspects of the financial sector in Belgium.

<sup>100</sup> Raad van State, arrest nr. 241.822 van 19 juni 2018, XIV-35.624.



*in question will be applied by the public authorities, which, contrary to the applicant's claim, does not harm legal certainty."* <sup>101</sup>

Although the aforementioned case concerned a circular issued by the FSMA and not the NBB, the consideration could just as well apply to a circular letter issued by the NBB.

Consequently, given that a circular letter cannot be considered binding implies that a failure to comply cannot *ipso facto* lead to a fault in a private law dispute. <sup>102</sup>

### 3.4.2. Circular letters as a framework for substantiating a bank's duty of care

20. Since failure to comply with a circular letter cannot in itself give rise to a fault in a private law dispute, we must conclude that a bank can only be at fault if failure to comply with a circular letter is to be considered as conduct inconsistent with conduct expected of a normal prudent bank, placed in the same circumstances.

First, we should note that published case law does not provide an answer to the question of whether the court should take into account circular letters issued by the NBB when determining the scope of a bank's general duty of care. More generally, in Belgium there is no published case-law where soft-law provisions are used to substantiate a (legal) person's duty of care.

According to Belgian law, the purpose of the legislative norm plays no role whatsoever if the perpetrator violates a *statutory rule* (binding regulation). In other words, under Belgian law, when a person violates binding statutory rules, it does not matter who or what this statutory rule intends to protect. Any disregard of statutory obligations is a fault under Belgian law. <sup>103</sup> However, when defining the scope of a bank's *duty of care*, it seems appropriate that when non-binding prudential regulation (such as the EBA Guidelines, or the NBB's circular letter) are considered to determine the scope of a bank's duty, the purpose of these provisions should be taken into account.

That the purpose of prudential regulation should be taken into account when determining liability in a private law context was confirmed by the French Court of Cassation. <sup>104</sup> Indeed, the French Court of Cassation ruled in this regard that bearing in mind the purpose of anti-money laundering legislation (prudential regulation), a failure to comply with the duty of vigilance and notification prescribed by this law cannot be used by customers of the bank to claim damages from the financial institution. <sup>105</sup>

As the purpose of prudential regulation should be considered, it should be noted that the circular letter – ratifying the EBA Guidelines – does not aim to create a liability basis for financial institutions in a private law context, but is solely intended to impose rules at a prudential level that are intended to allow

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<sup>101</sup> Raad van State, arrest nr. 241.822 van 19 juni 2018, XIV-35.624-25/30.

<sup>102</sup> Although circulars are not binding, they are subject to annulment and suspension: "*Overwegende dat circulaires van een bevoegde overheid, die nieuwe regels aan de bestaande toevoegen waarvan het bovendien de bedoeling is ze verbindend te maken door die bevoegde overheden en waarvan de naleving afdwingbaar is, omzendbrieven zijn met verordenend karakter die in beginsel vernietigbaar zijn en derhalve ook voor schorsing vatbaar; dat te dezen de CBF regels en voorwaarden vaststelt die niet voorkomen in de bestaande wetgeving maar die de bestaande wetgeving aanvullen;*" Cf. Raad van State, arrest nr. 91.998 van 8 januari 2001 in de zaak A. 93.715/IX-2465, IX-2465-6/19.

<sup>103</sup> Cf. *Supra*.

<sup>104</sup> Cf. Cour de Cassation, civil, Chambre commerciale, 21 septembre 2022, 21-12.335, ECLI:FR:CCASS:2022:CO00519.

<sup>105</sup> More specifically, the French Court of Cassation ruled that a breach of anti-money laundering legislation could not result in a fault within the meaning of Art. 1382 of the Civil Code. Cf. Cour de Cassation, civil, Chambre commerciale, 21 septembre 2022, 21-12.335, ECLI:FR:CCASS:2022:CO00519, randnr. 11: "*la victime d'agissements frauduleux ne peut se prévaloir de l'inobservation des obligations de vigilance et de déclaration précitées pour réclamer des dommages-intérêts à l'organisme financier*".





banks to better deal with their borrower's solvency risks (created by ESG-factors).<sup>106</sup> The EBA guidelines, and consequently the circular letter, do not, nor intend to, grant any rights to (potential) borrowers. Therefore, given the purpose of the particular EBA Guidelines (namely not to protect (potential) borrowers, but only to limit a bank's risk of non-repayment of the borrower), a violation of the circular letter - intended to confirm that the EBA Guidelines must be followed - does not *ipso facto* lead to conduct that violates a bank's duty of care in a *private law* dispute.

21. Starting from considering the objective of legislative documents aids to understand why a violation of the EBA Guidelines does not *ipso facto* constitute a breach of the standard of due care, but, for example, a breach of MiFID II conduct of business rules may in itself be sufficient to constitute behaviour contrary to that which can be expected of a normally diligent bank.

The Markets in Financial Instruments Directive (MiFID II) is a European directive with various objectives, among which protecting the rights of the consumer investors and, in doing so, provides for certain conduct of business rules and requirements for investment companies.<sup>107</sup> Notably, MiFID II itself does not contain any provisions that answer the question to what extent a breach of these regulatory conduct rules for investment services can be civilly remedied. It is up to individual Member States to determine this.<sup>108</sup> In Belgium, there is no doubt that a consumer investor has a civil claim against the investment firm that has caused him damage by not complying with the MiFID II rules of conduct.<sup>109</sup> In principle, the bank's fault consists of its failure to comply with the Belgian transposition of the MiFID II rules of conduct,<sup>110</sup> but the normative content of most MiFID II rules of conduct almost always equate to a general requirement of reasonableness and diligence, which is a so-called 'open norm'.<sup>111</sup> Consequently, since the conduct of the investment firm is not specifically determined by law (because MiFID II has so-called 'open norms'), the consumer investor will often have to prove that the

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<sup>106</sup> Cf. *Supra*.

<sup>107</sup> Cf. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU Text with EEA relevance.

<sup>108</sup> In the *Genil* Case (CJEU 30 May 2013, no C-604/11), the Court of Justice of the European Union held that in the absence of EU legislation, it is up to the Member States to determine the contractual consequences of non-compliance with MiFID I obligations, as long as those consequences are subject to the principles of equivalence and effectiveness: "It should be noted that, although Article 51 of Directive 2004/39 provides for the imposition of administrative measures or sanctions against the parties responsible for non-compliance with the provisions adopted pursuant to that directive, it does not state either that the Member States must provide for contractual consequences in the event of contracts being concluded which do not comply with the obligations under national legal provisions transposing Article 19(4) and (5) of Directive 2004/39, or what those consequences might be. In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness (see, to that effect, Case C-591/10 Littlewoods Retail and Others [2012] ECR, paragraph 27 and the case-law cited)." Cf. CJEU 30 May 2013, no C-604/11, par. 57.

<sup>109</sup> Cf. M. KRUIHOF, "De Privaatrechtelijke Werking van de MiFID-2004 Gedragsregels: Een Analyse van de Mate Waarin Zij de Wederzijdse Rechten En Plichten van Dienstverlener En Cliënt Kunnen Aanvullen En Beperken" *Financiële Regulering in de Kering*, Vol. 14, Intersentia, 2012, (273-356), 308 with reference to : M. TISON, "De civielrechtelijke dimensie van MiFID in rechtsvergelijkend perspectief", *Ondernemingsrecht* (Nederland) 2010, 303-313, p. 308; G. FERRARINI, "Contract Standards and the Markets in Financial Instruments Directive (MiFID)", *European Review of Contract Law* 2005, 19-43, p. 20; F. FERRARINI, "Contract Standards and the Markets in Financial Instruments Directive (MiFID)", *European Review of Contract Law* 2005, 19-43, p. 21; W. VANDEVOORDE, "De Bescherming van de belegger herbekeken. Een commentaar bij enkele institutionele en transactionele innovaties van de Belgische bepalingen tot omzetting van Richtlijn 2004/39 (de 'MiFID-Richtlijn') en Richtlijn 2006/73", *BFR* 2007/VI, 367-395, p. 382; M.-D. WEINBERGER, *Gestion de portefeuille et conseil en investissement: aspects contractuels et de responsabilités avant et après MiFID*, Waterloo, Wolters Kluwer, 2008, nr. 233, p. 166.

<sup>110</sup> See art. 27-28 of the 'Wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, BS 4.09.2002' and its implementing provisions in 'het KB van 3 juni 2007 tot bepaling van nadere regels tot omzetting van de richtlijn betreffende markten voor financiële instrumenten, BS 18.06.2007'.

<sup>111</sup> M. KRUIHOF, "De Privaatrechtelijke Werking van de MiFID-2004 Gedragsregels: Een Analyse van de Mate Waarin Zij de Wederzijdse Rechten En Plichten van Dienstverlener En Cliënt Kunnen Aanvullen En Beperken" *Financiële Regulering in de Kering*, Vol. 14, Intersentia, 2012, (273-356), 312.



investment firm did not behave as a normally prudent investment firm should have done in the given circumstances.<sup>112</sup>

The fact that a breach of MiFID II may in itself be sufficient to conclude that a bank has acted in violation of conduct that can be expected of a normally diligent bank, but a breach of the EBA Guidelines does not *ipso facto* constitute a breach of a bank's duty of care, can be explained by the fact that the objective of both legislative texts is entirely different. Indeed, as mentioned, MiFID II has the objective of protecting the consumer investor, justifying the provision of civil action options for aggrieved parties in the event the investment firm fails to comply with the protection provisions. In contrast, the EBA Guidelines on Loan Origination and Monitoring do not have such an objective. As mentioned, they do not aim to protect the borrower/borrower-applicant, but merely aim to limit the creation of so-called 'non-performing loans', in order to protect the financial stability of banks and the financial stability of the economic system as a whole. The EBA Guidelines on Loan Origination and Monitoring are not at all intended to provide the borrower with any additional grounds for a civil claim. Failure to comply with rules that are not intended to provide protection to a particular party cannot result in an assessment that the entity that must comply with these rules (the bank) is acting contrary to the conduct that should be expected of it with respect to that party (the borrower).

Furthermore, in Belgium MiFID II was enacted into law, with the corresponding implementing Royal Decrees, as a result of which a breach of a provision that does not require a normative assessment is in itself sufficient to constitute a fault. As mentioned, the EBA Guidelines on Loan Origination and Monitoring were not ratified but only issued by the NBB through the issuance of a circular letter.

A comparison between EBA Guidelines and MiFID II rules helps in clarifying why, bearing in mind the purpose of both documents, it is appropriate to assign civil law consequences in case of non-compliance with MiFID regulations, but not in case of non-compliance with EBA Guidelines on loan origination and monitoring. However, on a more technical level, it seems more appropriate to compare EBA Guidelines with Guidelines issued by another ESA<sup>113</sup>, such as ESMA<sup>114</sup>. ESMA is authorized to issue Guidelines that provide further clarification on European Directives and Regulations, think for instance of the "Guidelines on certain aspects of the MiFID II suitability requirements"<sup>115</sup>. In themselves, ESMA Guidelines are not legally binding.<sup>116</sup> They rather constitute non-binding recommendations on how to interpret the provisions of European Directives and Regulations. However, a crucial difference between EBA Guidelines on loan origination and monitoring and ESMA Guidelines on certain aspects of the MiFID II suitability requirements, is that ESMA's Guidelines concern a clarification of (MiFID II) rules that are in themselves binding on market participants and whose disregard can give rise to civil liability - which is in stark contrast with the EBA Guidelines on loan origination and monitoring. Consequently, although ESMA Guidelines are not binding, when they clarify binding MiFID II rules, market

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<sup>112</sup> M. KRUIHOF, "De Privaatrechtelijke Werking van de MiFID-2004 Gedragsregels: Een Analyse van de Mate Waarin Zij de Wederzijdse Rechten En Plichten van Dienstverlener En Cliënt Kunnen Aanvullen En Beperken" *Financiële Regulering in de Kering*, Vol. 14, Intersentia, 2012, (273-356), 312. See for example art. 27, §1 Wet van 2 augustus 2002 betreffende het toezicht op de financiële sector en de financiële diensten, BS 4.09.2002: "Bij het aanbieden of verstrekken van financiële producten of diensten of, in voorkomend geval, nevendiensten, zetten de gereguleerde ondernemingen zich op loyale, billijke en professionele wijze in voor de belangen van hun cliënten, en op een manier die bevorderlijk is voor de integriteit van de markt. Bij het aanbieden of verstrekken van beleggingsdiensten of, in voorkomend geval, nevendiensten, nemen zij inzonderheid de in de paragrafen 2 tot en met 10 en de artikelen 27bis tot 27quater neergelegde gedragsregels in acht". It is clear that the consumer investor has to prove that the investment firm did not behave like a normally prudent professional.

<sup>113</sup> European Supervisory Authorities.

<sup>114</sup> European Securities and Markets Authority.

<sup>115</sup> ESMA, Final Report - Guidelines on certain aspects of the MiFID II suitability requirements, 23 September 2022.

<sup>116</sup> ESMA, Frequently Asked Questions, A Guide to Understand ESMA, 3 January 2011, p. 5 [https://www.esma.europa.eu/sites/default/files/library/2015/11/2011\\_009.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2011_009.pdf)



participants will hardly be able to deviate from them since they explain (MiFID II) rules that are binding.<sup>117</sup>

On a final note, considering the objective of the soft-law instrument (in this case a circular letter issued by the NBB) is in line with the Dutch RDS case.<sup>118</sup>

22. The present analysis leads to the conclusion that the contravention by a bank of either the Guidelines established by the European Banking Authority (EBA) or the circular letter confirming such Guidelines does not *ipso facto* entail a breach of the bank's duty of care obligation in a civil law dispute. However, as elucidated below, in determining the conduct of a prudent and reasonable bank, the court must take EBA Guidelines into consideration.

### 3.5. *The obligation for national courts to take EBA soft law into consideration*

23. Our analysis would be incomplete if we were to ignore the CJEU's holding that national courts are expected to take EBA's soft law into consideration when resolving cases.

24. In 2021, the CJEU considered, in line with its former rulings,<sup>119</sup> in *BT v. Balgarska Narodna Banka*<sup>120</sup> – where the validity of a *Recommendation* issued by the EBA was under review – that even if

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<sup>117</sup> Over het punt dat market participants will hardly be able to deviate from ESMA Guidelines, zie o.m. ESMA, SMSG advice to the European Commission - Response to the Public Consultation on the Operations of the European Supervisory Authorities, 10 May 2017, nr. 9.

<sup>118</sup> To recall: in the Dutch RDS case, both the UNGP and the OECD Guidelines were used to substantiate the duty of care standard of Royal Dutch Shell. Both the UNGP and the OECD are soft-law instrument, intended to give rights to individuals. Although these soft-law instrument cannot be enforced since the provisions are non-binding, it does seem appropriate to consider these regulations to determine the scope of a legal entity - although they cannot be enforced since the provisions are non-binding.

<sup>119</sup> See, to that effect, judgments of 13 December 1989, Grimaldi, C-322/88, EU:C:1989:646, paragraph 18: “*However, in order to give a comprehensive reply to the question asked by the national court, it must be stressed that the measures in question cannot therefore be regarded as having no legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions*”; of 11 September 2003, Altair Chimica, C-207/01, EU:C:2003:451, paragraph 41: *As regards, third, the interpretation of Recommendation 81/924, it must be recalled that, according to the case-law of the Court, even if recommendations are not intended to produce binding effects and are not capable of creating rights that individuals can rely on before a national court they are not without any legal effect. The national courts are bound to take recommendations into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Community provisions (Case C-322/88 Grimaldi [1989] ECR 4407, paragraphs 7, 16 and 18)*”; and of 15 September 2016, Koninklijke KPN and Others, C-28/15, EU:C:2016:692, paragraph 41: “*Nevertheless, according to the Court's settled case-law, even if recommendations are not intended to produce binding effects, the national courts are bound to take them into consideration for the purpose of deciding disputes submitted to them, in particular where the recommendations cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU provisions (judgment of 24 April 2008, Arcor, C-55/06, EU:C:2008:244, paragraph 94 and the case-law cited).*”.

<sup>120</sup> In the case *BT v. Balgarska Narodna Banka*, BT, and individual depositor, brought an action for damages against the Bulgarian National Bank (BNB). BT, an individual depositor concluded, between 2008 and 2011, three contracts with Bulgarian bank Korporativna Targovska Banka (“KTB”) on unlimited deposits in euros and leva at preferential conditions. The amounts deposited were guaranteed by the Bulgarian Bank Deposit Guarantee Fund (“Fund”) up to BGN 196 000 (approximately EUR 100 000). On 20 June 2014, KTB informed the BNB that it was suspending payments to its customers due to a lack of liquidity due to a massive bank run. As a reaction, the BNB decided to place KTB under special supervision for a period of three months due to a risk of insolvency, appointed receivers, suspended the execution of all KTB's commitments and prohibited KTB from carrying on all activities covered by its banking licence. On 17 October 2014, the EBA adopted Recommendation EBA/REC/2014/02, addressed to the BNB and the Fund. The Recommendation established essentially that the BNB breached EU Law and concluded that the Fund is required to pay out the guaranteed amounts of unavailable deposits following the determination of the BNB. On 4 December 2014, the Fund paid out to BT the amount of BGN 196 000 plus contractual and remuneration interest for the period from 30 June to 6 November 2014. The remaining credit balances (BGN 44 070) were included in the list of recognised claims within the bankruptcy proceedings. Since BT was not fully reimbursed, he brought an action before the Administrative Court of the City of Sofia, Bulgaria, demanding



Recommendations are measures not intended to produce binding legal effect, national courts are obliged to take them into consideration with a view to resolving the disputes submitted to them:<sup>121</sup>

*“a national court must take into consideration a recommendation of the EBA adopted on the basis of that provision, with a view to resolving the dispute before it, in particular in the context of an action seeking to establish the liability of a Member State for damage caused to an individual as a result of the non-application or incorrect or insufficient application of Union law giving rise to the investigation procedure which led to the adoption of that recommendation. Individuals harmed by the breach of Union law established by such a recommendation, even if they are not the addressees of the recommendation, must be able to rely on it as a basis for establishing, before the competent national courts, the liability of the Member State concerned for the breach of Union law in question.”<sup>122</sup>*

In 2022, the Court extended this reasoning from EBA Recommendations to EBA Guidelines, by considering in the FDF case that national courts are expected to take EBA Guidelines into consideration when resolving cases:

*It is also for the national courts to take into consideration EBA Guidelines in order to resolve the disputes submitted to them, in particular when those guidelines are, like the contested guidelines, intended to supplement binding provisions of European Union law (see, to that effect, judgments of 13 December 1989, Grimaldi, C-322/88, EU:C:1989:646, paragraph 18, and of 25 March 2021, Balgarska Narodna Banka, C-501/18, EU:C:2021:249, paragraph 80).<sup>123</sup>*

25. Thus, while it is well established that courts must consider EBA Guidelines in order to resolve the disputes submitted to them, this does not change our aforementioned conclusion that violating EBA Guidelines does not *ipso facto* lead to conduct that violates a bank’s duty of care in a private law dispute.

<sup>124</sup>

The fact that a court must take into account EBA Guidelines does not mean that a violation of these Guidelines by a bank automatically constitutes a breach of the conduct that can be expected of a normal prudent banker. The fact that a court must take the EBA Guidelines into account merely means that the EBA Guidelines are one of several elements that the court must take into account in assessing whether the bank has acted in accordance with rules that are binding. In other words, as the Court of Justice also indicates, the EBA Guidelines are *intended to supplement binding provisions of European Union law*.<sup>125</sup> Legal scholar MARIIA explains that ‘based on the logic behind Lamfalussy process, one of the legal effects that soft law may have is an interpretation and clarification of the EU hard law provisions’.<sup>126</sup> Non-compliance with the

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compensation for all damage resulting, directly and immediately, from actions and omissions of the BNB committed in breach of EU law. BT argues that the special supervisory measures vis-à-vis KTB were unjustified and disproportionate to the situation of that bank.

<sup>121</sup> Case C-501/18 *BT v. Balgarska Narodna Banka* 2021. In the judgment in case *BT v Balgarska Narodna Banka*, the CJEU declared, for the first time, invalid a part of a legally non-binding EU act – a recommendation adopted by the European Banking Authority and addressed to the Bulgarian National Bank.

<sup>122</sup> Case C-501/18 *BT v. Balgarska Narodna Banka* 2021, par. 81.

<sup>123</sup> Case C-911/19 *FBF v ACPR*, 71, with reference to judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 18, and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 80.

<sup>124</sup> Cf. *supra*.

<sup>125</sup> 71, with reference to judgments of 13 December 1989, *Grimaldi*, C-322/88, EU:C:1989:646, paragraph 18, and of 25 March 2021, *Balgarska Narodna Banka*, C-501/18, EU:C:2021:249, paragraph 80.

<sup>126</sup> D. MARIIA, “The Broadening ‘Soft Law’ Powers of the European Banking Authority”, *European Company Law Journal*, 2022, 19, no. 1, (22-26), 23.



EBA Guidelines is in itself not decisive to conclude that the bank acted contrary to the conduct of a normal prudent banker.<sup>127</sup>

26. Regarding the value of soft-law, it is interesting to note the Swedish Supreme Court confirmed in 1995 that courts should take into account non-legally binding guidelines, in the case *Sydinnovator AB and Conny H vs Alfred Berg Fondkommission AB*.<sup>128</sup> In this case the Swedish Supreme Court ruled that the accused broker failed to exercise due care towards the client by failing to follow the supervisory authority's general advice or otherwise ensure that the client was adequately informed of the specific risks involved in trading in index options.

At the time of the verdict, there was no legislation regulating the index markets.<sup>129</sup> The only document available was general advice, issued by the Swedish Banking Supervisory Authority. However, this general advice was not legally binding regulation.<sup>130</sup>

In determining whether the broker was at fault for not following the general advice, the Supreme Court stated:

*“As general advice is in principle not binding, the mere fact that it has not been followed in a particular case cannot give rise to liability.*

*However, depending on their nature, as the Court of Appeal has found, general advice may be relevant to an assessment of whether the circumstances of a case are such that fault giving rise to liability should be considered to exist. Thus, a person who has followed an example set out in general advice may often be considered to have acted with due care, whereas it may be obvious that a person who has deviated from a recommended course of action is guilty of negligence.”<sup>131</sup>*

The conclusion of the Swedish Supreme Court is consistent with our previous decision, emphasizing that non-compliance with non-binding regulations does not automatically signify a failure to fulfil the duty of due care. Moreover, the ruling elucidates that considering the nature of the non-binding document, it may be *relevant* (in other words: appropriate) to consider incorporating soft-law provisions to determine the scope of the general duty of care. The objective of the non-binding advice in this case was aimed at safeguarding the interests of the financial consumer, rendering it more appropriate to take these provisions into consideration, rather than non-binding provisions for the protection of the interests of the financial system as a whole.

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<sup>127</sup> The ECJ fails to clarify which courts must consider EBA Guidelines in order to resolve the disputes submitted to them. Until now, the context in which the Court always considered that both EBA Recommendation and EBA Guidelines should be considered were disputes before an administrative court. In de zaak *BT v. Balgarska Narodna Banka* was de referring court the Administrative Court of the City of Sofia, Bulgaria. In de FDF zaak was the referring court Conseil d'État (Council of State, France). The Court does not state that EBA recommendations or Guidelines should be taken into consideration before a civil court.

<sup>128</sup> K. CHEN, *Legal Aspects of Conflicts of Interest in the Financial Services Sector in the EU and China*, Stockholm University, Sweden, 2018, 135.

<sup>129</sup> *Sydinnovator AB and Conny H vs Alfred Berg Fondkommission AB*, NJA 1995 s. 695.

<sup>130</sup> *Sydinnovator AB and Conny H vs Alfred Berg Fondkommission AB*, NJA 1995 s. 699.

<sup>131</sup> *Sydinnovator AB and Conny H vs Alfred Berg Fondkommission AB*, NJA 1995 s. 705. Freely translated from: “Eftersom allmänna råd principiellt sett saknar bindande verkan kan enbart det förhållandet att de inte har följts i ett visst fall inte grunda skadeståndsskyldighet.

Allmänna råd kan emellertid allt efter sin karaktär, såsom HovR:n funnit, ha betydelse för en bedömning av omomständigheterna i ett fall är sådana att skadeståndsgrundande vållande skall anses föreligga. Sålunda kanden som har följt ett exempel i allmänna råd ofta bedömas ha handlat med tillbörlig aktsamhet, medan det kan ligga nära till hands att anse att den som har avvikit från ett rekommenderat handlingssätt har gjort sig skyldig till vårdslöshet.”

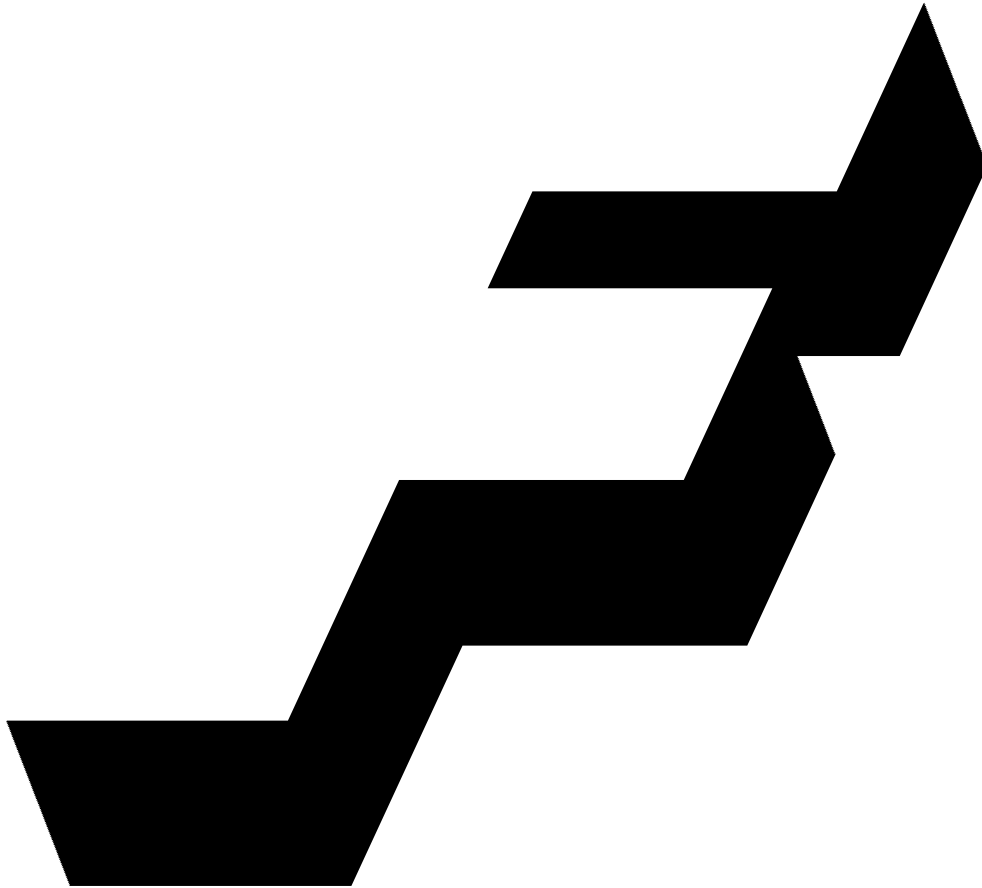


#### 4. Conclusion

27. In conclusion, we find that neither the EBA Guidelines, nor the Belgian Circular letter issued by the NBB can be considered as binding regulations. As such, a breach of the EBA Guidelines does not *ipso facto* lead to a fault in the context of a private law dispute.

What remains to establish a fault in the context of a private law dispute, is to conclude that conduct contrary to the EBA Guidelines or the Belgian Circular should be considered conduct contrary to that of a normally prudent banker in the same concrete circumstances. Currently, there is no case law in Belgium that clarifies whether violating soft-law provisions automatically leads to conduct that violates a bank's duty of care or whether soft-law provisions could substantiate a bank's duty of care. Our research concludes that when determining how a reasonably prudent bank would behave in the same concrete circumstances, the EBA Guidelines and circular letters issued by the NBB can be relevant in assessing whether a person has acted with due care. This means that although they can provide guidance, a failure to comply is in itself not decisive to conclude that the bank acted contrary to the conduct of a reasonably prudent banker. The objectives of the EBA Guidelines and circular letters must always be taken into consideration when determining what constitutes as reasonable care.

It is worth noting that financial institutions should make every effort to comply with the EBA Guidelines since the NBB has indicated that it will apply them and can impose administrative sanctions for non-compliance.



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