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A Bank's Duty of Care: Perspectives from European and Comparative Law

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I. Introduction

The financial crisis of 2007–12 sparked a flood of litigation across Europe and the United States. This may be gleaned from the previous chapters, which all provide an overview of the major cases and affairs in which banks have been subject to litigation and in a number of cases have been held civilly liable to investors for mis-selling financial products, poor financial advice, insufficient disclosure of and warning for financial risks. Many of these disputes and scandals were triggered by the crisis. The chapters mention litigation and affairs on a vast array of financial products and services, including interest rate swaps, futures, options, short sales, structured finance products, payment protection insurances (PPIs), shares, bonds, mutual funds, loan contracts and mortgage lending. Many of these cases are somehow linked to the fall of Lehman Brothers, the US housing crisis and the fraudulent Madoff scheme.

The previous chapters offer a treatment of a bank's duty of care from the viewpoint of national jurisdictions. In this chapter we place a bank's duty of care in a European and comparative law perspective. Looking at the national reports from this angle, the first thing that strikes is that courts throughout the jurisdictions approach the questions with respect to the bank's duty of care in a pragmatic way. They do not seem to feel strongly bound or hindered by dogmatic or theoretical distinctions. For example, the courts do not generally distinguish between consumers and professionals but focus on the circumstances of the case and assess whether the client had sufficient knowledge to understand the financial product that was provided. The more knowledge and experience, the less protection he needs. And vice versa, the less knowledge and experience, the more protection he needs. From this balancing act, the courts find and shape the tools in their national legal system to achieve the outcome they deem to be fair, just and reasonable.

However, even though the courts are similarly pragmatic in their use of legal tools to decide cases, they clearly do not strike the balance in the same way. In particular, they are not equally protective for investors. This does not come as a surprise, as the question what amounts to a fair and just decision very much depends on the legal-cultural and legal-social make-up of the country in which the courts hand down their decision. Hence, courts are pragmatic in choosing the road to their decision and to embed their decision into the legal system but the substance of these decisions differs between the legal systems.[1]

For this chapter, we have chosen five topics which are hotly debated in theory and practice. The first topic is the scope and intensity of the essential duties which typically flow from a bank's duty of care: duties to investigate, duties to disclose or warn, and—in exceptional cases—outright duties to refuse to render financial services or products (section II). In some jurisdictions, financial disputes between investors and banks are not so much resolved by reference to a bank's duty of care, but by reference to the traditional doctrine of error or mistake, and fraud. That is the second topic we discuss in this chapter (section III). The third topic is the impact of the European Markets in Financial Instruments Directive (MiFID) on a banks' duty of care (section IV). The fourth topic focuses on the role of the financial regulator in settling disputes between banks and clients (section V). We conclude this chapter with the bigger picture and relevant reform perspectives (section VI).

II. Scope, Content and Intensity of a Bank's Duty of Care

A. General

i. The Imposed Duties

The picture that emerges from the previous chapters is that the courts typically resolve financial disputes between investors and banks by reference to duties to investigate (also known as Know your Customer or KYC rules) and duties to disclose or warn, often stemming from a duty of care, good faith, fiduciary law or statutory law. As for the Netherlands, the Dutch Supreme Court (Hoge Raad or HR) has many times stated that the position of banks in society brings with it a 'special' duty of care towards consumer clients. According to the Dutch Supreme Court, a bank's special duty of care is also based on the fact that banks are professional service providers which must be deemed to have the necessary expertise.

[1] See eg C van Dam, 'Who is Afraid of Diversity? Cultural Diversity, European Co-operation, and European Tort Law' (2009) 20 *King's Law Journal* 281–308.

The scope of this duty of care depends on the circumstances of the case. These circumstances may include the client's expertise, if any, its financial position, the complexity of the financial product involved and the regulatory rules to which the bank is subject.[2] The French duty to warn seems not so much based on the role of the bank in society and its expertise knowledge, but, as one French commentator puts it, on the idea of risk.[3]

Whatever the exact rationale of the relevant concepts, in France, Germany, Italy and the Netherlands there is a steady flow of case-law in which the courts submit banks to duties to investigate and disclose or warn by reference to a duty of care or by reference to a general notion of good faith—always subject to the caveat that in the end the facts of the individual case are decisive.[4] On at least a theoretical level the approach is similar in Spain, but as a practical matter disputes with banks are often resolved by reference to a defect of consent, in particular the doctrine of error or mistake.[5] This is also the case in Austria, but perhaps to a lesser extent.[6] Although the Dutch courts normally resolve disputes by reference to breach of duty of care, it is noteworthy that the Amsterdam Court of Appeal recently revived the doctrine of mistake with respect to banks advising SMEs on interest rate swaps.[7] And it is needless to say that information duties are also of paramount importance in the context of mistake. We will return to this in more detail in section III below. The civil law jurisdictions included in this book generally tend to protect investors, not only consumers, but also less experienced commercial parties.

In the common law jurisdiction of England and Wales, breach of duty of care is the most frequently invoked issue in financial litigation regarding the bank's rendering of advice, or failing to give advice, and the same is true for Ireland. But the success rate is rather small, both in England and Wales and in Ireland.

[2] See Dutch Chapter, s III.

[3] See French Chapter, s IV.A.

[4] French Chapter, ss I–IV; German Chapter, s III.D; Italian Chapter, s II.A–II.C; Dutch Chapter, ss II and III. Although arguably less so in French law. The author of the French chapter puts it as follows: 'For a French lawyer, the main cases are less connected to the facts or circumstances of the case than to the rules or principles mentioned by the French Supreme Court in its decisions' (French Chapter, s I).

[5] See Spanish Chapter, s III, *in fine* (in a general sense), s II (examples from case-law). However, based on SR Bachs and ED Ruiz, 'Chapter 9—Spain' in D Busch and DA DeMott (eds), *Liability of Asset Managers* (Oxford: Oxford University Press, 2012) and the Spanish case-law they mention, this appears to be different in the context of banks (and other financial institutions) providing asset management services, where damages *are* awarded on the basis of breach of contract or tort law. See ss 9.59–9.80.

[6] See Austrian Chapter, ss I.C and I.F. See for a case where the defect of consent of fraud was successfully invoked, Austrian Chapter, s I.G, *in fine*. In Italy, some lower courts previously resolved disputes between banks and their customers by applying the doctrines of mistake and fraud, but after a clear ruling by the United Chambers of the Italian Supreme Court this is no longer the case. See Italian Chapter, ss III.A and III.B.i. See for more detail s III below.

[7] See Amsterdam Court of Appeal 15 September 2015, ECLI:NL:GHAMS:2015:3842, *Ondernemingsrecht* 2016/37 with annotation by Arons, *JOR* 2015/334 with annotation by Atema & Hopman (*X/ING BANK NV*); Amsterdam Court of Appeal 11 November 2015, ECLI:NL:GHAMS:2015:4647, *JOR* 2016/37 with annotation Van der Wiel & Wijnberg; Court of Appeal Amsterdam 11 October 2016, case number 200.153.823/01 (*X Vastgoed BV/ABN AMRO NV*). See on these cases Dutch Chapter, ss II.E and VII.C.

The liability rules of England and Wales, and Ireland, tend to favour banks and impose a heavy burden on clients to prove breach of any statutory, common law or fiduciary duties. A major hurdle for a client to overcome is to show that the bank owed it a duty of care in the sale of a product or the rendering of advice regarding the risks associated with the bank's products and investments. In principle, all banks that sell financial products and services to clients in England and Wales are subject to a duty of care in the sale of these products and services. But this duty of care is subject to limitations imposed by the principle of freedom of contract and the contractual estoppel doctrine. Moreover, the absence of any principle of good faith or unconscionability in English law further safeguards banks from a high volume of successful claims. English common law generally allows a bank and its customer to contract out of the duty of care, resulting in an arm's length relationship between the bank and the customer in which the bank has no obligation to inform or advise its client, nor to reveal any of the risks associated with its product or to assess the suitability of its customer for the products it sells. A bank does have a duty of care not carelessly to misstate facts—which is breached to the extent that its representations or statements are inaccurate or false. But as Mance J once put it, a duty of care to advise clients of the risks or on the suitability of a product, 'should not be readily inferred in a commercial relationship'.[8,9]

However, in England and Wales it explicitly follows from section 138D (previously 150) of the Financial Services and Markets Act 2000 (FSMA) that a breach of the FCA's (previously FSA's) organisational or conduct-of-business rules under Part X, Chapter I of FSMA (which includes the implementation of organisational or conduct-of-business rules pursuant to MiFID) is directly actionable at the suit of a 'private person' (ie a non-professional, or private, investor), subject to the defences and other incidents applicable to breach of statutory duty. Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 contains a similar provision, subject to two important differences. First, it provides a statutory basis for an action for damages by customers in general, including commercial parties. Second, it applies to customers who have suffered loss as a result of *any* failure by the financial services provider to comply with its obligations under financial services legislation, and not merely the conduct-of-business rules it contains.[10]

Turning to the US, it is first of all important to note that the 1933 Glass Steagall Act separated to a degree commercial banking from investment banking and placed limits on US banks' securities activities. But during the latter part of the twentieth century, Federal Reserve Board rulings and Supreme Court decisions

[8] See *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] CL.C 531, per Mance J (on which see Chapter England and Wales, s I.B).

[9] See England and Wales Chapter, s I. See for Ireland, Irish Chapter, s II.A (duty of care in tort), s II.C (duty of care in contract). In the context of a duty of care in contract, the author of the Irish chapter remarks that '[t]he Courts will not impose a duty of care on a financial institution merely because such a term would have been beneficial to a customer or because the failure to include it has detrimental consequences for them' (s II.C).

[10] See also ss III.B.ii, II.C, II.D, IV.B and IV.E.i.

took an increasingly flexible approach to banks' provision of securities' services. The 1999 Gramm-Leach-Bliley Act repealed portions of Glass Steagall and allowed for broad affiliations between commercial banks and securities firms. US bank holding companies and their subsidiaries now provide a wide-range of securities services, including investment management, investment advice and execution-only services. Those services are subject to federal regulation and SEC enforcement as well as private rights of action under state statutory and common law.[11]

For US law purposes, a distinction must be drawn between investment advisers (including asset managers and investment advisers) and broker-dealers (including providers of execution-only services). *Investment advisers* are subject to the Investment Advisers Act of 1940. Section 206 of this Act establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients, submitting advisers to duties to investigate (known as the suitability test) and duties to disclose all material facts, and to employ reasonable care to avoid misleading clients.[12] While holding that the Advisers Act 'establishe[d] 'federal fiduciary standards to govern the conduct of investment advisers',[13] the Supreme Court has also held that 'that there exists [only] a limited private remedy under the [Advisers Act] to void an investment adviser's contract, [and] the Act confers no other private causes of action, legal or equitable'.[14] Thus, litigation to enforce the fiduciary standards established by the Advisers Act is limited to SEC enforcement actions, and private damages claims for breaches of an investment adviser's fiduciary duties or negligence are a matter of state law.[15]

Broker-dealers are subject to the anti-fraud provisions of the Securities Exchange Act of 1934, broadly prohibiting misleading omissions of material facts as well as affirmative statements and fraudulent or manipulative acts or practices. The SEC has adopted rules, issued interpretations and brought enforcement actions that define these prohibited practices that apply to broker-dealers. Important among broker-dealers are duties of fair dealing, duties of disclosure and compliance with suitability requirements. For broker-dealers, the suitability requirement is codified in self-regulatory organisation (SRO) rules.[16] But according to the SEC, the suitability doctrine is not limited to broker-dealers. The doctrine is applicable to investment advisers and has been enforced against advisers under section 206 of

[11] See US Chapter, s III.B.iii.

[12] See US Chapter, s III.C.ii.a.

[13] *Transamerica Mortg Advisors, Inc*, 444 U.S. at 17. See US Chapter, s III.C.ii.a.

[14] ibid, 24. See U.S. Chapter, s III.C.ii.a. As amended in 1970, the Advisers Act also 'impose[s] upon investment advisers a "fiduciary duty" with respect to compensation received from a mutual fund, 15 U.S.C. § 80a-35(b), and grant[s] individual investors a private right of action for breach of that duty, *ibid*'; *Jones v Harris Assocs LP*, 130 S. Ct. 1418, 1423 (2010). See US Chapter, s III.C.ii.a, n 221.

[15] See US Chapter, s III.C.ii.a. See *Davis v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 906 F2d 1206, 1215 (8th Cir 1990) ('The question of whether a fiduciary relationship exists is a question of state law'.). See also eg *Stokes v Henson*, 217 Cal App 3d 187, 265 Cal Rptr 836 (Cal Ct App 1990) (affirming judgment against investment adviser for breach of fiduciary duty under California law). See US Chapter, s III.C.ii.a, n 222.

[16] See US Chapter, s III.C.ii.b.

the Advisers Act.[17] Although there is no private cause of action for violation of the SEC's suitability rule, courts 'have held that the suitability rule may set brokers' common law duty of care toward clients'.[18]

ii. Sources for the Imposed Duties

Sources for the bank's duties to investigate, to disclose or to warn vary strongly throughout the legal systems: they are found in tort law, contract law, fiduciary law and statutory law (section II.A.i).

In the continental European jurisdictions, the courts have developed these duties mostly within the framework of contract and in tort law on the basis of unwritten (uncodified) law but with distinct accents. Spain very much focuses on general rules of contract law (error/mistake). Also in France, Germany and Italy duties to investigate, disclose and warn have been developed in general contract law without reference to statutory developments. Italy and the Netherlands show a more mixed picture with developments in general contract law, with references to statutory (MiFID) developments as a confirmation or justification when applying general contract law, at the same time ensuring that they are not a follower of the statutory fashion but keep developing contract law independently.

In general, investors may claim both on the basis of general contract law and on the basis of breach of a statutory duty. What is crucial, however, is that in continental Europe, the former is developed independently from the latter and often sets higher requirements for banks to comply with than follows from legislation. It shows how courts are able and, apparently, keen to provide protection to investors, particularly private investors and small commercial investors, regardless of the rules set by the legislator.

This does not exclude, however, that in continental European jurisdictions the violation of a regulatory rule may indirectly influence the extent of the bank's contractual duty. In Austria and Germany this is called a 'radiating' or a 'concretising' effect of regulatory duties. In the Netherlands, a violation of MiFID duties may not only amount to a tort but also to a failure in the performance of a contractual obligation. The same goes for Spain where it is accepted that non-compliance with MiFID duties may have a bearing on a claim based on the contractual tenet of mistake section IV.J).

[17] See DA DeMott and AB Laby, 'Chapter 13—United States of America' in Busch and DeMott (eds), *Liability of Asset Managers* (n 5) § 13.67, in fn 83 referring to Advisers Act Release, No 1406.

[18] See US Chapter, s III.C.ii.b. *Ives v Ramsden*, 142 Wash App 369, 390, 174 P3d 1231, 1242 (Wash Ct App 2008) (collecting cases); see eg *Scott v Dime Sav Bank of NY, FSB*, 886 F Supp 1073, 1080–81 (SDNY 1995) (upholding negligence claim based on evidence of violation of suitability rule); *cf Merrill Lynch, Pierce, Fenner & Smith, Inc v Chen*, 697 F Supp 1224, 1227 (DDC 1998) (violation of suitability rule 'will not automatically result in [broker] being held liable for negligence' but 'would simply be a factor for consideration by the jury as to whether he acted as a "reasonable" person'). See US Chapter, s III.c.ii.b, n 239.

The breach of a contractual duty to investigate, disclose or warn usually gives rise to damages. However, if these duties are considered in the framework of the contractual doctrines of error or mistake, the breach of such a duty will make the contract null and void or voidable, giving rise to restitution obligations for banks. These can be more onerous for banks, also because, unlike in the case of damages, contributory negligence of the investor is not a defence.

In the common law systems, particularly in England and Wales and Ireland, the emphasis is less on contract law and tort law and more on statutory law. Here, the distinction between common law and statutory is rather strict; they clearly do not mix. Although investors also bring claims against banks based on common law, they are generally less successful than in other jurisdictions. As mentioned above, in England and Wales and Ireland, courts are reluctant to accept contractual duties for banks to investigate, to disclose and to warn their clients regarding the risks associated with the bank's products and investments, even when the investor is a consumer. This reluctant approach by the courts is not owing to any systematic limitation of the common law but to the stronger endorsement of the principle of the freedom of contract, as expressed, inter alia, in the contractual estoppel doctrine (in case of a written contract, neither party can subsequently deny the existence of the facts and matters upon which they have agreed). Moreover, considerations of reasonableness or unconscionability are unknown in common law. Therefore it does not come as a surprise that investors rely more heavily on the bank's statutory duties, inter alia following the implemented MiFID legislation.

In the United States, the picture is different from other common law jurisdictions (section II.A.i). Federal tort law does not allow claims against investment advisers. Private damages claims for breaches of an investment adviser's fiduciary duties or negligence are a matter of state law. Under state law, common law contractual duties are imposed on retail banks to deliver reasonably prudent services to their depositors (section II.C.iv). Under federal law, broker-dealers are subject to statutory rules such as the so-called suitability rule but violation of these rules is not privately enforceable: they are enforced by the SEC. However, state courts have held that the suitability rule may set brokers' common law duty of care towards clients. This cross-over from statutory law to common law is more common in the US, where the tort of negligence and breach of statutory duty are interconnected, whereas in English law they are two distinct torts with limited intertwinement.[19]

[19] C van Dam, *European Tort Law* (Oxford: Oxford University Press, 2013) s 902-1; WHV Rogers (ed), *Winfield and Jolowicz on Tort*, 18th edn (London: Sweet & Maxwell, 2010) para 7.1, points out that other common law countries and the majority of jurisdictions in the United States generally consider the statute to 'concretise' the common law duty under the tort of negligence, which resembles more the German and French approach: Van Dam, *European Tort Law* (n 19) ss 903 and 904. See, however, also A Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232–59.

B. Scope

i. General

In this subsection, we analyse and discuss the scope of duties to investigate and duties to disclose or warn. First, do these duties only apply in relation to consumers or do they also apply in relation to commercial parties? Second, do duties to investigate and duties to disclose or warn only apply within the context of investment management, investment advice and execution-only services, or also beyond the scope of investment services? Third, are duties to investigate or warn also accepted in relation to third parties, and if so in which circumstances?

ii. Consumers and Commercial Parties

As regards the first aspect, duties to investigate and duties to warn or disclose are widely accepted with respect to consumers in the jurisdictions covered in this book. Owing to their lack of knowledge and experience when it comes to financial products and services, they are considered most worthy of protection.

In the Netherlands, the question whether banks also owe a special duty of care to SMEs and other commercial clients is hotly debated, largely triggered by the massive mis-selling of interest rate swaps to SMEs. There is some lower court case-law on interest rate swaps which accepts that banks are also subject to a special duty of care towards SMEs, resulting in the usual duties to investigate and warn. However, the Dutch Supreme Court has not yet had the chance to confirm or reject this view.[20]

In France there is more clarity. A duty to warn of the risks of speculative financial operations exists in all cases in which the client is ignorant of the risks involved in the transaction. It does not matter whether the client is a consumer or not, only his lack of knowledge is relevant. So in France the distinction between retail and commercial clients is not in itself decisive.[21]

In Germany, in the context of investment advice, the differentiation between retail and commercial clients is likewise not relevant for determining the scope and intensity of the duty of care, as each provision of advice has to be tailored to the facts of the specific case. In a much discussed 2011 decision rendered by the Federal Supreme Court (Bundesgerichtshof or BGH), a bank was held liable in

[20] See Dutch Chapter, s II.E. See esp Court of Appeal Den Bosch, 15 April 2014, *JOR* 2014/168, with annotation Van der Wiel & Wijnberg; *Ondernemingsrecht* 2014/92, with annotation Arons (*Holding Westkant BV, in liquidatie/ABN AMRO Bank NV*), mentioned in s II.E, n 12. Please also note that the open norms in the Dutch Civil Code could in any even facilitate the development of any such special duty of care towards commercial parties. See Dutch Civil Code, Arts 6:2, 6:248 and 7:401. See s II.E, n 12. See on these provisions Dutch Chapter, ss III and VII.B.

[21] See French Chapter, s IV.A.

damages for breach of its duty of care after having sold a highly complex interest rate swap—a spread ladder swap—to a corporate client.[22]

In England and Wales and Ireland, the distinction between retail and commercial clients is not in itself decisive for determining the existence, scope and intensity of the duty of care, as the assessment much depends on the specific facts of the relevant case.[23] The same is true for the US, where this likewise depends on the circumstances.[24] However, the distinction between private and commercial clients *is* in itself decisive in England and Wales in the case of a claim for damages based on section 138D (previously section 150) of FSMA. This claim for breach of regulatory requirement for the provision of suitable and adequate advice in the sale of financial products or investments provides a statutory right of action where breach of these regulatory requirements cause loss to a 'private person'. Generally, the claimant must therefore be an individual. Corporate clients may only use this provision if they were not 'conducting business of any kind'. In *Titan Steel Wheels Ltd v Royal Bank of Scotland plc*,[25] the Court gave a narrow interpretation to the concept of a private person. A steel manufacturer who had been sold inappropriate swaps by a bank was not able to use section 138D. It was held to be conducting business, even though it was not experienced in financial markets.[26] Irish law is different in this respect. Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 also contains a statutory claim, but with a much wider scope. First, it provides a statutory basis for an action for damages by 'customers' in general, including commercial parties. Second, it includes customers who have

[22] BGH 22 March 2011—XI ZR 33/10, reported in BGHZ 189, 13, on which see German Chapter, s III.B.i.

[23] See Chapter on England and Wales, s II.A, stating that '[d]espite the limitations in establishing a duty of care between a bank *and* commercial or individual clients, the duty of care issue is the most frequently invoked issue in financial litigation regarding the bank's rendering of advice, or failing to give advice'. See for Ireland, Irish Chapter, s II.E, stating that 'while a financial institution does not ordinarily owe a duty of to advise or to explain documentation, such a duty may arise depending on the facts of the case'. See also on commercial and consumer clients, Chapter on England and Wales, s II.A and see s III for several examples of claims by third parties against banks (referred to in the chapter on England and Wales as 'third party banks'; see further on liability against third parties s II.B.iv). In the Irish Chapter it is also stated that '[w]here the recipients of the information are not sophisticated or are clearly missing important information, there may be a greater responsibility on the Bank to give advice' (s II.E).

[24] The US Chapter remarks that '[t]he general rule is that a fiduciary duty does not exist between commercial parties operating at arm's length. […] Special circumstances, however, even in commercial transactions in the banking context, can give rise to fiduciary duties'. (s II.A.i.d). See also the statement (s II.A.i.d) that '[m]ost states find existence of fiduciary duty in the banking context, as in other contexts, to be a question of fact to be determined on a case-by-case basis'.

[25] [2010] EWHC 211.

[26] See the UK Law Commission (LAW Com No 350), *Fiduciary Duties of Investment Intermediaries* (2014) § 11.12. In this paper, the Law Commission considered an extension of Art 138D. The Law Commission concluded that there are arguments to be made both for and against an extension of s 138D. Given the controversy involved the Law Commission concluded that the issue is one for government. If the government were sympathetic to this change, the Law Commission thinks that the issue would merit further research and debate. See § 11.33–11.35.

suffered loss as a result of *any* failure by the financial services provider to comply with its obligations under financial services legislation, and not merely some of the conduct-of-business rules it contains.[27]

In Italy, it seems that the distinction between consumers and commercial clients is not in itself decisive either. Nevertheless, there is empirical evidence which confirms that a claim brought by an unsophisticated investor has more probability of being upheld: the probability of having such a claim upheld equals to 94.3 per cent, while the probability for a claim by an expert investor to be rejected is 77.8 per cent.[28]

Finally, in Spain, the parties and the civil courts do not normally resort to breach of duty of care to resolve civil disputes between banks and customers. It is much more common to argue that there is a lack of consent, principally on the basis of mistake or even fraud. But, as may be evidenced by recent Spanish interest rate swap litigation, in the context of mistake, it is not so much the status of the client that is relevant (consumer or commercial), but rather his knowledge and expertise as regards the financial product or service concerned.[29]

In conclusion it can be said that the courts generally do not distinguish between consumers and professionals but focus on the circumstances of the case and assess whether the client had sufficient knowledge to understand the financial product that was provided.

iii. Extensions beyond the Scope of Provision of Investment Services

a. Bank Loans

Turning to the second aspect, the scope of the French duty of care is not confined to investment services. Duties to investigate and warn may also exist in the context of a simple loan agreement between the bank and its contractual counterparty. The French chapter indicates that in the case of loans the bank has a duty to investigate the financial situation of the client and warn him, if the loan is disproportionate in view of his financial situation. So debtors must be warned only if there is excessive risk, unless he knows of the risk.[30]

As for Austrian law, it is noteworthy that in 2013, the Austrian Supreme Court (Oberster Gerichtshof or OGH) assumed a breach of duties to investigate and warn in a case beyond the scope of the provision of investment services, ie in a case

[27] See Irish Chapter, s VI. See also IV.B below.

[28] See Italian Chapter, s I.

[29] Spanish Chapter, ss II.B, II.C, II.D and III. Finally, the Austrian chapter does not explicitly address the question of whether a bank's duty of care cannot extend beyond consumers. At the same time, the chapter does not contain any indications that this should not be possible. On the contrary, the open norms contained in § 1299 and § 1300 ABGB would appear to be able to facilitate any such development. See on these provisions, Austrian Chapter, s IV, *in fine*.

[30] French Chapter, s IV.B.

in which a bank must have noticed that a foreign currency loan was not suitable for its customer, but failed to warn accordingly.[31] Of course, a foreign currency loan is far more risky than a simple loan agreement, as the actual payments on the loan by the debtor are subject to the exchange rate between the currency in which the debtor actually pays his debt and the relevant foreign currency. A sharp change in the exchange rate may cause severe financial problems for the debtor. To take a recent example, on 15 January 2015, the Swiss National Bank (SNB) discontinued the minimum exchange rate of CHF 1.20 per euro.[32] The result was a sharp change in the exchange rate of the CHF in comparison with the euro, making foreign currency loans denominated in CHF much more expensive for debtors who ultimately pay in euros. Private households in Central and Eastern Europe were hit hard by the unexpected decision of the SNB to end the peg to the euro, notably in Poland, Hungary and Croatia.[33]

The French and Austrian approach may be contrasted with the German and Irish approach. In Germany the courts have generally been very reluctant to recognise duties to investigate, inform or warn in the context of a bank loan, holding borrowers fully responsible for both the decision to take out a loan and for the decision how to invest it.[34] In Ireland the approach is similarly reluctant. This may be gleaned from the Irish case *ACC Bank plc v Deacon & anor*,[35] where Ryan J quoted with approval the following extract from the *Encyclopaedia of Banking Law* (2013):

> Where a bank assumes the role of financial adviser to its customer, it owes the customer a duty to exercise reasonable care and skill in the execution of that role. However, a bank does not usually assume the role of financial adviser to a customer who merely approaches it for a loan or for some other form of financial accommodation.

It is notable that an attempt was made in the Irish courts to establish a new tort of reckless lending which would apply to banks and which would have the effect of imposing a special duty of care on them in relation to their lending. So far, the Irish courts have refused to recognise the existence of a tort of reckless lending.[36]

b. Guarantees

Another recurring case in which duties to warn and investigate are accepted by the courts beyond the scope of investment services, is the situation where a consumer acts as the guarantor of a debtor of a bank loan. In both the Netherlands

[31] 8 Ob 66/12g, EvBl 2013, 922 (*Cach*). See Austrian Chapter, ss I.J and II.B, *in fine*.
[32] See Press release SNB dated 15 January 2015, available at: www.snb.ch/en/mmr/reference/pre_20150115/source/pre_20150115.en.pdf.
[33] See http://bruegel.org/2015/10/foreign-loan-hangovers-and-macro-prudential-measures-in-central-eastern-europe/.
[34] German Chapter, s II.
[35] [2013] IEHC 427. See Irish Chapter, s II.B.iii.a.
[36] See Irish Chapter, s II.F. The Chapter on England and Wales does not provide leads in this respect.

and France the bank has a duty to warn such guarantor for the risks involved.[37] See for Austria § 25 KschG, which applies whenever a consumer guarantees (or provides other personal securities) for someone else's loan granted by a bank or other financial institute.[38] In such cases, the creditor must warn this third party accordingly, if it knows, or ought to know, that its customer, the credit recipient, may not be able to pay back the loan. If the bank or other financial institution fails to do so, the third party is not obliged to pay back the loan despite the given guarantee.[39]

Also in Ireland and England and Wales, consumers acting as the guarantor of a debtor of a bank loan are considered special cases, although in such cases the courts have applied the doctrine of undue influence rather than a breach of duty of care or breach of a fiduciary or statutory duty. See for example *Ulster Bank Ireland Limited v Roche & Buttimer*,[40] where the High Court considered whether a bank should have responsibility for advising a guarantor of her partner's company of the consequences of a guarantee. It referred to the seminal English case of *Royal Bank of Scotland v Etridge (No 2)*,[41] which established that whenever a wife offered to act as guarantee for the indebtedness of her husband or his business, the bank was put on inquiry and was obliged to take reasonable steps to satisfy itself that she had understood and freely entered into the transaction. Clarke J determined

> that the general principle, which underlies *Etridge*, is to the effect that a bank is placed on inquiry where it is aware of facts which suggest, or ought to suggest, that there may be a non-commercial element to a guarantee.

The Court held that the bank was aware of the personal relationship between the surety and the owner of the company and that the former had no direct interest in the company and it was obliged to take 'at least some measures to seek to ensure that the proposed surety was openly and freely agreeing to provide the requested security'. As it had not done so, the surety was entitled to rely on the undue influence which her partner exercised over her.[42]

c. Sale of Risky Products to Consumers

Finally, in a case involving the mere selling of risky and complex financial products to consumers (ie without rendering advice or any other type of investment

[37] See HR 1 April 2016, ECLI:NL:HR:2016:543, *NJ* 2016/190 (*Aruba Bank c.s./Hardeveld*), consideration 3.4.1. See for similar reasoning in the context of avoidance of the guarantee on the basis of error (*dwaling*): HR 1 June 1990, *NJ* 1991/759 with annotation Brunner (*Van Lanschot/Bink*). See Dutch Chapter, s II.F. See for France the French Chapter, s II.B.iii.

[38] Of course, the guarantor for the loan does have a contractual relationship with the bank and, therefore, is not a 'third party' of the bank in a strict sense. See Austrian Chapter, s II.E, n 91.

[39] Unless the creditor proves that the third party would have guaranteed for its customer anyway; see S Perner, M Spitzer and GE Kodek, *Bürgerliches Recht*, 3rd edn 630. See Austrian Chapter, s II.E and n 92.

[40] [2012] IEHC 166. See also *ACC Bank Plc v Connolly & anor* [2015] IEHC 188.

[41] [2002] 2 AC 773.

[42] Irish Chapter, s II.C, *in fine*.

services), the Dutch Supreme Court held that it followed from the special duty of care that there was a duty to warn consumers for the risks involved and a duty to comply with KYC rules, even though the bank was only acting as contractual counterparty (seller) and not as a financial services provider. In such a case the MiFID KYC rules would not apply as their application is confined to cases in which the bank provides investment services.[43]

iv. Third Parties

The main part of our questionnaire (and, hence, the country reports) focused on duties banks owe to their customers. However, in a number of countries the case-law has fairly recently also developed duties banks owe to third parties. Obviously, these duties are not based on contract but on tort (liability law). From a quantitative point of view this may not yet be a major development and courts enter this area with caution but it shows that they look beyond the regulatory focus on customers. It also shows that banks do need to broaden their risk perspectives and assessments and look beyond their traditional circle of customers. During the financial crisis it became apparent that the impact banks have on society at large is huge. For this reason, it cannot come as a surprise that courts also see a role for banks to protect third parties against harm and develop duties accordingly.

From a legal-systematic (or dogmatic) point of view, liability to third parties for pure economic loss is a rather underdeveloped area in most jurisdictions, as courts are generally reluctant to adopt duties to protect third parties against pure economic loss. Compensation of pure economic loss is complicated both from a technical and a policy point of view. The policy issue regards the fact that it is thought that compensating pure economic loss on a general basis would open the floodgates to claims. It has been argued that awarding such claims on a general basis would put such a heavy burden on the tortfeasor and the courts that it would be preferable to let the loss lie where it falls.[44]

It is hard to say whether this scenario is a nightmare or reality. The best to be said is that it is the product of a political view. There is no evidence whatsoever that compensating pure economic loss on a more general basis would lead to apocalyptic events. Moreover, in personal injury cases the financial consequences can be extensive too.[45] Moreover, as William Prosser said in the 1930s: 'It is a pitiful confession of incompetence on the part of any court of justice to deny relief upon the ground that it will give the courts too much work to do'.[46]

[43] See HR 5 June 2009, *JOR* 2009/199, annotated by Lieverse (*Treek v Dexia Bank Nederland*), consideration 5.2.1. See Dutch Chapter, s II.B; Chapter 2, s III, *in fine*; this chapter, s VI.C, *in fine*.

[44] See eg J Spier (ed), *The Limits of Expanding Liability* (The Hague: Kluwer International, 1998).

[45] M Bussani and VV Palmer, 'The Notion of Pure Economic Loss and its Setting' in M Bussani and VV Palmer (eds), *Pure Economic Loss in Europe* (Cambridge: Cambridge University Press, 2003) 16–21. See also H Bernstein, 'Civil Liability for Economic Loss' (1998) 46 *American Journal of Comparative Law* 111, 126–28.

[46] W Prosser, 'Intentional Infliction of Mental Suffering: A New Tort' (1939) 37 *Michigan Law Review* 877.

Over the past decades, the importance of protection against pure economic loss has become more apparent. The ongoing financial crisis has made clear that the consequences of financial losses can be considerable, particularly when they affect savings, pensions and company assets. In such cases, economic loss is not the loss of some type of luxury or some commercial risk but it may affect a person's essential income and livelihood. The distinction made in tort law between tangible damage on the one hand (personal injury, property loss) and intangible damage on the other (pure economic loss) is artificial and conceals the real value of the damage suffered.

The ways in which the legal systems have translated these policy considerations into legal rules differ considerably. French law has the most open approach, seemingly awarding compensation for pure economic loss on a general basis. However, the control mechanisms can be found in the way the requirements for liability (*faute*, causation and damage) are applied; in particular, the limits provided by the requirements of causation and damage should not be underestimated. The English and German tort law systems both contain high hurdles for compensation of pure economic loss but the judiciaries in both countries have found ways to lower them in certain circumstances. Therefore, the differences between the legal systems are less black and white than the systems suggest, although English judges probably remain the most reluctant when it comes to protecting someone who has suffered pure economic loss.[47]

As the *French-based legal systems* (represented in this book by France, Italy, Spain, and the Netherlands) do not know formal hurdles when it comes to liability for pure economic loss to third parties, one would expect the strongest developments with respect to a bank's duty of care to third parties in these legal systems. In France and Spain the courts have not yet been asked to rule on such a duty but if this would happen, they would not be hindered by any legal-systematic limitations.[48]

The main examples of third party liability of banks come from Italy and the Netherlands. These jurisdictions have accepted such duties but under fairly strict conditions.

In Italy, a duty of care of banks is accepted in the rather specific area of tied agents. According to Italian case-law, the scope of application of such duty of care encompasses also cases of scams committed by a bank's tied agents, even when it is clear that the latter acted in the absence—or beyond the limits—of a proxy to represent the banks. The most common case is that of the tied agent unduly receiving money from the clients and diverting it to its own personal accounts. Indeed, in such cases banks could not be deemed to be providing any service at all to clients, but the mere fact that the tied agent received a mandate by the bank to act in

[47] van Dam (n 19) s 710-1.

[48] French Chapter, s I. In the Spanish Chapter it is not even mentioned as a theoretical possibility. Ruiz and Bachs seem to consider it in theory possible, at least in the context of asset management. See Bachs and Ruiz, 'Chapter 9—Spain' (n 5) § 9.73.

its interest is deemed sufficient to ground a vicarious liability on the bank itself pursuant to Article 2049 of the Italian Civil Code (establishing the liability of the employer for damages caused by its employees to third parties).[49] The main consequence of this trend in the case-law is that the sole effective defence for a bank in these cases is related to a possible contributory negligence by clients, considering that usually tied agents are not entitled at all to directly receive money from clients.

In the Netherlands, the case-law has accepted various scenarios of third party liability of banks. The Dutch Supreme Court justified this 'special duty of care' on the role banks play in society, implying that they also have to take interests of certain third parties into account on the basis of the requirements of unwritten law.

In 1998, in *Mees Pierson/Ten Bos*, the Dutch Supreme Court held that the role that banks have within society causes banks to have a special duty of care, not only towards clients on the basis of contractual relationships, but also towards third parties whose interests the bank has to take into account on the basis of the requirements of unwritten law. The scope of this duty of care depends on the circumstances of the case.[50] The cases *Fortis/Stichting Volendam* and *ABN AMRO/SBGB* concerned fraudulent investment services; the banks' only involvement in these matters was that the fraudulent 'investment services provider' used bank accounts held with these banks. In both cases, the Dutch Supreme Court upheld the Court of Appeal's finding that the banks are liable for the investors' losses (in *ABN AMRO* this was only a conditional finding).[51] In the *Fortis* matter, the bank's liability was grounded on the fact that at some point in time the bank had observed that the services were possibly being provided without the required regulatory licence, but had failed to investigate this further.[52] In the *ABN AMRO* case, the (presumed) liability of the bank was based on the fact that the payments to and from the fraudster's private bank account were unusual in quantity and nature, which should have prompted the bank to further investigate these transactions.[53] In *ABN AMRO*, the Dutch Supreme Court held that the special duty of care towards third parties also aims to protect these third parties against their own rashness or lack of insight.[54]

A final important judgment on a bank's liability towards third parties concerns World Online's IPO.[55] The Hoge Raad held as being relevant aspects for ABN AMRO and Goldman Sachs' duty of care towards investors in World Online, the fact that these banks were the (joint) global coordinators, lead managers and bookrunners to the IPO. According to the Hoge Raad, this meant that they had

[49] See eg Supreme Court, decision no 6091 of 20 March 2006; Supreme Court decision no 19166 of 29 September 2005. See Italian Chapter, s II.F and n 42.

[50] HR 9 January 1998, *NJ* 1999/285 (*Mees Pierson/Ten Bos*).

[51] The Court of Appeal allowed the bank to rebut the assumption of its knowledge of unusual payment transactions.

[52] HR 23 December 2005, *NJ* 2006/289 (*Fortis/Stichting Volendam*).

[53] HR 27 November 2015, ECLI:NL:HR:2015:3399 (*ABN AMRO/SBGB*).

[54] See Dutch Chapter, s II.D.

[55] HR 27 November 2009, *NJ* 2014/201 (*VEB c.s./World Online c.s.*).

been engaged by World Online as issuer to lead the syndicate of banks involved in the IPO and that they were responsible for the determination of the price, for the due diligence investigation and for drafting and distributing the prospectus. As a syndicate leader, a bank has the responsibility to prevent potential investors getting a wrong impression of the issuer, as far as is possible within the syndicate leader's sphere of influence—for example within the scope of the due diligence investigation and when drafting the prospectus.[56]

In common law countries like England and Wales, a duty to third parties is in principle conceivable, also in case of pure economic loss. Such a duty may be based on the *Caparo* case-law but a potentially more successful basis is 'assumption of responsibility', also known as the *Hedley Byrne* rule as part of the tort of negligence.[57] This latter rule implies that a duty of care exists if someone reasonably relies on another person's special skills and knowledge, the main categories being the provision of information and of services. Examples include an inaccurate statement by a bank regarding the solvency of a client, negligent underwriting by managing agents of an insurance syndicate, a negligently conducted survey of a house, and the failure by a solicitor to draw up a will on time.[58] However, in the framework of a bank's duty of care such duties are in practice not or hardly accepted, as banks do not make representations to individualised third parties and therefore do not assume responsibility for third party's interests, let alone that the latter may reasonably rely on it.

Following the financial crisis of 2007–08, a growing number of legal claims have been filed by professional and other sophisticated third party investors against banks[59] who acted as arrangers or managers in the sale of structured finance and other complex financial products. For example, a professional investor holding a structured debt instrument issued as part of a securitisation who suffered losses as a result of negligent statements or misrepresentations in the sale of that product might look for redress to those parties who made the statements and promoted the products (the 'managers') or to those parties who structured the investment (the 'arrangers'). A preliminary issue would be whether the managers/arrangers acted *reasonably* and, if they did not, whether they are *liable* in negligence for making a false statement about the product or rendering negligent advice to its customer in deciding whether to purchase the product. If they did not act reasonably or acted deceitfully, to prove liability the investor must first show whether the bank—as a manager or arranger of the product—owed a duty of care to the investor.[60]

[56] See Dutch Chapter, s II.D.

[57] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ([1963] 2 All ER 575, [1964] AC 465); *Caparo Industries plc v Dickman* ([1990] 1 All ER 568, [1990] 2 AC 605).

[58] van Dam (n 19) ss 503-4 and 710-4.

[59] Referred to as 'third party banks' in the chapter on England and Wales, s III, but this is just a matter of perspective. What is decisive is that there is no contractual relationship between the investor and the bank in question.

[60] Chapter on England and Wales, s III.

In these cases, the author of the chapter on England and Wales concludes, the English courts have generally resisted expanding the scope of liability to third party banks because, as arrangers or managers of the sale of the complex financial product—they were not the issuers or the sellers of the product or securities in question. Instead, a special purpose vehicle that was a separate legal entity was the seller or the issuer. Therefore, the banks were not parties to the contract with the claimant investors who purchased the investment products. Moreover, the investment contract entered into by the investors with the SPV expressly stated that the investors did not rely on any representations that were not stated in writing in the contract. In other words, any marketing statements or promotions provided by the bank as arranger or manager had no legal effect with respect to liability in the issuance or sale of the investment product.[61]

In the United States, liability of a bank to non-customers is possible in state law but the threshold is high. In addition to the common law and contractual duties of retail banks to deliver reasonably prudent services to their depositors, banks have a common law duty in tort to some non-customers. Historically, courts employed the doctrine of 'constructive fraud' as a catch-all for omissions contrary to a legal or equitable duty to act, causing injury to another in circumstances offending 'good conscience'.[62] Although in some states there may be no duty in tort to non-customers to detect and prevent a bank customer's fraudulent conduct, many states do impose criminal and tort liability for aiding and abetting violations of law. Typically, such liability is triggered by knowing aid to a violation, or reckless disregard of the possibility of a violation, not by mere negligence. Thus, there may be no bank duty to police customer accounts proactively for purposes of protecting non-customers. However, if a bank has actual knowledge of wrongdoing, it may be liable for aiding and abetting a breach of fiduciary duty owed by a customer to a non-customer. It may also be liable on a theory of 'conscious avoidance':

> Conscious avoidance … involves a culpable state of mind whereas constructive knowledge imputes a state of mind on a theory of negligence. Reflecting this analysis, the Second Circuit has held in the criminal context that conscious avoidance may satisfy the knowledge prong of an aiding and abetting charge. Accordingly, the Court sees no reason to spare a putative aider and abettor who consciously avoids confirming facts that, if known, would demonstrate the fraudulent nature of the endeavor he or she substantially furthers.[63]

[61] Chapter on England and Wales, s III. The Irish Chapter does not explicitly address the case of liability of banks towards third parties, but it does refer to the *Hedley Byrne* case, which is good law in Ireland as well. See Irish Chapter, ss II.A, II.B, II.D. So a similar approach as in England and Wales seems feasible in Ireland, at least in theory.

[62] See US Chapter, s II.A.ii and see *Jackson v Jackson*, 47 Ga 100, 109 (1872), mentioned in US Chapter, s II.A.ii, n 79.

[63] See US Chapter, s II.A.ii and see *Fraternity Fund Ltd v Beacon Hill Asset Mgmt, LLC*, 479 F Supp 2d 349, 367–68 (SDNY 2007), mentioned in US Chapter, s II.A.ii, n 80.

So-called 'red flags' of wrongdoing may be sufficient to hold a bank liable in such a case, even without a definitive adjudication against or criminal conviction of the customer.[64]

The Germanic legal systems (Germany and Austria) maintain a strict distinction between tort and contract and at the same time impose strong formal limitations when it comes to compensation for pure economic loss. German tort law has three general rules. Paragraph 823(1) is the most important one but it does not apply to pure economic loss. Paragraph 823(2) establishes liability for breach of a statutory duty and paragraph 826 liability for intentionally caused harm, including pure economic loss; however, it is generally hard to prove intention even though the courts have somewhat relaxed this requirement.

To some extent, this gap is filled by the tenet of the so-called contract with protective effect for third parties (*Vertrag mit Schutzwirkung für Dritte*), which at the same time provides an exception to the otherwise strongly held distinction between contract and tort. The tenet has not only been applied in the area of liability of auditors and attorneys,[65] but also in the area of a bank's duties of care.

In Germany, while liability would normally be restricted to the bank's counterparty, in exceptional circumstances the bank may also be held liable for losses incurred by third parties who do not themselves become party to the contract. Under general principles of contract law, this may be the case where a client informs the bank that its advice will be relied upon by that third party, and where the bank consents to it.[66]

In Austria, this doctrine of *Vertrag mit Schutzwirkung zugunsten Dritter* allows a third party to claim damages resulting from a breach of contractual duties between two other parties. An example is the liability of a bank working as intermediary between the customers and another financial institution as laid down in § 11 KMG. Even though the contract of sale over the investment products is concluded between the customer and the other financial institution, the bank may be held liable for damages caused by wrong information in the product's prospectus, if the bank has acted at least grossly negligently. If both financial institutions violate § 11 KMG, they can be held liable jointly and severally (§ 11(3) KMG).[67]

C. Duties to Investigate

In Italy it is settled case-law that the bank has a duty to investigate, mostly with explicit reference to, and in line with, the regulatory KYC requirements.[68]

[64] See US Chapter, s II.A.ii and see *Lerner v Fleet Bank, NA*, 459 F3d 273 (2d Cir 2006); *Fraternity Fund Ltd v Beacon Hill Asset Mgmt, LLC*, 479 F Supp 2d 349 (SDNY 2007); *Casey v US Bank Nat'l Ass'n*, 127 Cal App 4th 1138, 26 Cal Rptr 3d 401 (Cal Ct App 2005), mentioned in US Chapter, n 81.

[65] van Dam (n 19) s 710-3.

[66] See German Chapter, s IV.B.

[67] See Austrian Chapter, s II.E.

[68] See Italian Chapter, s II.B.

In Germany, in the case of investment advice, there is likewise a duty to investigate, but not so much with explicit reference to regulatory law. The duty to investigate was first established in the *Bond* case, a 1993 landmark decision rendered by the Federal Supreme Court. According to that decision, a provider of investment advice has to investigate the individual client's expertise and past investment experience, as well as his individual risk preferences prior to offering specific advice—and of course the proposed investment must itself be adequate in view of the circumstances. German case-law indicates that the bank may rely on the client's information and, if provided with information requested by the client, is required to pursue further exploration only if and to the extent that it has reason to doubt the correctness. However, if the client, upon request by the bank, responds in an ambiguous way, the bank will need to explore this further and may not simply proceed on the basis of the given response.[69]

According to consistent case-law from the Dutch Supreme Court, the bank must comply with its duty to investigate, and verify the consumer's knowledge and expertise, as well as his financial position, very much in line with, and often even with explicit reference to, the regulatory KYC rules.[70] After having investigated the personal situation of the potential client, it is sometimes even necessary to advise the client not to conclude the relevant financial transaction in case the investigation reveals that the financial means are insufficient to deal with the financial risks which may result from the financial product or service.[71] Admittedly, there is a thin line between a duty to advise the client not to enter into the transaction and a duty to warn the client for the risks involved (on which see section II.D below). This is also apparent from the French chapter, which indicates that initially the French Supreme Court (Cour de Cassation) referred to a duty of advice rather than a duty to warn.[72]

As for KYC requirements, the French Supreme Court has many times decided that whatever the contractual relationship between the client and the bank, the financial institution has the duty to assess the financial situation of the client.[73]

As already indicated in section II.A above, despite the limitations in establishing a duty of care, most claims in England and Wales and Ireland in financial litigation are based on a breach of the bank's duty of care, albeit often unsuccessfully. Be that as it may, depending on the financial product or investment sold, the duty of care could entail a duty to investigate the suitability of the products sold to customers.[74] In England and Wales, as previously mentioned, *private*

[69] See German Chapter, s III.B.ii.

[70] But see s II.B.iii.c, above.

[71] See HR 5 June 2009, *JOR* 2009/199, annotated by Lieverse (*Treek v Dexia Bank Nederland*), consideration 5.2.1. See Dutch Chapter, s II.B.

[72] French Chapter, s IV.B.

[73] French Chapter, s II.A.ii, V.A.

[74] At least in England and Wales, see Chapter England and Wales, s I.C, *in fine*. In the Irish Chapter this is not explicitly mentioned.

(not: commercial) investors who claim that there has been a breach of a common law duty of care may also invoke their statutory right of action under section 138D (previously section 150) of FSMA for breach of regulatory requirements, including a breach of the regulatory KYC rules. Also in Ireland, as previously mentioned, a statutory right of action exists. Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 contains a similar provision, subject to two important differences. First, it provides a statutory basis for an action for damages by customers in general, including commercial parties. Second, it applies to customers who have suffered loss as a result of *any* failure by the financial services provider to comply with its obligations under financial services legislation, and not merely KYC rules and other conduct-of-business rules it contains.[75]

In the US, both investment advisers and broker-dealers providing advice have a strict duty to take into consideration a client's circumstances. As already indicated in section II.A above, this obligation is known as a duty of suitability.[76] The duty requires the adviser or broker to evaluate a client's investment objectives, identify an appropriate level of investment risk and tailor investment recommendations to the risk a client can bear.[77] In respect of broker-dealers the suitability requirement is codified in SRO rules. It 'generally requires a broker-dealer to make recommendations that are consistent with the best interests of his customer'.[78] A broker-dealer must have an adequate and reasonable basis to believe that a securities recommendation is 'suitable for its customer light of the customer's financial needs, objectives and circumstances'.[79] It is not relieved of the duty to make suitable recommendations by a client's consent to an unsuitable transaction.[80] At least as for broker-dealers, there is no private cause of action for violation of the SEC's suitability rule, but courts 'have held that the suitability rule may set brokers' common law duty of care toward clients'.[81]

75 Irish Chapter, s VI.

76 See DeMott and Laby, 'Chapter 13—United States of America' (n 17) § 13.66, at fn 80 referring to NASD, r 2310 (1996), which, effective 9 July 2012, has become FINRA, r 2111; Suitability of Investment Advice Provided by Investment Advisers; Custodial Account Statements for Certain Advisory Clients, Advisers Act Release, No 1406, 1994 WL 84902 (16 March 1994).

77 See DeMott and Laby (n 17) 13.66.

78 See US Chapter, s III.C.ii.b, n 234 to an SEC Study (citing SRO rules) at 59.

79 See US Chapter, s III.C.ii.b, n 235 to an SEC Study (citing SRO rules) at 61.

80 See US Chapter, s III.C.ii.b, n 236 to an SEC Study (citing SRO rules) at 62. See US Chapter, s III.C.ii.b. See also on suitability DeMott and Laby (n 17) § 13.66–13.69. For the sake of clarity, in the chapters on Austria and Spain no civil litigation is mentioned on breach of KYC requirements.

81 See US Chapter, s III.C.ii.b, n 239 referring to *Ives v Ramsden*, 142 Wash App 369, 390, 174 P3d 1231, 1242 (Wash Ct App 2008) (collecting cases); see eg *Scott v Dime Sav Bank of NY, FSB*, 886 F Supp 1073, 1080–81 (SDNY 1995) (upholding negligence claim based on evidence of violation of suitability rule); *cf Merrill Lynch, Pierce, Fenner & Smith, Inc v Chen*, 697 F Supp 1224, 1227 (DDC 1998) (violation of suitability rule 'will not automatically result in [broker] being held liable for negligence' but 'would simply be a factor for consideration by the jury as to whether he acted as a "reasonable" person').

D. Duties to Disclose or Warn

In French law it is settled case-law that banks have a duty to warn their clients of the risks involved in a financial transaction, unless the client knows the risks.[82] In Germany, it follows from the *Bond* judgment[83] that in the case of investment advice, banks are generally also subject to a duty to warn clients. Generally they are required to warn clients if, on the basis of the necessary exploration of their individual expertise and risk profile, they perceive the client to be unaware of specific risks arising in the context of a proposed investment. Likewise, a bank has been held to be under an obligation to warn the client against the risk that potential losses from a certain (credit-funded) investment may exhaust the client's financial resources. This is also consistent with the general principle that investment advice will not be considered to be commensurate with the client's profile if it does not properly take into account his financial means. If the bank is aware of financial irregularities or criminal conduct on the part of the issuer or sponsor of financial products, it must also warn the client accordingly. By contrast, no duty to warn clients has been held to exist if, as a rule, the bank recommends only its own financial products. No duty to warn exists once the advice has been given and the client has placed an order accordingly. While this would be arguable in special circumstances under general principles of contract law, the courts have so far denied that such duties exist in cases where the market price of a proposed investment deteriorated later and held that the bank was under no obligation to continually monitor market developments with regard to recommended securities after the advice was given.[84]

In more general terms, under German law, again as part of their duties as spelled out in the *Bond* case, banks engaging in contracts for investment advice have a duty to inform their clients of all aspects that are material for their investment decision. All information given has to be accurate, prompt and prior to the execution of the client's order, complete and comprehensible given the individual client's profile. In providing the advice, the bank may rely on information provided by issuers of securities, but its duty to inform typically requires more than merely passing on information material provided by the issuer. So if the bank is aware of adverse information concerning the respective issuer or the investment itself, it must not conceal it. It follows from a steady flow of German case-law that the nature and content of information will be deemed to be dependent on the client's expertise and needs in each particular case, so that it is almost impossible to define general standards in this context. Nevertheless, as a rule banks are required to inform the client both of the general risks associated with any type

[82] See French Chapter, s II.A.i, s III.B, s IV.
[83] BGH 6 July 1993—XI ZR 12/93, reported in BGHZ 123, 126.
[84] See German Chapter, s III.B.v.

of investment in given market circumstances and specific types of risk associated with the proposed investment. The more complex the structure of the recommended investment is, the higher the required standard of information will be in this context. Likewise, banks will generally be required to inform their client if the proposed investment entails the risk of full loss of the invested capital. It follows from German case-law that, as a rule, clients must be made aware of the speculative nature of an investment. Also, the bank must inform their clients of conflicts of interest that may affect their advice and have a bearing on the clients' return on investment. A conflict of interest does not exist merely because of the bank's profit or trade margins, as it would be entirely unrealistic and inappropriate for the client to assume that the bank's services are offered pro bono. But the bank does have to inform the client if it has structured the recommended product in such a manner that it facilitates a hidden profit to itself, which the client has no reason to suspect ex ante. In particular, banks are required to disclose kick-back fees even if these are mentioned in the prospectus on the recommended investment, except where the prospectus itself also specifies the size of the kick-back that will be payable to the bank.[85]

In Italy, the duties to inform and warn again closely follow the MiFID rules. But not entirely, so it seems. Article 31 of Consob Regulation 16190 (Information on financial instruments) provides that intermediaries shall provide customers or potential customers with 'a general description of the nature of risks involved with the financial instruments concerned'. Such description, in practice, is provided through a standard form delivered to clients. Nevertheless, according to some Italian case-law the delivery of such document is per se insufficient and the bank would be in default of its duty to inform.[86] So, it seems that a standardised warning for the risks is insufficient, although this is permitted under Article 19(3) of MiFID as implemented in Article 31 of Consob Regulation 16190. Also in Austria claims for damages for breach of duties to warn or inform are filed against banks, although a claim based on mistake or fraud is more common; see section III below.[87]

In the Netherlands, the special duty of care towards consumers typically results in duties to warn explicitly and unequivocally for the specific risks involved in a financial transaction, even alongside a duty to advise the client not to enter into the transaction after having investigated the personal situation of the potential client (on which see section II.C above). More recent Dutch Supreme Court case-law indicates that warning explicitly and unequivocally of the specific risks involved in a financial transaction is in itself not even sufficient: the bank has to verify that the consumer actually understands the warning given by the bank (verification duty). This means that the bank may be obliged to ask control questions so as to make sure the retail client genuinely understands the risks. The verification duty seems

[85] See German Chapter, s III.B.iii.
[86] See Italian Chapter, s II.C.
[87] See Austrian Chapter, ss II.C and II.D.

to imply that the bank should meet the client in person or at least that there is a more or less elaborate telephone conversation with the client to discuss the investment proposition.[88]

As already indicated in section II.A above, despite the limitations in establishing a duty of care, most claims in England and Wales and Ireland in financial litigation are based on a breach of the bank's duty of care, albeit often unsuccessfully. Be that as it may, depending on the financial product or investment sold, the duty of care could entail a duty to warn customers of the risks of investing in products sold to customers.[89] *Private* (not: commercial) investors who claim that there has been a breach of the duty of care at common law may also additionally invoke their statutory right of action of Section 138D (previously section 150) of FSMA for breach of regulatory requirements, including a breach of the regulatory information duties. Ireland also knows a statutory right of action. Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 contains a similar provision, subject to two important differences. First, it provides a statutory basis for an action for damages by 'customers' in general, including commercial parties. Second, it includes customers who have suffered loss as a result of *any* failure by the financial services provider to comply with its obligations under financial services legislation, and not merely regulatory information duties and other conduct-of-business rules it contains.[90]

As for the US, as already indicated in section II.A above, Section 206 of the Investment Advisers Act of 1940 establishes a statutory fiduciary duty for investment advisers to act for the benefit of their clients, including duties to disclose all material facts, and to employ reasonable care to avoid misleading clients.[91] While holding that the Advisers Act 'establishe[d] 'federal fiduciary standards to govern the conduct of investment advisers',[92] the Supreme Court has also held that 'that there exists [only] a limited private remedy under the [Advisers Act] to void an investment adviser's contract, [and] the Act confers no other private causes of action, legal or equitable'.[93] Thus, litigation to enforce the fiduciary standards established by the Advisers Act is limited to SEC enforcement actions, and

[88] HR 24 December 2010, *NJ* 2011/251 (*Fortis/Bourgonje*); HR 2 February 2012, *NJ* 2012/95 (*Rabobank/X.*); HR 14 August 2015, *NJ* 2016/107 (*Brouwer/ABN AMRO*). See Dutch Chapter, ss II.C, IV.C and V.B.

[89] See Chapter England and Wales, s I.C, *in fine*.

[90] See Irish Chapter, s VI.

[91] See US Chapter, s III.C.ii.a and esp where reference is made to the seminal *Capital Gains* case (375 US 180 (1963)).

[92] See US Chapter, s III.C.ii.a and see n 220 where reference is made to *Transamerica Mortg Advisors, Inc*, 444 US at 17.

[93] See US Chapter, s III.C.ii.a and see n 221 where reference is made to *Transamerica Mortg Advisors, Inc*, 444 US at 24. n 224 also mentions that as amended in 1970, the Advisers Act also 'impose[s] upon investment advisers a "fiduciary duty" with respect to compensation received from a mutual fund, 15 U.S.C. § 80a-35(b), and grant[s] individual investors a private right of action for breach of that duty, *ibid*'; *Jones v Harris Assocs LP*, 130 S Ct 1418, 1423 (2010).

private damages claims for breaches of an investment adviser's fiduciary duties or negligence are a matter of state law.[94]

Broker-dealers are subject to the anti-fraud provisions of the Securities Exchange Act of 1934, broadly prohibiting misleading omissions of material facts as well as affirmative statements and fraudulent or manipulative acts or practices.[95]

E. Duty to Refuse?

An outright duty to refuse to transact or advise a client is considered a bridge too far in most of the jurisdictions covered in this book—the principle of freedom of contract is often still paramount in this context.

In Austria, the predominant view in legal doctrine is that a bank is subject to a duty to warn if a product is not suitable or appropriate for the customer, but there is no prohibition against selling these products, if a customer insists on buying such despite any warnings.[96] German law is no different in this respect.[97] Irish law is also similar. In the case of *Allied Irish Banks Plc v Pierse & Anor*,[98] the High Court rejected an argument that a bank owed a duty to provide advice in relation to a client's agreement to purchase the foreign properties financed by way of a loan facility that they were seeking in respect of a concluded land sale agreement with one of the bank's other customers, a developer. Keane J did not express a view on what he described as the 'novel argument' that the bank was under a duty to decline a customer's application for finance in respect of any transaction in which another customer is involved if there is any basis for concern on the part of that bank regarding the financial position of that other customer. He explained that even if it were accepted as a correct statement of the law, there was no evidence before him that the bank knew or ought to have known about the developer's financial position.[99] In the chapters on England and Wales and the US the possibility of a duty to refuse is not even mentioned as a theoretical option.

[94] See US Chapter, s III.C.ii.a and see n 222 where reference is made to *Davis v Merrill Lynch, Pierce, Fenner & Smith, Inc*, 906 F2d 1206, 1215 (8th Cir 1990) ('The question of whether a fiduciary relationship exists is a question of state law'.) and *Stokes v Henson*, 217 Cal App 3d 187, 265 Cal Rptr 836 (Cal Ct App. 1990) (affirming judgment against investment adviser for breach of fiduciary duty under California law).

[95] See US Chapter, s III.C.ii.b.

[96] See Austrian Chapter, s III.C. Although one Austrian author has argued that in a very specific case the bank is obliged to refuse to carry out the customer's instructions. See Austrian Chapter, s III.C.

[97] See German Chapter, s III.B.i. In Germany there is case-law indicating that if the client requests specific information on an investment for which the bank does not have significant experience, it *may* (not: must) refuse to provide the requested advice on these grounds and will not be held liable if the client nonetheless engages in the relevant transaction. See German Chapter, s III.B.i, referring in n 58 to BGH 11 November 2003—XI ZR 21/03, reported in BKR—*Zeitschrift für Bank– und Kapitalmarktrecht* 2004, 124, 126.

[98] [2015] IEHC 136.

[99] See Irish Chapter, s II.E.

In Dutch case-law an outright duty to refuse has explicitly been accepted, albeit in one specific instance. The Dutch Supreme Court has explicitly accepted that in case a consumer-client is not prepared or able to provide sufficient margin for options transactions he wants to execute, the bank violates its special duty of care as soon as the bank executes the options transaction notwithstanding that the client furnished no or insufficient margin. As a consequence, if the option transaction turns out to be a loss, the bank will be liable to pay damages. It should however be noted that the amount payable in these cases is often reduced owing to the client's contributory negligence, for example if the consumer-client ignored warnings on the part of the bank. In this context it is worth mentioning that the Dutch Supreme Court has held several times that negligence of the retail client resulting from his/her frivolity of lack of understanding in principle weighs less heavily than negligence of the bank.[100]

Furthermore, the Italian and French chapter both note the national implementation of Article 35(5) of the MiFID I Implementing Directive, which provides that when advisers and asset managers are unable to obtain the information concerning the client's financial position and investments objectives, they must refuse to provide such services.[101]

Finally, it is noteworthy that in Spain the civil law notary plays an important role in the provision of consumer loans. When granting the notarial instruments that formalise a consumer loan, the notary should not only inform and warn the customers of the most relevant points of the contract, but also check as to what extent the credit institution has respected its duties to warn. What is more, the notary should refuse the authorisation of the loan when he considers that the credit institution has not respected these duties (Article 30.3 of Order EHA/2899/2011).[102]

III. Applications of the Doctrine of Mistake and Fraud

In Spain, the parties often resort to the doctrines of mistake and fraud to resolve disputes between banks and customers. As the authors of the Spanish chapter

[100] See HR 23 May 1997, *NJ* 1998/192 (*Rabobank/Everaars*); HR 11 July 2003, *NJ* 2005/103 (*Kouwenberg/Rabobank*); HR 26 June 1998, *NJ* 1998/660 (*Van de Klundert/Rabobank*); HR 23 March 2007 *NJ* 2007/333 (*ABN AMRO/Van Velzen*) and HR 4 December 2009, *NJ* 2010/67 (*Nabbe/Staalbankiers*), on which see Dutch Chapter, ss II.A, IV.D and VI.F.i. Please note that under Dutch law a duty to refuse to enter into an agreement may also arise with respect to credit agreements between banks and consumers, when a bank concludes that a particular consumer is insufficiently creditworthy. This obligation is in line with Wft, Art 4:34, s 2. See Dutch Chapter, s IV.D.

[101] Italian Chapter, s II.B; French Chapter, s V.A, *in fine*. See on Art 35(5) of the MiFID I Implementing Directive/Article 54(8) of the Draft Commission Delegated Regulation MiFID II, C(2016) 2398 final, 25 April 2016, Ch 2, s VIII.B, *in fine*. See extensively on the private law effect of MiFID I and II, s IV below.

[102] Spanish Chapter, s IV.

indicate, it is perfectly possible to base a duty of loyalty and cooperation on the principle of good faith (Article 1258 of the Spanish Civil Code). At the same time the authors explain that any specification in a given situation of the scope of good faith and the consequent duty of loyalty is not simple or exempt from uncertainties. Consequently, according to the Spanish authors, this principle does not represent a secure foundation and shall always be a last resort option. In recent times, the Spanish Supreme Court (Tribunal Supremo de España) has consistently applied the traditional doctrine of error in cases involving interest rate swaps concluded between banks and their clients. In these cases, the alleged error was basically caused by a lack of information. A much-cited decision of 20 January 2014 was the first to accept that non-compliance with the MiFID duties of information and the MiFID KYC rules may perhaps not be the cause of the error, but makes a mistake on the side of the customer a presumable option.[103]

In Austria, the focal point of financial litigation also appears to be the avoidance of the contract for mistake or fraud, although perhaps less than in Spain, and sometimes successful and sometimes not.[104] In a successful claim against Constantia based on avoidance for mistake the OGH found that there was a violation of duties to inform arising from regulatory provisions applicable to the relevant financial contract. Therefore Constantia had caused a relevant mistake and the claimant was entitled to avoid the contract and the price of the investment was to be paid back.[105] So like in Spain, the test revolves around duties of information. In 2014, the OGH decided over a case against Meinl Bank (MEL). Here, a customer inter alia claimed that he had been purposely misled (*List*), a line of argument that also leads to the long period of limitation of 30 years. The OGH granted the claim, which leads the authors of the Austrian chapter to the assumption that MEL will continue to be subject of a vast number of disputes in the future.[106]

As indicated above, duties to warn are a prominent feature of the bank's duty of care in the Netherlands. But recently the Amsterdam Court of Appeal revived the doctrine of mistake in connection with interest rate swaps.[107] At the time of writing it is not clear whether the Dutch Supreme Court agrees with this approach. In another prominent case regarding the bank's duty of care, the argument of

[103] See Spanish Chapter, ss II and III, *in fine*. Based on Bachs and Ruiz (n 5) and the Spanish case-law they mention, this appears to be different in the context of banks (and other financial institutions) providing asset management services, where damages are awarded on the basis of breach of contract or tort law. See § 9.59–9.80.

[104] See Austrian Chapter, ss I.B, I.C and I.F.

[105] 6 Ob 116/11v., on which Austrian Chapter s I.C.

[106] 6 Ob 203/13s., on which Austrian Chapter, s I.G.

[107] See Amsterdam Court of Appeal 15 September 2015, ECLI:NL:GHAMS:2015:3842, *Ondernemingsrecht* 2016/37 with annotation by Arons, *JOR* 2015/334 with annotation by Atema & Hopman (*X/ING BANK NV*); Amsterdam Court of Appeal 11 November 2015, ECLI:NL:GHAMS:2015:4647, *JOR* 2016/37 with annotation Van der Wiel & Wijnberg; Court of Appeal Amsterdam 11 October 2016, case number 200.153.823/01 (*X Vastgoed B.V./ABN AMRO NV*). See on these cases Dutch Chapter, ss II.E and VII.C.

mistake was rejected and the Dutch Supreme Court resorted to a breach of duty of care for not warning the client explicitly enough for the special risks involved.[108]

Finally it should be noted that in Italy, some lower courts previously held that a financial contract entered into by the customer on the basis of false or erroneous information provided by the bank can be annulled, under the doctrine of mistake or fraud. However, since the decision rendered by the United Chambers of the Italian Supreme Court in the leading case n 26724 on 19 December 2007, this should no longer be the case. With reference to the nature of the liability of intermediaries for having breached the duty of care towards their investors, the United Chambers of the Italian Supreme Court excluded that it leads to the invalidity of the investment contract.[109]

IV. The Impact of MiFID I and II on a Bank's Duty of Care

A. General

Banks providing asset management services, investment advice or execution-only services have been subject to the Markets in Financial Instruments Directive (MiFID I) since 1 November 2007.[110] On 3 January 2018—some 10 years later—the MiFID I regime will be replaced by MiFID II (in the remainder of this chapter, MiFID I and II are collectively referred to as MiFID).[111] MiFID contains a general duty of loyalty, which has to some extent been defined in more specific conduct-of business-rules for banks that provide investment services, including detailed

[108] HR 5 June 2009, *JA* 2009/116 (*Levob Bank/Bolle*) considerations 4.5.6–4.5.7; HR 5 June 2009, *JOR* 2009/199 with annotation by Lieverse; *JA* 2009/117 (*Treek/Dexia Bank Nederland*) considerations 4.10.1–4.10.4; HR 5 June 2009, *JOR* 2009/200; *JA* 2009/118 with annotation by Van Boom (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*) considerations 4.6.4–4.6.13. See on these cases Dutch Chapter, ss II.B and VII.C.

[109] See Italian Chapter, ss III.A and III.B.i.

[110] The MiFID I regime at level 1 and 2 is composed of 3 measures: (1) Directive 2004/39/EC [2004] OJ L145/1; (2) Commission Regulation (EC) No 1287/2006 [2006] OJ L241/1; (3) Commission Directive 2006/73/EC [2006] OJ L241/26. It should be noted that not all Member States of the European Union and countries forming part of the European Economic Area succeeded in implementing the MiFID regime as of 1 November 2007.

[111] The MiFID II regime at level 1 and 2 is composed of the following measures: (1) Directive 2014/65/EU [2014] OJ L 173/349 (MiFID II); (2) Regulation (EU) No 600/2014 [2014] OJ L 173/84 (MiFIR); (3) a truly impressive number of implementing measures. Initially, MiFID II/MiFIR stipulated that the bulk of the new legislation would become binding on the financial sector as per 3 January 2017, but this has been postponed until 3 January 2018 by means of a directive and a regulation published in the OJ on 23 June 2016, see (1) Directive 2016/1034/EU [2016] OJ L 175/8; (2) Regulation (EU) No 2016/1033 [2016] OJ L 175/1.

duties to investigate (KYC rules) and duties to inform.[112] As may be gleaned from the chapters on the EU jurisdictions included in this book, it is now commonly accepted that these regulatory rules, especially the conduct-of-business rules, help to define the pre-contractual and contractual duty of care of banks under private law. Moreover, in many jurisdictions, an infringement of national implementing provisions can constitute not only a breach of the civil duty of care but also a tort (unlawful act) for breach of a statutory duty. It should also be noted that duties of care under public law and other regulatory provisions are regularly explicitly incorporated into the contract, with all the contractual consequences that this entails.

However, the chapters on the EU jurisdictions contained in this book also show that the exact impact of MiFID on a bank's duty of care is largely unsettled. As will be shown below, there are considerable differences among the Member States regarding MiFID's impact on a bank's duty of care and, more broadly, its civil liability. Moreover, in many cases, national private law provides little clarity either. Below, we will explore MiFID's influence in the EU jurisdictions covered by this book on (1) a bank's private law duties, including the bank's duty of care; (2) the requirement of proximity or relativity in the Members States where this is a requirement for liability in tort; (3) proof of causation; and (4) the validity of limitation and exclusion clauses in contracts between banks and their customers. For each of the above topics, we will first provide a comparative overview of the impact on the relevant element of the bank's duty of care or its civil liability as perceived in the EU jurisdictions in this book. Subsequently, we will, again for each of the above topics, examine to what extent the civil courts are bound by MiFID under EU law.

B. Breach of MiFID Duties

This section particularly applies to the EU jurisdictions covered in this book. In all of these jurisdictions, a violation of a financial regulatory rule (such as implemented following MiFID) may lead to the conclusion that the bank is in breach of its private law duties.

The rules for liability based on the violation of a statutory rule differ substantially throughout the legal systems.[113] First, as was already mentioned, the relationship between the violation of a statutory rule and the general liability rules differ. In France, violation of a statutory duty is just another way of establishing a *faute*, in addition to the violation of unwritten law. In Germany, the violation of a statutory rule (§ 823 II BGB) is intended to supplement the possibilities for liability under

[112] MiFID I, Art 19(1); MiFID II, Art 24(1). See for more detail on the MiFID conduct-of-business rules ch 2 of this book.

[113] van Dam (n 19) s 906-1.

§ 823 I BGB (infringement of a right), whereas in England, breach of statutory duty is distinct from the tort of negligence and does not supplement it.

Second, for a breach of statutory duty to be successful in English law, it is required that the legislator, when issuing the statutory rule, intended to provide claimants with an action for damages in tort. This is called the private right of action. Continental European jurisdictions do not know such a requirement but the Germanic legal systems, including the Dutch legal system, require somewhat similarly that the statutory rule aims to protect the victim against the damage he has suffered. This is known as the relativity requirements. However, these differences should not be exaggerated. It can be argued that the requirement of the private right of action is an aspect of the scope of the statutory rule. If a statutory rule does not confer rights on individuals, not one individual is protected; in such a case, the statutory duty is to be fulfilled in the public interest only. Nevertheless, if a rule does confer rights on individuals, the scope issue refers to the question whether the claimant belongs to the class of protected individuals.

Third, even though in French legal systems the scope of a statutory rule is not relevant for establishing a *faute*, it requires a direct and certain causal connection between the harm suffered and the breach of the statutory duty.[114] Hence, in a number of cases one could argue that, if the statutory provision does not in fact aim to protect the victim against the damage suffered, it is likely that the requirement of causation is not fulfilled.

How does this general picture translate into liability for violating financial regulatory rules? In France, a violation of a regulatory duty constitutes a fault, be it in contract or in tort. This means a client may directly invoke a breach of conduct-of-business rules before a civil court and claim damages on that basis. This is easily achieved because no clear distinction between private and public law is drawn in France in this area.[115] In Italy, regulatory duties have a dual nature because they are considered both public and private law duties that a bank owes its clients. Thus, in Italy, a breach of regulatory duties directly triggers private law liability under general rules of civil liability.[116] Also in the Netherlands, the bank's violation of

[114] ibid, ss 904 and 1105.

[115] See explicitly A Couret, P Goutay and B Zabala, 'Chapter 3—France' in Busch and DeMott (n 5) § 3.46.

[116] See explicitly P Giudici and M Bet, 'Chapter 5—Italy' in Busch and DeMott (n 5) § 5.42, 5.62. Cp also Italian Chapter, s I, s II. However, one special rule applies. Art 23(6) of the Consolidated Law on Finance and Intermediaries (CLFI) imposes a special rule regarding the burden of proof. In actions for damages caused to investors in the performance of investment services, the burden of proof concerning diligence always lies on the intermediaries' shoulders. Therefore, the client must show the existence of a pre-contractual or contractual relationship, loss and a causal relation between the loss and the bank's failure in performance or breach of contract. The client can simply allege the occurrence of a failure in performance or a breach of contract, while the bank must offer evidence establishing its compliance with its legal and contractual duties. See Italian Chapter, s III.B.ii; Giudici and Bet, 'Chapter 5—Italy' (n 116) § 5.66.

regulatory duties is tortious on the ground that it constitutes a breach of statutory duty (Article 6:162 DCC).[117]

In England and Wales and Ireland, a client's claim for damages can be based directly on the manager's violation of MiFID duties, particularly the conduct-of-business rules. In England and Wales, it explicitly follows from section 138D (previously 150) of FSMA that a breach of the FCA's (previously FSA's) conduct-of-business rules under Part X, Chapter I of FSMA (which includes the implementation of organisational or conduct-of-business rules pursuant to MiFID) is directly actionable at the suit of a 'private person' (ie a non-professional, or private, investor), subject to the defences and other incidents applicable to breach of statutory duty.[118] Section 44 of the Central Bank (Supervision and Enforcement) Act 2013 contains a similar provision, subject to two important differences. First, it provides a statutory basis for an action for damages by 'customers'[119] in general, including commercial parties. Second, it includes customers who have suffered loss as a result of *any* failure by the financial services provider to comply with its obligations under financial services legislation, and not merely the conduct-of-business rules it contains.[120]

In Austria and Germany, a client can also achieve a direct impact of a violation of MiFID duties on the bank's private law liability. In these jurisdictions, a breach of (in particular) the conduct-of-business rules directly constitutes a breach of a private law duty, even in the absence of an explicit provision such as section 138D FSMA or section 44 of the Central Bank (Supervision and Enforcement) Act 2013 (see above) and even though the regulatory duties are not normally considered to have a private law nature. In Austria and Germany, the courts are reluctant to accept that regulatory rules aim to protect a claimant's patrimonial interests.[121]

A bank's breach of MiFID duties may also have an indirect effect on the bank's private law liability. In Austria and Germany, a violation of regulatory rules may indirectly affect the bank's contractual liability. In Germany, academics increasingly ascribe either a 'radiating' or a 'concretising' effect to regulatory duties in relation to the law of contract. All versions of these theories assume that regulatory duties influence the construction of the bank's contractual duties. This is possible because the private law duties are often 'open norms' that are expressed

[117] See Dutch Chapter, s V.A; D Busch and LJ Silverentand, 'Chapter 7—The Netherlands' in Busch and DeMott (n 5) § 7.90–7.92. Special tort provisions may also apply in this context. See Dutch Chapter, ss V.A, VI.B.v and VI.B.vi; Busch and Silverentand (n 117) § 7.121–7.128.

[118] See Chapter on England and Wales, s II.A, *in fine*. See also LD van Setten and T Plews, 'Chapter 11—England and Wales' in Busch and DeMott (n 5) § 11.67–11.68.

[119] s 3(1) of the Act defines a 'customer' in relation to a regulated financial service provider as '(a) any person to whom the regulated financial service provider provides or offers financial services, or (b) any person who requests the provision of financial services from the regulated financial service provider, and includes a potential customer and a former customer'.

[120] See Irish Chapter, s VI. For a discussion on breach of regulatory duties prior to the enactment of s 44 of the Central Bank (Supervision and Enforcement) Act 2013, see A Bates and B Clarke, 'Chapter 12—Ireland' in Busch and DeMott (n 5) § 12.100–12.103.

[121] See Austrian Chapter, s II.D; German Chapter, s III.A.iii; M Casper and C Altgen, 'Chapter 4—Germany' in Busch and DeMott (n 5) § 4.97–4.99.

in indeterminate legal terms. Therefore, regulatory duties derived from MiFID may serve as a model for interpreting private law duties, such as the standard of care. The contract or a pre-contractual relationship remains the link for liability, although a bank's duties and standard of care are also determined by public law duties.[122]

Likewise, in addition to the direct impact discussed above, a violation of MiFID duties has an indirect effect in the Netherlands. Under Dutch law, the courts frequently specify this duty of care by referring to regulatory duties imposed on the bank, particularly the conduct-of-business rules which apply prior to and during the term of the contract.[123] The breach of regulatory duties that apply prior to the conclusion of the contract in principle amounts to a violation of the pre-contractual duty of care. Such a violation is a tort because it constitutes an act or omission breaching a rule of unwritten law that pertains to proper social conduct.[124] The bank's breach of the regulatory duties applying during the term of the contract in principle amounts to a violation of the duty of care during the contractual term. Such a violation can amount to a tort or to a failure in the performance of a contractual obligation.[125]

Similarly, in Spain, England and Wales and Ireland, the MiFID duties, particularly the conduct-of-business rules, may specify a baseline for the private law standard of care expected from banks. Thus, a breach of regulatory duties may result in a breach of contract, a tort, or a breach of fiduciary duty.[126]

Finally, at least in Italy, the Netherlands and Ireland, and at least asset management agreements, especially those concluded with institutional clients (such as pension funds and insurance companies), may expressly incorporate regulatory duties. Regulatory duties thereby become normal contractual duties carrying all the usual consequences in case of a breach.[127]

One of the main obstacles for concluding that breach of a statutory duty constitutes the breach of a private law duty is the requirement of proximity or relativity or, in common law, the private right of action. In contrast to Austria, Germany

[122] See Austrian Chapter, s II.B; German Chapter, s III.A.iii; Casper and Altgen, 'Chapter 4—Germany' (n 121) § 4.39.

[123] See Dutch Chapter, s V.A; Busch and Silverentand (n 117) § 7.58.

[124] See DCC, Art 6:162(2).

[125] See Dutch Chapter, ss V.A, VI.B.ii, VI.B.v, VI.B.vi and VI.C.ii; Busch and Silverentand (n 117) 7.91–7.92, 7.104–7.105. Please note that a tort claim can also be based directly on a violation of such regulatory rules, in which case the violation of regulatory duties can amount to a tort on the ground that it constitutes an act or omission breaching a statutory duty. See main text above.

[126] See explicitly for Spain: Bachs and Ruiz (n 5) § 9.29–9.33, 9.63–9.67; see explicitly for England and Wales: van Setten and Plews, 'Chapter 11—England and Wales' (n 118) § 11.24–11.25; see explicitly for Ireland: Bates and Clarke, 'Chapter 12—Ireland' (n 120) § 12.79, 12.84, 12.87, 12.95. Please note that, in the case of England and Wales, and Ireland, a direct impact of regulatory law on the bank's private law liability is also possible, see FSMA, s 138D (previously s 150) (England and Wales) and the Central Bank (Supervision and Enforcement) Act 2013, s 44 (Ireland), discussed in the main text above.

[127] See Giudici and Bet (n 116) § 5.42; Dutch Chapter, s V.A; Busch and Silverentand (n 117) § 7.58; Bates and Clarke (n 120) § 12.68–12.74, 12.79.

the Netherlands and England and Wales, no relativity requirement is imposed in France.[128]

In the Netherlands, a tort claim cannot succeed in the absence of 'proximity' or 'relativity' (*relativiteit*) (Article 6:163 DCC). In the present context, this means that a regulatory duty must aim to protect the claimant's patrimonial interests. In the Netherlands, the legislator has explicitly stated that regulatory law rules, including the conduct-of-business rules, are intended to protect a claimant's patrimonial interests.[129]

In Austria and Germany, however, the courts are reluctant to accept that regulatory rules aim to protect a claimant's patrimonial interests. There is considerable academic debate in Germany as to whether regulatory rules aim to protect not only the public interest but also specific individual interests. According to the majority view, at least some regulatory duties can be considered as being imposed by protective statutes, depending on the characteristics of each duty. The courts are taking a similarly nuanced approach.[130]

In Austria, for a statute to qualify as a protective statute, it must be the law's intent to protect a victim against damages typically caused by the forbidden behaviour. So far, the highest Austrian court has not held that any of the financial regulatory rules are to be considered protective statutes.[131]

England and Wales also, at least in a functional sense, requires 'proximity', because section 138D FSMA (discussed above) makes it explicit that only the FCA's organisational or conduct-of-business rules under Part X, Chapter I of FSMA are directly actionable, and only at the suit of a 'private person' (ie a non-professional, or private, investor), not professional investors. This means that only private investors have a private right of action to sue financial institutions on the basis of the violation of regulatory rules. Hence, professional investors are not directly protected by the regulatory rules, in contrast to Ireland which does allow professional investors a statutory right of action.[132]

In conclusion, although in all legal systems breach of statutory duty is a possible avenue for the bank's liability, considerable formal limitations apply in Germany and Austria on the basis of 'relativity' and in England and Wales on the basis of the lack of a private right of action. This once again calls into question the level playing field throughout Europe when it comes to privately enforcing MiFID rules.

Another problem with the harmonising aims of MiFiD occurs if one asks the question: to what extent exactly does MiFID influence the breach of private law duties?

[128] See V Colaert, 'De rechtsverhouding financiële dienstverlener—belegger' (PhD Leuven, 2011) 145; M Tison, 'The Civil Law Effects of MiFID in a Comparative Perspective' in S Grundmann et al (eds), *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010, Unternehmen, Markt und Verantwortung. Band 2* (Berlin: De Gruyter, 2010) 2621–3269, 2631.

[129] See DCC, Art 6:163, on which see Dutch Chapter, s VI.B.iv; Busch and Silverentand (n 117) § 7.99.

[130] See Austrian Chapter, s II.D; German Chapter, s III.A.iii; Casper and Altgen (n 121) § 4.97–4.99.

[131] See Austrian Chapter, § II.D.

[132] See Irish Chapter, s VI.

C. May Civil Courts be Stricter than MiFID?

i. Comparative Law

Are civil courts allowed to be stricter or more demanding than MiFID? In Italy, Spain, Ireland and England and Wales, this seems to be the case: the civil courts appear to subject banks to private law duties that are stricter or more demanding than the MiFID duties.[133]

The situation in France is unclear. Some French authors are of the view that the civil courts in France are not allowed to subject banks to duties that are stricter or more demanding than the applicable regulatory duties, and they explain this result by reference to the principle of strict interpretation of financial rules, on the basis of which *contra legem* decisions (eg decisions that are stricter than the law) are not permitted.[134] Other authors still see some room for private law duties which are stricter than the MiFID duties.[135]

The situation is much debated in Germany, but is likewise unclear. Some authors assume that the civil courts may not be stricter than MiFID, because MiFID was intended to achieve maximum harmonisation. Thus, public law binds private law courts. Others argue that harmonising public law regulation of banks does not (necessarily) preclude stricter private law duties.[136]

Finally, the situation in the Netherlands is also unclear. In 2009, in the *Dexia* case and in two other decisions handed down on the same date, the Dutch Supreme Court ruled that, in the circumstances of the case, the private law duty of care could be stricter than the public law duties of care contained in the conduct-of-business rules.[137] However, these decisions did not concern the conduct-of-business rules implementing the *maximum* harmonisation regime of MiFID, but rather the conduct-of-business rules implementing the *minimum* harmonisation regime of its predecessor, the Investment Services Directive (ISD). It should be noted that the conduct-of-business rules pursuant to ISD were very basic. Only one provision, Article 11, dealt with conduct-of-business rules. In view of this, it is an open question in the Netherlands whether the civil courts can impose a private law duty of care that is stricter than the regulatory rules implementing the current MiFID regime.

The Dutch legal literature is divided on this issue. Some Dutch authors argue that for the sake of legal certainty, and in view of MiFID's purpose a European

[133] See explicitly Giudici and Bet (n 116) § 5.43–5.44; Bachs and Ruiz (n 5) § 9.30, 9.63 (Spain); Spanish Chapter, s III; Bates and Clarke (n 120) § 12.86; van Setten and Plews (n 118) § 11.27.

[134] See Couret, Goutay and Zabala, 'Chapter 3—France' (n 115) § 3.46.

[135] See French Chapter, s IV.A.

[136] See for an overview of the discussion in Germany, Casper and Altgen (n 121) § 4.38. See also German Chapter, s III.A.iii.

[137] HR 5 June 2009, *NJ* 2012/182; *JOR* 2009/199 with annotation by Lieverse (*De Treek/Dexia Bank Nederland*) consideration 4.11.5; HR 5 June 2009, *NJ* 2012/183; *JA* 2009/116 (*Levob Bank/Bolle*) consideration 4.5.8; HR 5 June 2009, *NJ* 2012/184 with annotation by Vranken; *JOR* 2009/200 (*Stichting Gedupeerden Spaarconstructie/Aegon Bank*) consideration 4.6.10.

level playing field and the idea of maximum harmonisation, it should not be possible for civil courts to impose a higher or stricter standard than the conduct-of-business rules contained in MiFID.[138] Other Dutch authors argue that the civil courts can impose a higher or stricter standard, based on an alleged autonomy of private law. After all, these authors argue, MiFID only harmonises regulatory law, not private law. This autonomous position of private law is important, they argue, because the ex ante application of regulatory law may lead to ex post solutions that are unacceptable in the circumstances of a specific case. According to these authors, the *Dexia* case would provide an excellent illustration.[139] The argument that the European civil courts cannot render justice in individual cases because the MiFID duties are inflexible has been rejected as unconvincing by some authors, because important MiFID duties are principles-based. A well-known example is Article 19, providing that a bank must act honestly, fairly and professionally in accordance with the best interests of its clients. It is argued in the legal literature that this and other principles-based provisions give the civil courts sufficient latitude to render justice in individual cases, although, these authors claim, for the sake of legal certainty, the principles-based duties under MiFID should be used with caution.[140]

As for German case-law, it is notable that in 2010 the German Higher Regional Court in Düsseldorf explicitly rejected the view that the civil courts may not impose stricter duties than MiFID.[141] The court ruled that the famous *Bond* judgment (which is stricter than MiFID)[142] is still valid law under MiFID. As regards Dutch law, one cannot rule out that the civil courts would likewise feel free to subject banks to private law duties which are stricter or more demanding than the MiFID duties. This can be illustrated by the *Fortis Bank/Bourgonje* judgment rendered by the Dutch Supreme Court in 2010. In this judgment it was held that Fortis was subject to a special duty of care towards its non-professional client Bourgonje. This special duty of care was based on the fact that Fortis was a professional provider of asset management services with the necessary expertise par excellence. According to the Dutch Supreme Court, this special duty may

[138] Lieverse in her annotation No 12 under HR 5 June, *JOR* 2009/199 (*Treek/Dexia Bank Nederland*); in a similar vein, SB van Baalen, 'Aansprakelijkheid als gevolg van een schending van de Wft-regels' in D Busch et al, *Onderneming en financieel toezicht* (Serie Onderneming en Recht deel 57), 2nd edn (Deventer: Kluwer, 2010) 1013–38, 1024.

[139] See esp OO Cherednychenko, 'European Securities Regulation, Private Law and the Firm-Client Relationship' (2009) *European Review of Private Law* 925–52, 945–46; OO Cherednychenko, 'De bijzondere zorgplicht van de bank in het spanningsveld tussen publiek- en privaatrecht' (2010) *NTBR* 66–77, 74.

[140] See D Busch, 'Why MiFID Matters to Private Law—the Example of MiFID's Impact on an Asset Manager's Civil Liability' (2012) *Capital Markets Law Journal* 386–413, 395–96. See also Dutch Chapter, s V.2.

[141] Higher Regional Court Düsseldorf 16 December 2010, *WM* 2011, 399, 400, explicitly rejecting the view of P Mülbert, *Anlegerschutz bei Zertifikaten* (2007) 1155–57.

[142] BGH 7 July 1993, BGHZ 123, 126. See on the relationship between the *Bond* judgment and MiFID esp Mülbert, *Anlegerschutz bei Zertifikaten* (n 141) 1155–57; P Mülbert, 'The Eclipse of Contract Law' (2006) 317–19.

encompass a duty to explicitly and unequivocally warn the client of the risk of considerable financial loss posed by the composition of the portfolio (excessive concentration of the portfolio in a particular asset). Whether and to what extent such duty to warn exists, and whether it is breached, depends on the relevant circumstances of the case.[143]

The *Fortis Bank/Bourgonje* case came before the Court prior to the implementation of MiFID I. Would the Dutch Supreme Court have rendered the same decision under MiFID I? This cannot be ruled out. In any event, to the extent relevant here, Article 19(3) of MiFID I states the following:

> Appropriate information shall be provided in a comprehensible form to clients or potential clients about:
>
> — (…)
> — financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risk associated with investments in those instruments or in respect of particular investment strategies;
> — (…)
> — (…)
>
> so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardized format.

In short, the Dutch Supreme Court assumes a duty to warn the non-professional client explicitly and unequivocally of the risk of considerable financial loss posed by the composition of the portfolio (excessive concentration of the portfolio in a particular asset), which depends on the relevant circumstances of the case. Those circumstances may result in a duty to warn that is more or less intense. The circumstances may even lead to the conclusion that there is no duty to warn at all.

Article 19(3), third dash of MiFID I follows a different approach towards non-professional and professional clients. The bank must provide 'appropriate' warnings of the risks associated with particular investment strategies. Now that the composition of a portfolio is based on an investment strategy, we may safely assume that a duty to warn of the risks associated with a particular investment strategy is materially the same as a duty to warn the client of the risk of considerable financial loss posed by the portfolio's composition. 'Appropriate' could be interpreted to mean that a warning should be tailored to the specific circumstances of an individual client. This is of course permitted under MiFID I, but there is no duty to do so. After all, Article 19(3), *in fine*, of MiFID I provides that the warning should be such that the client is reasonably able to understand the risks and take informed decisions, but the warning may be provided in a standardised format.

[143] HR 24 December 2010, *NJ* 2011/251 with annotation by Tjong Tjin Tai; *JOR* 2011/54 with annotation by Pijls (*Fortis Bank/Bourgonje*) consideration 3.4.

Of course, the use of a standardised format does not preclude the possibility of using different standard texts in relation to non-professional and professional clients.[144]

In view of the above, it is submitted that a duty to warn explicitly and unequivocally based on the circumstances of the case goes further than to warn appropriately in a standardised format. Also it should be borne in mind that more recent case-law from the Dutch Supreme Court even requires that the bank should verify whether the consumer actually understood the warning.[145]

It may be concluded from the above survey that the answer to the question whether the civil courts may be stricter than MiFID differs across Europe. In addition, in many jurisdictions the answer is simply not clear.

ii. EU Law

a. General

What does EU law have to say on this issue? In *Genil 48 SL and Others v Bankinter SA and Others*, the EU Court of Justice does not seem to provide a definitive answer to the vexed question of whether civil courts may impose *stricter* duties of care under private law than those resulting from MiFID.[146] If a civil court holds, for example, that although a bank is admittedly not obliged to comply with KYC rules under MiFID (or indeed with other MiFID rules), it is nonetheless obliged to do so in the particular circumstances of the case because of its civil duty of care, the aggrieved client is not denied a claim on account of non-compliance with MiFID rules. If a civil court is stricter than MiFID, there would not appear to be any conflict with the principle of effectiveness as formulated by the Court of Justice in *Genil.* It should be noted, however, that the question whether civil courts may be stricter than MiFID was not at issue in *Genil* and was therefore not explicitly

[144] Please note that the provision of information in a standardised format becomes a Member State option under MIFID II: the Member States *may* allow the information to be provided in a standardised format (see MIFID II, Art 24(5), last sentence). In short, if a Member State does not allow this, it seems as though the information must always be provided in a personalised format. In the Netherlands this Member State option is exercised (implicitly). The relevant Dutch implementing provision (Wft, Art 4:20(6)) is not altered in the Draft Bill to implement MiFID II, and the accompanying Explanatory Memorandum is also silent on this point. See *Dutch Parliamentary Papers II*, 2016/2017, 34 583, no 2 (Draft Bill) and no 3 (Explanatory Memorandum). It will therefore remain possible in the Netherlands to provide information in standardised format. The situation will undoubtedly be different in at least a few other Member States. If the Member States had unanimously considered that information could be provided in standardised format, a compromise in the form of a Member State option would have been unnecessary. In the Italian Chapter, s II.C, it is explicitly reported that at the time of writing the Italian chapter, it was not possible to predict how the Italian legislator would exercise such option. In a similar vein, Spanish Chapter, n 17; Irish Chapter, s V.A. Cf also Austrian Chapter, n 54.

[145] See HR 3 February 2012, *NJ* 2012/95; *Ars Aequi* (2012) 752, with note by Busch; *JOR* 2012/116, with note by Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA v X*); HR 14 August 2015, *NJ* 2016/107 (*Brouwer/ABN AMRO*). See on these cases Dutch Chapter, ss II.C and IV.C.

[146] ECJ 30 May 2013, C-604/11, *Ars Aequi* (2013) 663, with note by Busch; *JOR* 2013/274, with note by Busch (*Genil 48 SL and Others v Bankinter SA and Others*).

addressed. *Genil* dealt only with the question of the private law consequences of non-compliance with MiFID rules.[147] However, this does not exclude the possibility that an argument could be made on the basis of other principles of EU law that civil courts may not be stricter than MiFID. The recent judgment of the EU Court of Justice in the case of *Nationale-Nederlanden v Van Leeuwen*[148] concerning the sale of insurance policies with exorbitant management charges (*woekerpolissen*) provides some leads in this respect. So this is sufficient reason to pause and consider this judgment at greater length, although it should be noted that it relates to the Third Life Assurance Directive and not to MiFID.

b. *Nationale-Nederlanden v Van Leeuwen*

Facts

In 1999, Mr Van Leeuwen concluded a life assurance contract with Nationale-Nederlanden Assurance forming part of an investment known as 'flexibly insured investing'. It is evident from the policy dated 29 February 2000 that Nationale-Nederlanden insures a benefit of NLG 255,000, or the value of participations in investment funds taken out for Van Leeuwen (plus 10 per cent thereof). Under this contract Mr Van Leeuwen was both the policyholder and the insured.

If Mr Van Leeuwen died before 1 December 2033 the contract offered two options. Benefit A was a guaranteed and fixed amount of NLG 255,000. Benefit B was the (variable) sum of the value of his participations in investment funds (based on the value of those participations) as of the date of his death, plus 10 per cent thereof. If, at the time of his death, benefit B was greater than benefit A, then the higher sum was to be paid to the beneficiaries of his life assurance. Thus, benefit A set a minimum level for the benefit to be paid out in case of death prior to 1 December 2033.[149]

The 'gross premium' consisted of a single payment of NLG 8,800 at the start of the contract and then monthly payments of NLG 200 from the inception date of 1 May 1999. This gross premium was invested in investment funds chosen by the policyholder. Costs such as premiums for the death cover were periodically deducted from the value accrued in this way. These premiums were therefore not charged separately, but—like these costs—formed an integral part of the gross premium.

Before Mr Van Leeuwen concluded this insurance contract with Nationale-Nederlanden, he was supplied with a 'Proposal for flexibly insured investing'. This proposal contained three scenarios based on different returns and management

[147] In the same sense, see C Herresthal, 'Zu den Auswirkungen der MiFID auf das nationale Vertragsrecht' (2013) *ZIP* (2013) 1420–22, 1421; J Lieder, 'EuGH: Anlageberatung bei Zinsswaps' (2013) *LMK* 349404.

[148] ECJ, 29 April 2015, C-51/13, *Ars Aequi* (2015) 696, with annotation by Busch and Arons (*Nationale-Nederlanden Levensverzekering Mij NV/Hubertus Wilhelminus van Leeuwen*).

[149] See Opinion of AG Sharpston, 12 June 2014, Case C-51/13, ECLI:EU:C:2014:1921, [15].

costs of 0.3% per cent The text under the heading ‘product return’ contained the following sentence:

> The difference between the fund return and the product yield is dependent on the risks insured, the costs payable as well as any additional coverage.

Legal Framework

Article 31 of the Third Life Assurance Directive[150] (which has now been repealed and replaced by a more recent version)[151] plays a crucial role in this respect and reads as follows:

1. Before the assurance contract is concluded, at least the information listed in Annex II(A) shall be communicated to the policyholder.
2. The policyholder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex II(B).
3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment.
4. The detailed rules for implementing this Article and Annex II shall be laid down by the Member State of the commitment.

The obligation to furnish the information specified in Annex II to the Third Life Assurance Directive was transposed into Dutch law at that time in Article 2 of the 1998 Regulation regarding the provision of information to policyholders (*Regeling informatieverstrekking aan verzekeringnemers 1998*). In view of the text of the 1998 Regulation, the Netherlands did not at that time make use of the possibility of imposing a duty to furnish additional information under Article 31(3) of the Third Life Assurance Directive.

It was established that Nationale-Nederlanden, in compliance with Article 2(2)(q) and (r) of the 1998 Regulation, furnished the policyholder with information about the effect of the costs and the risk premiums on the return. However, the policyholder did not receive a summary or full overview of the actual and/or absolute costs and their composition. Nor was this obligatory under the 1998 Regulation. In short, it was established that Nationale-Nederlanden furnished the policyholder with all information which it was bound to supply under the 1998 Regulation.

Nonetheless, in its interim judgment Rotterdam District Court held as follows about the fact that Nationale-Nederlanden had not sent the policyholder a summary or full overview of the actual and/or absolute costs and their composition:

> Although Nationale-Nederlanden fulfilled the requirements referred to in Article 2(2)(q) and (r) of the 1998 Regulation regarding the provision of information to policyholders,

[150] Directive 92/96/EEC, OJ L 360, 1–27.
[151] See the present judgment, [3].

> it nonetheless infringed the open rules (including, in this legal action, the general and/or special duty of care owed by Nationale-Nederlanden to Van Leeuwen in the context of their contractual relations, pre-contractual good faith and/or requirements of reasonableness and fairness) by confining the information it furnished to information about the effect of costs and risk premiums on the return.[152]

Nationale-Nederlanden argued that it could not be required to furnish additional information on the basis of open and/or unwritten rules.

Questions Referred for a Preliminary Ruling

The District Court referred the following two questions to the Court of Justice for a preliminary ruling:

(1) Does EU law, and in particular Article 31(3) of the Third Life Assurance Directive, preclude an obligation on the part of a life assurance provider on the basis of the open and/or unwritten rules of Dutch law—such as the reasonableness and fairness[153] which govern the contractual and pre-contractual relationship between a life assurance provider and a prospective policyholder, and/or a general and/or specific duty of care—to provide policyholders with more information on costs and risk premiums of the insurance than was prescribed in 1999 by the provisions of Dutch law by which the Third Life Assurance Directive was implemented (in particular, Article 2(2)(q) and (r) of the 1998 Regulation)?

(2) Are the consequences, or possible consequences, under Dutch law of a failure to provide that information relevant for the purposes of answering question 1?

Duties to Furnish Additional Information on the Basis of Reasonableness and Fairness?

The first question referred for preliminary ruling is answered negatively. In short, the civil courts may, by reference to the dictates of reasonableness and fairness under Article 6:2 of the Dutch Civil Code (*Burgerlijk Wetboek*, DCC) and Article 6:248 DCC,[154] impose duties to furnish information additional to that required under

[152] Rotterdam District Court 28 November 2012, ECLI:NL:RBROT:2012:BY5159, consideration 2.9.

[153] In Dutch: *redelijkheid en billijkheid*.

[154] DCC, Art 6:2 read as follows: '(1) A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness. (2) A rule binding upon them by virtue of law, usage or legal act does not apply to the extent that in the given circumstances, this would be unacceptable according to criteria of reasonableness and fairness'. See also DCC, Art 6:248: 'A contract has not only the legal effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and fairness. (2) A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reasonableness and fairness'.

the 1998 Regulation, provided that three *cumulative* conditions are fulfilled (this is a matter for the referring court to decide):

1. the information required must be clear and accurate;
2. the information required must be necessary to enable the policyholder to understand the essential elements of the commitment; and
3. legal certainty for the insurer is sufficiently safeguarded (paragraphs 21, 29–31 and 33).

The first two conditions follow from the express wording of Article 31(3) of the Third Life Assurance Directive, Annex II and Recital (23) in the preamble to the Third Life Assurance Directive (paragraph 21). The third condition expresses the principle of legal certainty under EU law. The EU Court of Justice held that the legal basis for the use by the Member State concerned of the possibility provided for in Article 31(3) of the Third Life Assurance Directive must be such that, in accordance with the principle of legal certainty, it enables insurance companies to identify with sufficient foreseeability what additional information they must provide and which the policyholder may expect (paragraph 29). An additional duty to provide information based on the requirements of reasonableness and fairness under Article 6:2 DCC or Article 6:248 DCC would not seem at first sight to fulfil this requirement since this rule is extremely vague and has little if any predictive value. So that seemed to be good news for Nationale-Nederlanden.

But the EU Court of Justice then went on to formulate two arguments that were favourable to the policyholder and unfavourable to Nationale-Nederlanden. It held that when deciding whether the legal certainty principle has been fulfilled the national court *may* (not 'must') take into consideration the fact that it is for the insurer to determine the type and characteristics of the insurance products which it offers, so that, in principle, it should be able to identify the characteristics which its products offer and which are likely to justify a need to provide additional information to policyholders (paragraph 30). In short, the ball is played back into the insurer's court. It knows best what information it should furnish to its clients in order to ensure that they understand the insurance product. What perhaps played a role in this connection is that, according to the EU Court of Justice, the fact that the policyholder should receive a summary or full overview of the actual and/or absolute costs and their composition to be able to understand the operation of the product is so apparent that the insurer itself should have realised it was necessary to furnish this information to the policyholder. The Court of Justice added in this connection that, in accordance with the description of the grounds of the 1998 Regulation, its application is governed, in particular, by the national private law in force, 'including the requirements of reasonableness and fairness' set out in Article 6:2 DCC and Article 6:248 DCC (paragraph 31). In short, the EU Court of Justice clearly considers that Nationale-Nederlanden could and should have known that its responsibility did not begin and end with literal compliance with the 1998 Regulation.

c. May Civil Courts thus be Stricter than MiFID?

It seems to follow from the *Nationale-Nederlanden* judgment that EU law is blind to the distinction between public and private law when it comes to implementing rules of EU law (paragraph 28). After all, the EU Court of Justice had no problem with the fact that directives are transposed into national law by a combination of public and private law. Annex II to the Third Life Assurance Directive has been transposed into Dutch law by the 1998 Regulation (public law), whereas the Member State option to furnish additional information may be implemented by means of the requirement of reasonableness and fairness under Article 6:2 DCC (private law), provided that three conditions are fulfilled (see paragraph IV.B.ii.d above).

If it is indeed true that EU law is blind to the distinction between public and private law, this also has an important bearing on whether civil courts may impose stricter standards than the rules under MiFID. For the most part, MiFID provides for maximum harmonisation. If EU law is truly blind to the distinction between public and private law when it comes to the transposition of EU legal rules, it may be argued that the maximum harmonisation standard also applies to the civil courts. If that is correct, they may not impose stricter duties of care than those that apply under the rules resulting from MiFID. In the abovementioned *Genil* judgment about the private law impact of MiFID, the EU Court of Justice admittedly notes that in the absence of EU legislation it is for the Member States themselves to determine what effect non-compliance with MiFID has under private law (provided that it is not practically impossible to recover compensation for the loss or damage suffered), but this refers to the sanction and not to the substantive rule.[155] If this line of reasoning is rejected because it is considered that the civil courts may be stricter than MiFID, the present judgment in any event shows that legal certainty is an important factor that the civil courts must take into consideration in deciding whether they may impose stricter duties of care than apply under MiFID (see section IV.C.ii.b under 'Duties to Furnish Additional Information on the Basis of Reasonableness and Fairness?' above).

What has been said above can be qualified as follows. MiFID itself also contains open rules. One important rule of this kind is that banks must act honestly, fairly and professionally in accordance with the best interests of their clients (below: duty of honesty).[156] This obligation is admittedly translated into more specific rules in MiFID (including KYC rules and duties to furnish information), but the general rule does not coincide with the more detailed provisions. The general duty of honesty therefore leaves some scope for additional duties of care. This scope could be used by the civil courts. By doing so, they would not, strictly speaking, be applying stricter standards than MiFID since they would be using the space

[155] ECJ, 30 May 2013, C-604/11, *Ars Aequi* (2013) 663, with note by Busch; *JOR* 2013/274, with note by Busch (*Genil 48 SL and Others v Bankinter SA and Others*).

[156] MIFID I, Art 19(1); MIFID II, Art 24(1).

provided by MiFID itself. The only question is how much space exactly is left by the open rule, bearing in mind the EU principle of legal certainty.

Let us take an example. Under MiFID, warnings may be provided in a standardised format.[157] An approach in which the civil courts hold that the special duty of care means that banks are obliged to provide express investment risk warnings in terms that are not misleading, and that the banks must subsequently check to ensure that the private investor is actually aware of these risks seems to go further than a standard warning,[158] although a standard warning too must naturally be sufficiently clear. Would a civil court then be justified in adopting the following reasoning?

> The bank has discharged its duty to provide a warning in standardised format of the risks of the product and has thus complied with its specific duty to provide information under MiFID. However, in view of the general duty of honesty, the bank should nonetheless have given an express warning in not misleading terms, and should have subsequently checked to ensure that the private investor was actually aware of these risks. Consequently, the bank has breached the general duty of honesty under MiFID and must pay damages to the investor.

Reservations based on the EU principle of legal certainty could be expressed about this argument. Nonetheless, the *Nationale-Nederlanden* judgment shows that the EU Court of Justice is prepared to adopt a flexible approach to the principle of legal certainty and does not shun acrobatic reasoning in its efforts to achieve a just result.

It remains to be seen, therefore, whether the EU Court of Justice will actually bar civil courts of the Member States from using the argument that banks have a general duty of honesty under MiFID as a ground for requiring them to issue personalised rather than standardised risk warnings on the risk.

[157] Please note that the provision of information in a standardised format becomes a Member State option under MIFID II: the Member States *may* allow the information to be provided in a standardised format (see MIFID II, Art 24(5), last sentence). In short, if a Member State does not allow this, it seems as though the information must always be provided in a personalised format. In the Netherlands this Member State option is exercised (implicitly). The relevant Dutch implementing provision (Wft, Art 4:20(6)) is not altered in the Draft Bill to implement MiFID II, and the accompanying Explanatory Memorandum is also silent on this point. See *Dutch Parliamentary Papers II*, 2016/2017, 34 583, no 2 (Draft Bill) and no 3 (Explanatory Memorandum). It will therefore remain possible in the Netherlands to provide information in standardised format. The situation will undoubtedly be different in at least a few other Member States. If the Member States had unanimously considered that information could be provided in standardised format, a compromise in the form of a Member State option would have been unnecessary. In the Italian Chapter, s II.C, it is explicitly reported that at the time of writing the Italian Chapter, it was not possible to predict how the Italian legislator would exercise such option. In a similar vein, Spanish Chapter, n 17; Irish Chapter, s V.A. *Cf* also Austrian Chapter, n 54.

[158] For this approach in relation to private investors, see HR 3 February 2012, *NJ* 2012/95; *Ars Aequi* (2012) 752, with note by Busch; *JOR* 2012/116, with note by Van Baalen (*Coöperatieve Rabobank Vaart en Vecht UA v X*) (duty of care in relation to the provision of investment advice) consideration 3.6.2. It should be noted that these (and other) judgments of the Dutch Supreme Court about the duty to provide warnings relate, without exception, to the pre-MiFID era. Whether the Supreme Court will continue this line of reasoning under MiFID remains to be seen.

D. May Civil Courts be less Strict than MiFID?

i. Comparative Law

May the civil courts be less demanding than MiFID? One may argue that the question is largely academic and not very relevant to legal practice. In most European jurisdictions, civil courts favour the interests of the investor, particularly non-professional investors. In view of this, it may be argued that civil courts across Europe are in all probability not inclined to impose private law duties on a bank that are less demanding than the MiFID duties to which it is subject.

Let us return to the Dutch Supreme Court case *Fortis/Bourgonje*. What if the private law duty to warn explicitly and unequivocally, accepted in this judgment, does not apply in the circumstances of the case? This is certainly conceivable. The Dutch Supreme Court quashed the decision of the Amsterdam Court of Appeal, in part because the appeal court failed to take into account the client's level of expertise and relevant experience. In *Fortis/Bourgonje* this was very important, because Fortis argued that its non-professional client Bourgonje (1) had more knowledge than Fortis about the value of the ICT shares in which Bourgonje had invested disproportionally; (2) had insider knowledge with respect to the ICT company; and (3) was an experienced businessman and investor in the ICT sector.[159] If the Court of Appeal to which the Supreme Court referred the case were to rule that in the circumstances of the case the bank owed the non-professional client no duty to warn him explicitly and unequivocally, this is clearly less demanding than Article 19(3) of MiFID. After all, according to this provision, the warning must at least be provided in a standardised format.

So may the courts be less demanding than MiFID? This question has hardly been addressed in the legal literature across Europe, let alone in case-law. Nevertheless, there is some discussion of this question in Germany, where some authors advance the view that the civil courts are allowed to be less demanding in the circumstances of a specific case.[160] Other German authors submit that the civil courts are not so permitted, because in their view MiFID provides minimum standards in civil law.[161]

It may well be argued that in many Member States this question is indeed academic after all. In at least England and Wales, Ireland, France, Italy and the Netherlands, a breach of a MiFID duty may directly trigger civil liability for breach of statutory duty, quite apart from any (special) duty of care.[162]

[159] HR 24 December 201, *NJ* 2011/251 with annotation by Tjong Tjin Tai; *JOR* 2011/54 with annotation by Pijls (*Fortis Bank/Bourgonje*) consideration 3.5.

[160] A Fuchs in A Fuchs (ed), *Wertpapierhandelsgesetz* (Munich: C H Beck, 2009) Vor §§ 31 et seq, para 61.

[161] See E Schwark in E Schwark and S Zimmer (eds), *Kapitalmarktrechts-Kommentar*, 4th edn (Munich: C H Beck, 2010) Vor §§ 31 ff WpHG para 16. See for a similar stance, Italian Chapter, s III.B.iii, *in fine*.

[162] See s IV.B above.

ii. EU Law

It seems to follow from the *Genil* case that the EU principle of effectiveness (*effet utile*) prevents the civil courts from imposing private law duties on banks that are less strict than that to which they are subject under the MiFID rules. In *Genil*, the EU Court of Justice held that in the absence of EU legislation it is for the Member States themselves to determine the contractual consequences of non-compliance with the Know your Customer (KYC) rules under MiFID I, but that the principles of equivalence and effectiveness must be observed (paragraph 57).[163] The EU Court of Justice referred in this connection to paragraph 27 of a judgment of 19 July 2012 concerning a tax matter (*Littlewoods Retail and Others*, Case C-591/10) and the case-law cited there. This paragraph reads as follows:

> In the absence of EU legislation, it is for the internal legal order of each Member State to lay down the conditions in which such interest must be paid, particularly the rate of that interest and its method of calculation (simple or 'compound' interest). Those conditions must comply with the principles of equivalence and effectiveness; that is to say that they must not be less favourable than those concerning similar claims based on provisions of national law *or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible* (see, to that effect, *San Giorgio*, paragraph 12; *Weber's Wine World*, paragraph 103; and Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17).

In the MiFID I context, the principle of effectiveness therefore appears to mean that the conditions which an investor must fulfil in order to bring a civil action against a bank may not be such that success is practically impossible. The judgment appears to mean, among other things, that civil courts may not be less strict than MiFID I. Where, according to MiFID I, there is non-compliance with KYC rules in a specific case and the aggrieved investor brings a civil action for damages, the civil courts may not dismiss this claim by arguing that in the particular circumstances it was not necessary to comply with the KYC rules. This would seem, after all, to be at odds with the principle of effectiveness.[164] This approach can be extended to claims for damages for non-compliance with other MiFID I provisions, particularly infringements of other conduct-of-business rules. And the approach can also be extended to MIFID II, especially as under MiFID II the operation of the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph of MIFID II:

> Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any

[163] ECJ 30 May 2013, C-604/11, *Ars Aequi* (2013) 663, with note by Busch; *JOR* 2013/274, with note by Busch (*Genil 48 SL and Other v Bankinter SA and Others*).

[164] As regards the question of how the principle of effectiveness affects the impact of EU law on private law in a general sense, see eg AS Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals*, 2nd edn (Cambridge: Intersentia, 2016) 98–116; T Tridimas, *The General Principles of EU Law* (Oxford: Oxford University Press, 2006) 418–76; W van Gerven, 'Of Rights, Remedies and Procedures' (2000) 37 *Common Market Law Review* 501–36.

financial loss or damage suffered as a result of an infringement of this Directive or of [MiFIR].[165]

In the Italian chapter, it is noted that the Italian legal system seems already in line with *Genil* and Article 69(2), last paragraph of MiFID II, as in Italy the MiFID conduct-of-business rules are deemed a specification of the general principle of good faith established by the Italian Civil Code.[166] The situation in Germany is different. In the German chapter it is noted that so far, courts and leading German commentaries have refused to interpret *Genil* to the effect that EU law requires private law implications, and it is doubtful that this position will change as a consequence of the transposition of MiFID II into German law. It is very likely, the author of the German chapter concludes, that only a further clarification by the EU Court of Justice can eventually accomplish a review of the present position.[167]

E. May the Contracting Parties be less Strict than MiFID?

i. Comparative Law

May the contracting parties themselves be less demanding than MiFID? In other words, are contractual clauses that set lower standards than those following from MiFID effective?

For England and Wales, the FCA's Conduct of Business Sourcebook (COBS, part of the FCA Handbook) provides a clear rule in COBS 2.1.2R, which applies inter alia to banks regulated by the FCA. To the extent relevant here, the provision provides that

> [a] firm must not, in any communication relating to designated investment business seek to (1) exclude or restrict or (2) rely on any exclusion or restriction of, any duty […] it may have to a client under the regulatory system.[168]

[165] For a different view, see O Eloot and H Tilley, 'Beleggersbescherming in MiFID II en MiFIR' (2014) *Droit Bancaire et Financier* 179–201, 200.

[166] See Italian Chapter, s III.B.iii, *in fine*.

[167] See German Chapter, s III.A.iii.

[168] It should be noted that the FSA is of the view that the general regulatory duty to act in the client's best interest (MiFID, Art 19(1) as implemented through 2.1.1R), combined with the general legal principles of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) and the Unfair Contract Terms Act 1977 and its subsidiary legislation (UCTA), already prevent a regulated firm (such as a bank) from contractually restricting or excluding duties (or liabilities) it has to its clients under the regulatory framework (including MiFID). However, the FSA also observed that having the specific duty of COBS 2.1.2R might serve as a further deterrent. See FSA, *Reforming Conduct of Business Regulation* (Policy Statement 07/6, May 2007), para 6.7. The view of the FSA as expressed in the Policy Statement corresponds with the guidance provided in the FSA Handbook with respect to COBS 2.1.1R (the client's best interests rule) and COBS 2.1.2R (exclusion of liability) in COBS 2.1.3G, which to the extent relevant here states that '(1) [i]n order to comply with the client's best interest rule, a firm should not, in any communication to a retail client relating to designated investment business, […] seek to exclude or restrict; or […] rely on any exclusion or restriction of, any duty […] it may have to a client other than under the regulatory system, unless it is honest, fair and professional for it to do so. (2) The general law, including the Unfair Terms Regulations, also limits the scope for a firm to exclude or restrict any duty […] to a consumer'. See also van Setten and Plews (n 118) 11.60–11.62.

Paragraph 3.8 of the Irish Consumer Protection Code contains a similar provision, albeit that it only applies in relation to consumers.[169]

In France, now that the MiFID implementation rules qualify as mandatory law, provisions setting lower contractual standards than MiFID are likewise ineffective.[170]

In Italy, contractual clauses setting lower standards than MiFID are normally ineffective as well. It has been argued in the Italian legal literature that the validity of contractual clauses setting lower standards than MiFID depends on MiFID's wording. When MiFID uses the expression 'where relevant', regulatory duties are not mandatory, and therefore it is up to the bank to choose whether to comply with the relevant MiFID provision. The wording 'where relevant' can be found, for instance, in MiFID I Implementing Directive, Article 30(1), 31(2), 34(3), (4), 41(2) and 40(4). This wording is also used in corresponding Consob Regulation rules. When MiFID provisions do not use the expression 'where relevant', they are compulsory. The view that the regulatory provisions of the Consob Regulation should be qualified as mandatory private law rules was endorsed by the United Sections of the Cassation Court in two important cases decided in 2007.[171] When a contract does not comply with any mandatory provision, general rules of contract or clause nullity apply (Article 1419 et seq of the Italian Civil Code, ICC).[172]

In Spain, the status of contractual clauses setting lower standards than MiFID is slightly less straightforward. The regulatory laws implementing MiFID in Spain are by their nature mandatory rules from which the contracting parties cannot derogate. With respect to contracts with consumers, any clause which derogates or waives a duty of the bank towards the consumer will be held to be abusive and, as a result, null and void according to Article 83 of the Consolidated text on the Law for the defence of consumers and users. In regard to non-consumers, when the public duties apply, the conclusion may not be so clear, in particular when the relevant rule is prescribed by a lower-rank item of regulation.[173]

In the Netherlands, contractual clauses setting lower standards than the applicable mandatory public law duties are invalid unless the relevant public law legislation states otherwise (Article 3:40 (2) and (3) DCC). In the Netherlands, MiFID

[169] See Irish Chapter, s III. It should be noted that also in Ireland there are other routes available. First, in the case of statutory duties, a financial institution would be unlikely to succeed in an attempt to exempt itself from liability in respect of certain absolute statutory duties. Any exemption clause purporting to do so would be likely to be determined by an Irish Court to be void as being contrary to public policy. Second, consumers may be protected by the Sale of Goods and Supply of Services Acts 1893 and 1980 for consumer transactions and by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 both of which may limit the ability of the bank to rely on an exemption clause. See Irish Chapter, s III.

[170] See Couret, Goutay and Zabala (n 115) § 3.57.

[171] See Court of Cassation, No 26724, 19 December 2007, Foro italiano, 2008, I, 784 et seq; Court of Cassation, No 26725, 19 December 2007, Giurisprudenza italiana, 2008, I, 350 et seq, referred to by Giudici and Bet (n 116) § 5.59 in fn 55.

[172] See Giudici and Bet (n 116) § 5.58–5.59.

[173] See Bachs and Ruiz (n 5) § 9.57. *Cf* Spanish Chapter, s V.A.

has been implemented in the Dutch central rulebook for the financial markets, the *Wet op het financieel toezicht* or Wft and lower legislation. The Wft and the lower legislation pursuant to the Wft qualify as mandatory public law. However, Article 1:23 Wft explicitly provides that a juridical act (*rechtshandeling*, eg the conclusion of an asset management agreement) is not invalid solely because it has been performed in violation of a rule laid down by or pursuant to the Wft (except where otherwise provided by the Wft, but this exception does not apply to any of the MiFID duties it implements). In view of this, contractual clauses setting lower standards than the applicable public law duties cannot be void or voidable on the basis that they are contrary to mandatory law (Article 3:40 (2) and (3) DCC). In theory, such clauses may still be null and void on the basis that they are contrary to public morals (*goede zeden*) or public policy (*openbare orde*) (Article 3:40 (1) DCC), but it seems highly unlikely that a civil court would render such clauses null and void. However, this does not mean that contractual clauses subjecting banks to lower standards than MiFID are always effective under Dutch law. Depending on the circumstances of the case, such clauses may be contrary to reasonableness and fairness and therefore inapplicable.[174] In addition, if this type of clause is included in standard terms, it may be unreasonably onerous and therefore voidable, especially if the client is a consumer.[175] The special duty of care to which banks are subject in respect of non-professional clients will probably only reinforce this approach. Nevertheless, in the absence of case-law it is unclear how much weight should be attached to the mandatory public law duties implementing MiFID in assessing whether this type of clause is contrary to reasonableness and fairness and/or unreasonably onerous.

In Germany the position is unclear. Whether or not a contractual duty setting a lower standard than MiFID is possible depends on the interaction between private and public law duties. According to the view that MiFID-derived duties bind private law courts, such a contractual derogation from MiFID duties is not possible. The same is true if one follows the view that MiFID duties have a dual nature and qualify as both private and public law duties. According to the theory of a radiating or a concretising effect, a lower standard would be possible. In such a case, the regulatory duties, particularly the conduct-of-business rules, cannot influence the private law duties if the agreement in question leaves no room for interpretation.

[174] DCC, Art 6:248 (2).

[175] See DCC, Art 6:233, opening words and under (a), stating that '[a] stipulation in general terms and conditions may be avoided […] if it is unreasonably onerous to the other party [the client], taking into consideration the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case'. See also DCC, Art 6:237, opening words and under (b), stating that '[i]n a contract between a user [the bank] and the other party [the client], who is an individual not acting in the conduct of a business or profession, the following stipulations contained in general terms and conditions are presumed to be unreasonably onerous. A stipulation which […] materially limits the scope of the obligations of the user [the bank] with respect to what the other party [the client] could reasonably expect without such stipulation, taking into account the rules of law which pertain to the contract'.

As a consequence, it would be possible by contract to exclude private law duties, even when they are similar to the conduct-of-business rules following from MiFID.[176]

It may be concluded from the above survey that most jurisdictions tend towards ineffectiveness in one way or another of contractual clauses setting lower standards than those following from MiFID. Nevertheless, in at least Spain, the Netherlands and Germany, the answer is open to doubt.[177]

ii. EU Law

In *Genil*, it was held that although in the absence of European legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with the MiFID rules, one of the principles that must be observed is the principle of effectiveness. As noted above, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph of MiFID II. The principle of effectiveness means in this connection that the conditions on which an investor can bring a civil claim against a bank may not be such that successful legal actions are practically impossible. Naturally, however, the argument is less strong in cases where the civil courts, regardless of the contractual provisions, wish to be less strict than MiFID (see section IV.D above)—the investor has, after all, himself agreed to the contract. On the other hand, private investors in particular often have little influence over the contractual conditions. The effectiveness principle could therefore be cited in support of the argument that the civil courts are obliged to hold that the relevant contractual provision is unacceptable, for example (depending on the applicable private law) according to the criteria of reasonableness and fairness or, if included in general terms and conditions, constitutes an unreasonably onerous provision. This goes further, by the way, than an assessment by the courts of their own motion since in the above approach the result of the assessment is also predetermined. The subject of assessments by the court of their own motion is dealt with in section IV.K below.

F. May the Contracting Parties be Stricter than MiFID?

i. Comparative Law

The question whether the contracting parties may be stricter than MiFID has not been much addressed in the legal literature across Europe, let alone in case-law. Nevertheless, in Germany there are some authors who have addressed this question explicitly. In Germany, some authors have advanced the view that it follows

[176] See Casper and Altgen (n 121) § 4.63, 4.38–4.40.
[177] The Austrian Chapter does not provide any leads in this respect.

from the principle of freedom of contract that contractual clauses setting higher standards than those following from MiFID are as a general rule effective.[178]

ii. EU Law

At first sight, it would seem that there could be little objection to contractual provisions that are stricter than MiFID since they can only benefit investor protection. Moreover, unlike the situation where civil courts, regardless of the contract, impose stricter duties of care than apply under the MiFID rules (see section IV.C), legal certainty is not at issue here. After all, the bank voluntarily submits to stricter duties of care. Nonetheless, if banks in a particular Member State were to voluntarily submit on a large scale to stricter duties of care, for example pursuant to local market usage, this might jeopardise the European level playing field. We should add, however, that in our view this is a rather theoretical argument.

Just as in connection with the question of whether civil courts may be stricter than MiFID, *Genil* does not seem to provide a definitive answer to whether contractual provisions that are stricter than MiFID actually produce an effect. In such a case, a client's claim is in any event not rejected on the grounds of non-compliance with MiFID rules. If contracting parties themselves are stricter than MiFID, there would not seem to be any conflict with the principle of effectiveness, as formulated by the Court of Justice in *Genil*.

Could it perhaps be reasoned on the basis of the *Nationale-Nederlanden* case that the civil courts are bound to hold that where a contractual provision is stricter than MiFID it is to this extent unacceptable according to, for example (depending on the applicable private law) the criteria of reasonableness and fairness or, if included in general terms and conditions, that it constitutes an unreasonably onerous provision? Although it may be possible to draw such a conclusion from a strictly logical approach, there are several reasons why we think this is not tenable.

To start with, one of the key objectives of MiFID is to offer investors a high level of protection.[179] If a bank voluntarily submits to stricter contractual rules than apply under MiFID, there could surely be little objection to this.

Moreover, offering contractual conditions that go further than MiFID is one of the ways in which a bank can compete with its rivals. To this extent the question goes to the root of free enterprise. If an entrepreneur wishes to do more than he is obliged to do by law, this must be possible. Another factor here is that the freedom to conduct a business is included in the Charter of Fundamental Rights of

[178] See I Koller in HD Assmann and UH Schneider (eds), *Wertpapierhandelsgesetz*, 5th edn (Cologne: Schmidt, 2009) Vor § 31 para 5; D Einsele, 'Anlegerschutz durch Information und Beratung—Verhaltens- und Schadensersatzpflichten der Wertpapierdienstleistungsunternehmen nach Umsetzung der Finanzmarktrichtlinie (MiFID)' (2008) *Juristenzeitung* 477, 481.

[179] See MiFID I, Recital (2); MiFID II, Recital (70).

the European Union and is therefore a principle that forms part of the European legal order.[180]

Finally, a client may have valid reasons for requesting a bank to submit contractually to rules that are stricter than those applying under MiFID. For example, under the Dutch supervision rules contained in the Pensions Act (*Pensioenwet*) and the Occupational Pension Scheme (Obligatory Membership) Act (*Wet verplichte beroepspensioenregeling*), pension funds are permitted to outsource their portfolio management to one or more external asset managers, but in doing so are required to ensure that the external portfolio manager complies with the rules applicable to them.[181] Insofar as relevant here, these rules mean that outsourcing to an external portfolio manager is permitted only if the contract regulating the outsourcing or portfolio management meets certain requirements, for example that the external portfolio manager enables the pension fund at all times to comply with the provisions laid down by or pursuant to the Pensions Act or the Occupational Pension Scheme (Obligatory Membership) Act.[182] Naturally, any such contractual obligation to which the external portfolio manager concerned is subject does not result from MiFID and may to this extent be stricter than the obligations to which it is subject under MiFID.[183]

G. Influence of MiFID on the Principle of Relativity

i. Comparative Law

In some European jurisdictions a tort claim based on breach of statutory duty cannot succeed in the absence of 'relativity', which means that the relevant duty must not only serve the general interest, but also the claimant's patrimonial interests. In the jurisdictions imposing a relativity requirement the question therefore arises whether the relativity requirement is met in case of a breach of MiFID duties.

[180] EU Charter, Art 16: 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognized'. As to the significance of the EU Charter for financial supervision law, see E Dieben, 'Vijf jaar bindend EU-Handvest en het financieel toezichtrecht' in J Gerards, H de Waele and K Zwaan (eds), *Vijf jaar bindend EU Grondrechtenhandvest* (Deventer: Wolters Kluwer 2015) 277–350.

[181] See Pensions Act, s 34(1) and Occupational Pension Scheme (Obligatory Membership) Act, s 43(1). These provisions are elaborated in ch 4 of the Decree implementing the Pensions Act and the Occupational Pension Scheme (Obligatory Membership) Act.

[182] Decree implementing the Pensions Act and the Occupational Pension Scheme (Obligatory Membership) Act, Art 13(2)(e).

[183] As regards outsourcing by pension funds under Dutch law, see eg PL Laaper, *Uitbesteding in de financiële sector, in het bijzonder van vermogensbeheer door pensioenfondsen*, Onderneming en Recht no 88 (Deventer: Kluwer, 2015); JAMI Hoens, 'Uitbesteding: een achilleshiel in de Pensioenwet?' (2009) *Pensioen & Praktijk* 16–22; RH Maatman and JW van Miltenburg, 'Pensioenfondsen' in D Busch, DR Doorenbos, CM Grundmann-van de Krol, RH Maatman and MP Nieuwe Weme/WAK Rank (eds), *Onderneming en financieel toezicht* (Onderneming en Recht no 57), 2nd edn (Deventer: Kluwer, 2010) 323–59, 339–42.

In the Netherlands, Article 6:163 DCC imposes a relativity requirement (*relativiteitsvereiste*). According to the legislative history of the Dutch central rulebook for the financial markets, the *Wet op het financieel toezicht* or Wft, the relativity requirement of Art. 6:163 DCC is met when a financial institution's client suffers loss as a consequence of a violation of the Wft or lower regulations pursuant to the Wft. This is so because the prudential rules as well as the conduct-of-business rules under or pursuant to the Wft, according to the legislative history, serve clients' individual interests as well as the general interest.[184] In view of the fact that MiFID is implemented in the Wft and subordinate regulations pursuant thereto, it can be concluded that according to the legislative history the relativity requirement is met in the case that a client suffers loss as a consequence of a violation of duties implementing MiFID. Nevertheless, some Dutch authors doubt whether this is the correct approach, arguing that only some conduct-of-business rules are drafted to protect the interests of individual clients and, in particular, prudential rules are not so drafted.[185]

Another jurisdiction where a tort claim cannot succeed in the absence of relativity is Germany. According to German law, a person who breaches a so-called 'protective statute' (*Schutznorm*) is liable to pay compensation for the damage arising from the breach (section 823(2) sentence 1 of the German Civil Code). Protective statutes aim to protect not only the public interest but also specific individual interests. There is considerable academic debate in Germany as to whether regulatory duties qualify as such. Only a minority in the legal literature suggest that regulatory duties are not protective of the bank's clients. According to the majority view, at least some regulatory duties can be considered as being imposed by protective statutes. Whether or not a statutory provision can be considered protective depends on the characteristics of each duty. For some MiFID-derived duties it is clear that the statutory provisions do not protect private interests. The record-keeping and retention obligations, for instance, explicitly exist to enable the German financial regulator to monitor managers' compliance with regulation. Moreover, it seems unlikely that the German civil courts would hold that other organisational duties are protective in favour of the client.[186] In addition, the Federal Supreme Court recently pointed out that not every rule of conduct is protective.[187] Recently, the Federal Supreme Court even concluded that sections 31 et seq WpHG

[184] *Dutch Parliamentary Papers II*, 2003/04, 29 708, No 3, 28–29; *Dutch Parliamentary Papers II*, 2005/06, 29 708, No 19, 393. This view accords with HR 13 October 2006, *NJ* 2008, 529 with annotation by Van Dam; *JOR* 2006/295 with annotation by Busch (*DNB/Stichting Vie d'Or*) consideration 4.2.2, where it was held that the patrimonial interests of policyholders are protected by the prudential rules to which life insurance companies were subject pursuant to the *Wet toezicht verzekeringsbedrijf* (Wtv), one of the predecessors of the Wft. See Dutch Chapter, s VI.B.iv.

[185] See eg van Baalen, 'Aansprakelijkheid als gevolg van een schending van de Wft-regels' (n 138) 1013–38, 1014–21. See Dutch Chapter, s VI.B.iv.

[186] See eg BGH 22 June 2010, WM 2010, 1393, concluding that WpHG, s 34a (segregation of assets) is not protective.

[187] See BGH 19 February 2008, BGHZ 175, 276, 280 et seq (concerning a version of the WpHG before the implementation of MiFID).

cannot be construed as a statutory duty intended to protect investors within the meaning of section 823(2) German Civil Code.[188]

Austrian law is similar as German law. In order for a statute to qualify as a protective statute, it must be the law's intent to protect a victim against damages typically caused by the forbidden behaviour. The OGH has generally denied that § 15 of the WAG 1997, which explicitly stated that a violation of the respective duties to inform which causes liability, constitutes such a protective law.[189] The Court argued that this rule laid down (pre-)contractual duties. So far, the OGH has not held that any rules of good conduct of the WAG 2007 are to be considered protective statutes.[190]

So all in all, in Austria and Germany the courts are reluctant to accept that regulatory rules generally aim to protect a claimant's patrimonial interests.[191]

England and Wales also, at least in a functional sense, requires 'proximity', because section 138D FSMA makes it explicit that only the FCA's organisational or conduct-of-business rules under Part X, Chapter I of FSMA are directly actionable, but that such a private right of action is only conferred on a 'private person' (ie a non-professional, or private, investor), not on professional investors.[192]

From the above survey it follows that views differ across Europe and even in individual jurisdictions as to whether, and if so, which MiFID duties aim to protect the claimant's patrimonial interests. In addition, in England and Wales only non-professional investors can base their claim for breach of MiFID conduct-of-business duties on section 138D of FSMA.

ii. EU Law

Does the *Genil* case provide any leads in this respect? It is apparent from *Genil* that in the absence of EU legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with MiFID rules, but one of the principles that must be observed is the principle of effectiveness. According to this principle, the conditions to be fulfilled by an investor in bringing a civil action against a bank may not be such as to virtually exclude

[188] BGH 19 December 2013—XI ZR 332/12, reported in BKR—*Zeitschrift für Bank– und Kapitalmarktrecht* 2014, 32, 34. In this regard, see also (referring to earlier versions of WpHG, ss 31 et seq) BGH 19 December 2006—XI ZR 56/05, reported in BGHZ 170, 226, 232. See for a review of the German discussion of protective statutes and MiFID-derived obligations German Chapter, s III.A.iii; Casper and Altgen (n 121) § 4.97–4.99.

[189] See RIS-Justiz RS0120998, mentioned in the Austrian Chapter, s II.D, n 84.

[190] See Austrian Chapter, s II.D. However, the Court stated that § 48a (1) No 2 lit c BörseG, which prohibits market manipulation through communication of wrong information, is to be seen as a protective law. But this provision is the Austrian transposition of the former Market Abuse Directive (MAD) (now replaced by the Market Abuse Regulation (MAR))—not MiFID. See on the private law effect of MAR, D Busch, 'Private Enforcement of MAR in European Law' in M Ventoruzzo and S Mock (eds), *Market Abuse Regulation—Commentary and Annotated Guide* (Oxford: Oxford University Press, 2017).

[191] See Austrian Chapter, s II.D; German Chapter, s III.A.iii; Casper and Altgen (n 121) § 4.97–4.99.

[192] See Chapter on England and Wales, s II.A; van Setten and Plews (n 118) § 11.67–11.68.

the possibility of success. As noted above, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph of MIFID II. It is arguable that *Genil* and Article 69(2), last paragraph of MIFID II mean that in view of the principle of effectiveness a claim for damages on account of an infringement of MiFID rules, in particular the conduct-of-business rules, must not fail by virtue of the requirement of relativity.

H. MiFID's Impact on Proof of Causation

i. Comparative Law

It is a universal requirement that a causal connection must be established between the bank's breach of duty (be it in tort, contract or otherwise) and the loss suffered by the client.[193] As a rule, the client claiming damages has the burden of proof with respect to this requirement. However, especially in the case of duties to furnish information or duties to warn, which may or may not be MiFID-derived, proof of this requirement is often problematic. After all, a bank may argue that there is no causal connection between the breach and the loss suffered because the client would have made the same investment decision had the manager complied with its duties to provide information and its duties to warn. In at least the following jurisdictions special rules apply in such cases to remedy the uncertainty in the causal link.

In France, to remedy the uncertainty in the causal link in case of a violation of duties of information or duties to warn, investors almost systematically use the theory of loss of chance. There are many examples in French case-law, including loss of chance to avoid incurring a loss,[194] loss of chance to realise a profit[195] and loss of chance to opt for a more cautious style of asset management.[196] In view of this it seems probable that in France the same approach would be followed in the

[193] See first and foremost the all-time classic of HLA Hart and T Honoré, *Causation in the Law*, 2nd edn (Oxford: Clarendon Press, 1985). See, more recently, MS Moore, *Causation and Responsibility—An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press, 2009). See for the jurisdictions covered by this book: (1) Austrian Chapter, s V.B; (2) French Chapter, s VI.A; Couret, Goutay and Zabala (n 115) § 3.109–3.117; (3) German Chapter, § IV.1; Casper and Altgen (n 121) § 4.116–4.120; (4) Italian Chapter, s III.B.ii; Giudici and Bet (n 116) § 5.86–5.90; (5) Dutch Chapter, s VI.D; (6) Spanish Chapter, s V; Bachs and Ruiz (n 5) § 9.76–9.77; (7) England and Wales Chapter, p. 10-11; van Setten and Plews (n 118) § 11.87–11.101; (8) Irish Chapter, p. 21, 25; Bates and Clarke (n 120) § 12.111–12.114; (9) DeMott and Laby (n 17) § 13.134.

[194] Cass Com, 10 December 1996; Joly Bourse 206 (1997), note H De Vauplane, referred to in Couret, Goutay and Zabala (n 115) § 3.116, fn 82.

[195] CA Paris, 25 June 1993; Juris-Data No 1993-023022, referred to in Couret, Goutay and Zabala (n 115) § 3.116, fn 83.

[196] CA Versailles, 15 December 2005; Joly Bourse 53 para 5 (2006), note L Ruet, referred to in Couret, Goutay and Zabala (n 115) § 3.116, fn 84. See on the theory of loss of chance in connection with a breach of an asset manager's duties of information and to warn referred to in Couret, Goutay and Zabala (n 115) § 3.116; see also French Chapter, s VI.A.

case of a breach of MiFID duties of information and duties to warn, with the effect that only the percentage of the damages which corresponds to the lost chance can be recovered.

A different approach is followed in Germany. In the case of a breach of the bank's duties to furnish information, the client must prove his (hypothetical) reaction to the respective information. However, to reduce this hardship the courts have established the rebuttable presumption that the client would have followed the advice (*Vermuting aufklärungsrichtigen Verhaltens*). The burden of proof shifts when a specific course of action would have been the only reasonable reaction to the information. The doctrine also applies if there are several possible courses of action but none of the alternatives would have caused any damage, for example because every other investment would have resulted in increased profits.[197] In view of this it seems probable that German law would follow the same approach in case of a breach of MiFID duties of information and duties to warn.

ii. EU Law

What is the impact of EU law on proof of causation of breach of MiFID duties of information? In this respect the Dutch *World Online* judgment on prospectus liability is noteworthy. This Supreme Court decision provides a special rule with respect to uncertainty in the causal link based on the EU principle of effectiveness. The case involved loss allegedly suffered by investors, inter alia due to a misleading prospectus issued on the occasion of an initial public offering of shares in a Dutch listed internet company named World Online. The Dutch Supreme Court ruled in summary as follows.

In prospectus liability cases it is often difficult to prove a causal (*condicio sine qua non*) connection between the loss suffered by an investor and the misleading prospectus, with the effect that the European Prospectus Directive's goal of investor protection may in practice become illusory.[198] The European Prospectus Directive provides detailed rules with respect to the content and layout of a prospectus but does not harmonise national regimes on prospectus liability. However, the European Prospectus Directive does provide that Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus (Article 6(2), first subparagraph).[199] In view of this, effective legal protection must be provided

[197] See German Chapter, s IV.A; Casper and Altgen (n 121) § 4.118.

[198] Now Directive 2003/71/EC [2003] OJ L345/64, as amended by Directive 2010/73/EU [2010] OJ L327/1, previously Directive 80/390/EEC [1980] OJ L100/1. The amendments following from Directive 2010/73/EU must have been implemented in national law by 1 July 2012 the latest (Directive 2010/73/EU, Art 3).

[199] Directive 2010/73/EU [2010] OJ L327/1 does not amend Art 6(2), first subpara of Directive 2003/71/EC [2003] OJ L345/64. It does, however, supplement the text of Art 6(2), second subpara. Hereinafter, the part in italics highlights the text supplemented by Directive 2010/73/EU: 'However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent, when

according to the rules of national law. With a view to effective legal protection and in view of the European Prospectus Directive's goal of protection of (potential) investors, it may serve as a 'point of departure' that the causal connection between the misleading statement and the investment decision is present. In principle it must be assumed that, but for the misleading statement, the investor would not have purchased the securities; or, in a secondary-market transaction, would not have purchased them on the same terms. However, taking into account the nature of the misleading information and the other available information, a court might instead arrive at the conclusion that this point of departure should be displaced; for example, in the case of a professional investor, who in view of its experience and knowledge may not have been influenced by the misleading prospectus in making its decision to invest.[200]

It is submitted that this reasoning in *World Online* could also be applied, with appropriate amendments, to a bank which violates duties to furnish information or to warn pursuant to MiFID. One of MiFID's stated aims is investor protection.[201] Although MiFID does not include a provision similar to Article 6(2) of the European Prospectus Directive, it seems fair to assume that the European legislator intended the Member States to provide effective legal protection in relation to MiFID as well. After all, the principle of effectiveness (*effet utile*) is a fundamental principle of European Union law.[202] *Genil* and Article 69(2), last paragraph of MiFID II provide support for this notion. It is apparent from the judgment, after all, that in the absence of EU legislation it is admittedly for the Member States themselves to determine the contractual consequences of non-compliance with MiFID obligations, but that one of the principles to be observed is the principle of effectiveness (paragraph 57). As noted previously, the principle of effectiveness has been explicitly codified in Article 69(2), last paragraph of MiFID II. The principle of effectiveness means in this connection that the conditions on which an investor can bring a civil claim against a bank may not be such as to virtually exclude the possibility of bringing a successful legal action.

read together with the other parts of the prospectus, *or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning to that effect*'. Please note that on 30 November 2015 the European Commission published a draft of the Prospectus Regulation which will replace the current Prospectus Directive. See for the proposal and further information: http://ec.europa.eu/finance/securities/prospectus/index_en.htm. The text of Art 6(2), first and second subpara of the Prospectus Directive, remain unchanged in the draft Prospectus Regulation, but the text is moved to Art 11(2), first and second para.

200 HR 27 November 2009, *JOR* 2010/43 with annotation by Frielink (*Vereniging van Effectenbezitters c.s./World Online International NV*) considerations 4.11.1 and 4.11.2.

201 MiFID I, consideration (2); MiFID II, consideration (70).

202 On the principle of effectiveness in European Union law, see eg Hartkamp, *European Law and National Private Law. Effect of EU Law and European Human Rights Law on Legal Relationships between Individuals* (n 164) 98–116; Tridimas, The General Principles of EU Law (n 164) 418–76; van Gerven, *Of Rights, Remedies and Procedures* (n 164).

In keeping with the *World Online* judgment, an exception could be made in the case of professional investors since it could be concluded on the basis of their knowledge and experience that they are not actually misled by the incorrect information into making their investment decision. However, this exception may be less appropriate in the event of non-compliance with duties to provide information and warnings under MiFID.[203] After all, the provisions of MiFID on banks make a clear distinction between duties to provide information and warnings to retail clients on the one hand and professional clients on the other.

The duties under MiFID to provide information and warnings to professional investors are geared to their specific information needs. In the event of non-compliance with one or more of these duties, it is reasonable to suppose that the investment decision of the professional client may have been influenced by this. It therefore seems legitimate to argue that even where a bank infringes its duty under MiFID to provide information or warnings to professional clients, the basic principle must be that a causal connection exists between the infringement and the loss. However, whether this approach would be followed by the civil courts across the EU is at present unclear. Naturally, other approaches which help the client to prove a causal connection may also be in keeping with the principle of effectiveness.[204]

I. MiFID's Impact on Limitation and Exclusion Clauses

i. Comparative Law

Is a contractual exclusion or limitation of liability for breach of MiFID duties valid? In England and Wales, the FCA's Conduct of Business Sourcebook (COBS, part of the FCA Handbook) provides a clear answer to this question in COBS 2.1.2R, which applies inter alia to banks providing investment services regulated by the FCA. To the extent relevant here, the provision provides that '[a] firm must not, in any communication relating to designated investment business seek to (1) exclude or restrict or (2) rely on any exclusion or restriction of, any […] liability it may have to a client under the regulatory system'.[205] Paragraph 3.8 of

[203] See also Busch, 'Why MiFID Matters to Private Law—the Example of MiFID's Impact on an Asset Manager's Civil Liability (n 140) 408–09.

[204] On this last point, see CJM Klaassen, 'Bewijs van causaal verband tussen beweerdelijk geleden beleggingsschade en schending van een informatie- of waarschuwingsplicht' in D Busch, CJM Klaassen and TMC Arons (eds), *Aansprakelijkheid in de financiële sector* (Onderneming en Recht no 78) (Deventer: Kluwer, 2013) 127–74, 151.

[205] It should be noted that the FSA (the FCA's predecessor) is of the view that the general regulatory duty to act in the client's best interest (MiFID, Art.19(1) as implemented through 2.1.1R), combined with the general legal principles of the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) and the Unfair Contract Terms Act 1977 and its subsidiary legislation (UCTA), already prevent a regulated firm (such as banks providing investment services) from contractually restricting or excluding liabilities (or duties) it has to its clients under the regulatory framework (including MiFID).

the Irish Consumer Protection Code contains a similar provision, albeit that it only applies in relation to consumers.[206]

In many other jurisdictions, the question as to the validity of contractual clauses limiting or excluding liability for breach of MiFID duties has not yet been squarely faced, or, if the question has been faced, the answer seems less clear-cut than in England and Wales and Ireland.[207] A jurisdiction in the latter category is the Netherlands. According to the general rules of Dutch private law, a limitation or exclusion of liability for damage caused by wilful default (*opzet*) or gross negligence (*grove schuld*) of the bank or its executives (*leidinggevenden*) is in principle contrary to public morals in the sense of Article 3:40(1) DCC and is thus null and void. A contractual clause limiting or excluding liability for breach of MiFID duties as implemented under or pursuant to the Wft can be regarded as a juridical act in violation of regulatory mandatory law. Such a clause will in any event not be void or voidable on the basis that such clause is contrary to mandatory law in the sense of Article 3:40(2) and (3) DCC. After all, Article 1:23 Wft explicitly provides that a juridical act is not invalid solely because it has been performed in violation of a rule laid down by or pursuant to the Wft (except where otherwise provided by the Wft), which includes the rules implementing MiFID. In theory, such clauses may be null and void on the basis that they are contrary to public morals or public policy (Article 3:40(1) DCC). However, it seems highly unlikely that a court would render such a clause null and void, except of course to the extent that it concerns a violation by bank or its executives caused by wilful default or gross negligence (see above). However, this does not mean that under Dutch law liability for breach of MiFID duties may always be effectively limited or excluded, except to the extent

However, the FSA also observed that having the specific duty of COBS 2.1.2R might serve as a further deterrent. See FSA, *Reforming Conduct of Business Regulation* (Policy Statement 07/6, May 2007) para 6.7. The view of the FSA as expressed in the Policy Statement corresponds with the guidance provided in the FCA (previously FSA) Handbook with respect to COBS 2.1.1R (the client's best interests rule) and COBS 2.1.2R (exclusion of liability) in COBS 2.1.3G, which to the extent relevant here states that '(1) [i]n order to comply with the client's best interest rule, a firm should not, in any communication to a retail client relating to designated investment business, […] seek to exclude or restrict; or […] rely on any exclusion or restriction of, any […] liability it may have to a client other than under the regulatory system, unless it is honest, fair and professional for it to do so. (2) The general law, including the Unfair Terms Regulations, also limits the scope for a firm to exclude or restrict any […] liability to a consumer'. See van Setten and Plews (n 118) § 11.60–11.62.

[206] See Irish Chapter, s III. It should be noted that also in Ireland there are other routes available. First, in the case of statutory duties, a financial institution would be unlikely to succeed in an attempt to exempt itself from liability in respect of certain absolute statutory duties. Any exemption clause purporting to do so would be likely to be determined by an Irish Court to be void as being contrary to public policy. Second, consumers may be protected by the Sale of Goods and Supply of Services Acts 1893 and 1980 for consumer transactions and by the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 both of which may limit the ability of the bank to rely on an exemption clause. See Irish Chapter, s III.

[207] See (1) French Chapter, s VI.D; Couret, Goutay and Zabala (n 115) § 3.132–136; (2) Casper and Altgen (n 121) § 4.37–4.40, 4.62–4.67, 4.140–4.143 (Germany); (3) Giudici and Bet (n 116) § 5.106–5.110; (4) Dutch Chapter, s VI.7; Busch and Silverentand (n 117) § 7.169–7.182; (5) Spanish Chapter, s VI.2; Bachs and Ruiz (n 5) § 9.84. The Austrian Chapter provides no leads in this respect.

that wilful default or gross negligence is concerned. Similar to the Dutch position with respect to the effectiveness of contractual clauses setting lower standards than following from MiFID,[208] depending on the circumstances of the case such clauses may be contrary to reasonableness and fairness and therefore inapplicable.[209] In addition, if this type of clause is included in standard terms, it may be unreasonably onerous and therefore voidable, especially if the client is a consumer.[210] The special duty of care to which banks are subject in respect of non-professional clients will here also probably only reinforce this approach. Nevertheless, in the absence of case-law, it is unclear how much weight should be attached to the mandatory public law duties implementing MiFID in assessing whether this type of clause is contrary to reasonableness and fairness and/or unreasonably onerous.[211]

ii. EU Law

The principle of effectiveness as formulated in *Genil* and in Article 69(2), last paragraph of MiFID II could be used to argue that in relation to consumers and small businesses the civil courts are obliged to hold that a contractual clause excluding or limiting liability for an infringement of MiFID rules constitutes an unreasonably onerous provision if included in the general terms and conditions, and that the contractual clause does not therefore prevent a claim for damages on account of non-compliance with the MiFID rules. Likewise, it could be argued that the civil courts are obliged to hold that a contractual clause that seeks to exclude or limit liability for infringement of the MiFID rules is unacceptable according to (depending on the applicable private law) the requirements of reasonableness and fairness that the contractual clause does not therefore prevent a claim for damages on account of non-compliance with the MiFID rules (even in relation to clients *other* than consumers and small businesses).

[208] See s IV.E.i above.

[209] DCC, Art 6:248 (2).

[210] See DCC, Art 6:233, opening words and under (a), stating that '[a] stipulation in general terms and conditions may be avoided […] if it is unreasonably onerous to the other party [the client], taking into consideration the nature and the further content of the contract, the manner in which the terms and conditions were established, the mutually apparent interests of the parties and the other circumstances of the case'. See also DCC, Art 6:237, opening words and under (f), stating that '[i]n a contract between a user [the bank] and the other party [the client], who is an individual not acting in the conduct of a business or profession, the following stipulations contained in general terms and conditions are presumed to be unreasonably onerous. A stipulation which […] releases the user [the bank] or a third person in whole or in part from a legal obligation to repair damage'. See perhaps also DCC, Art 6:237, opening words and under (b), stating that '[i]n a contract between a user [the bank] and the other party [the client], who is an individual not acting in the conduct of a business or profession, the following stipulations contained in general terms and conditions are presumed to be unreasonably onerous. A stipulation which […] materially limits the scope of the obligations of the user [the bank] with respect to what the other party [the client] could reasonably expect without such stipulation, taking into account the rules of law which pertain to the contract'.

[211] See Dutch Chapter, s VI.G.

The principle of effectiveness as formulated in *Genil* and in Article 69(2), last paragraph, MiFID II means, after all, that the national conditions which an investor must fulfil in order to bring a civil action against a bank for infringement of MiFID obligations may not be such that success is practically impossible. It could be argued that this also means that contractual clauses that seek to exclude or limit liability for infringement of MiFID rules are contrary to the principle of effectiveness. Naturally, however, the argument is less strong in cases where the civil courts, regardless of the contractual provisions, are less strict than MiFID. After all, the client has himself agreed to the contractual clause. On the other hand, retail clients in particular often have little influence over the contractual conditions. Arguments that also carry weight are, naturally, that clauses of this kind jeopardise the high level of investor protection which MiFID intends to provide and also detract from the level playing field envisaged by MiFID.

An example may help to clarify this. Article 14(1) of the MiFID I Implementing Directive provides that:

> Member States shall ensure that, when investment firms outsource critical or important operational functions or any investment services or activities, the firms remain *fully responsible* [italics added, *DB*] for discharging all of their obligations under [MiFID I].[212]

It follows, for example, that where a portfolio manager outsources part of the management to a third party (eg a more specialised portfolio manager), it remains *fully responsible* (despite the outsourcing) for observance of the regulatory provisions applicable to the outsourced activities under MiFID. In short, if the third party infringes conduct-of-business rules under MiFID during these activities and the portfolio manager's client suffers loss as a result, it can be argued that, according to the principle of effectiveness, the civil courts are obliged in relation to consumers and small businesses to hold that a contractual provision limiting the liability of the portfolio manager to carefully selecting third parties (including independent agents to whom activities have been outsourced) and excluding his liability for infringements of MiFID rules by a third party to whom aspects of the portfolio management have been outsourced constitutes an unreasonably onerous condition if included in general terms and conditions. Likewise (depending on the applicable private law), it can be argued that the civil courts are obliged here to hold that the contractual clause is unacceptable in the light of the requirements of reasonableness and fairness and is not therefore a bar to a claim for damages for infringement of the MiFID rules. This goes further, by the way, than an assessment by the courts of their own motion since in the above approach the result of the assessment is also predetermined. The subject of assessments by the court of their own motion is dealt with in section IV.K below.

[212] See also Draft Commission Delegated Regulation, C(2016) 2398 final, 25 April 2016, Art 31(1), first sentence.

J. MiFID's Impact on the Doctrine of Mistake and on other Restitutionary Claims

In the context of MiFID's impact on the doctrine of mistake a Spanish Supreme Court of 20 January 2014 is noteworthy. It was the first Spanish decision expressly accepting that non-compliance with the MiFID duties of information and the MiFID KYC may have a bearing on a claim based on mistake, in the sense that it made a mistake on the side of the SME a presumable option. The decision explicitly referred to the *Genil* case.[213]

For the sake of clarity it should be noted that the principle of effectiveness as referred to in *Genil* and Article 69(1) of MiFID II is neutral as to which route national private law chooses to provide the client with compensation for a bank's breach of MiFID duties, as long as obtaining compensation is not impossible or very cumbersome under national private law. In view of this, compensation may be provided by way of a damages claim based on tort, contract, fiduciary law, statute law or by way of a restitutionary claim based on a defect of consent such as fraud or mistake. Also, the principle of effectiveness is neutral as to whether rendering investment services without a licence turns the relevant contract into a void or voidable contract. This means, that the Dutch approach that such contract is simply valid is compatible with the EU principle of effectiveness, as long as the client has a real possibility to claim compensation through another route, such as by means of instituting a damages claim. But the converse is also true. In England and Wales, section 26(1) of FSMA explicitly provides that agreements made by persons who carry on a regulated activity if they are neither authorised nor exempt, are unenforceable against the other person. Section 26(2) provides that the other person, ie the bank's client, is entitled to recover any money or other property paid or transferred by that person to the offender and to recover compensation for any loss sustained by him as a result of having parted with it. However, section 28(3) provides that if the court is satisfied that it is just and equitable in the circumstances of the case, it may allow the agreement to be enforced and property paid or transferred under the agreement to be retained.[214] All this is fine from the perspective of the European principle of effectiveness as long as the customer has a real possibility to obtain compensation.

K. MiFID Assessments by the Courts of their own Motion in Relation to Private Investors?

This brings us, finally, to what we regard as an intriguing question that has a bearing on the intensity with which MiFID impacts private law. At present, the

[213] See Spanish Chapter, s II.B, *in fine*, s III, n 54. The decision was followed in subsequent decisions.

[214] See van Setten and Plews (n 118) § 11.111–11.113; Tison, 'The Civil Law Effects of MiFID in a Comparative Perspective' (n 128) 2621–3269, 2626.

parties to a legal action are often unaware that they could invoke an infringement of MiFID (conduct-of-business) rules. Are the civil courts obliged in such cases to determine of their own motion whether the MiFID (conduct-of-business) rules have been infringed? We would certainly not exclude this possibility.

It is apparent from the settled case-law of the Court of Justice that the national courts must determine of their own motion whether, on the basis of the European principle of effectiveness, unreasonably onerous clauses in contracts between businesses and consumers are 'unfair' within the meaning of Directive 93/13/EEC.[215] The Court of Justice may also direct the civil courts to determine of their own motion whether the legislation is applicable.[216]

Indeed, it would seem to be extending the protection to the entire field of consumer protection directives. Recently, the Court of Justice gave such a direction in the case of the Consumer Purchases Directive.[217] In any event, the MiFID conduct-of-business rules can, in our view, be treated as consumer protection provisions insofar as they must be observed in relation to private investors.[218] National civil courts should in that case determine of their own motion whether there has been an infringement of MiFID conduct-of-business rules in disputes between investment firms and private investors.

V. The Role of Financial Regulators in Settling Disputes

In the majority of the jurisdictions covered by this book, the competent financial regulators seem to play an active role in settling disputes between banks and clients, either formally or informally.

This is first and foremost the case in the US. The seminal case *SEC v Capital Gains Research Burea*,[219] is illustrative in this regard. The Court held that the SEC could obtain an injunction under the Advisers Act compelling a registered investment adviser to disclose to his clients a practice known as 'scalping'—'purchasing shares of a security for his own account shortly before recommending

[215] OJ L 95/29, 21 April 1993.

[216] See ECJ 26 October 2006, C-168/05, *NJ* 2007/201, with note by Mok (*Mostaza Claro*); ECJ 4 June 2009, C-243/08, *NJ* 2009/395, with note by Mok (*Pannon*); ECJ 6 October 2009, C-40/08, *NJ* 2010/11 (*Asturcom*); ECJ 30 May 2013, *NJ* 2013/487, with note by Mok (*Asbeek Brusse and De Man Garabito*); ECJ 28 July 2016, C-168/15, *AA* 2016/658, with note by Hartkamp (*Milena Tomášová v Ministerstvo spravodlivosti SR ea*); ECJ 21 December 2016, C-154/15, C-307/15 and C-308/15 (floor clauses).

[217] Directive 1999/44/EC, OJ L 171/12, 07 July 1999. See ECJ 3 October 2013, C-32/12, *AA* 2015/222, with note by Hartkamp (*Soledad Duarte Hueros v Autociba*); ECJ 4 June 2014, C-497/13, *Ars Aequi* 2015/816, with note by Hartkamp (*Froukje Faber v Autobedrijf Hazet Ochten BV*). See also A Ancery and B Krans, 'Ambsthalve toepassing van consumentenrecht: grensbepaling en praktische kwesties' (2016) *Ars Aequi* 2016, 825–30.

[218] One of the key objectives of MIFID is to offer a high level of investor protection. See Recital (2) to MiFID I and Recital (70) to MiFID II.

[219] 375 U.S. 180 (1963).

that security for a long-term investment and then immediately selling the shares for a profit following the recommendation'.[220] It is noteworthy that FINRA, the self-regulatory organisation (SRO) for registered US broker-dealers, also helps uncover and remedy fraudulent or illegal practices in the industry, and awarded a record $34 million in restitution to consumers in 2012. FINRA may also refer wrongdoing to the SEC, which may seek disgorgement in court or by settlement. In one notable case involving the SEC, a federal court established a claims fund for victims of Prudential Securities, with about $940 million in distributions from the fund.[221] The active role of the SEC over the last 50 years or so may perhaps be explained by the fact 'that there exists [only] a limited private remedy under the [Advisers Act] to void an investment adviser's contract, [and] the Act confers no other private causes of action, legal or equitable'.[222] Thus, litigation to enforce the fiduciary standards established by the Advisers Act is limited to SEC enforcement actions, and private damages claims for breaches of an investment adviser's fiduciary duties or negligence are a matter of state law.[223]

The UK Financial Conduct Authority (FCA) (formerly the UK Financial Services Authority (FSA)) has similar powers to the SEC. Pursuant to Part XXV of FSMA the FCA may apply for injunctions and restitution orders.[224] It is also notable that the FCA and the former FSA both played an active role in utilising the Financial Ombudsman Service (FOS) to settle disputes between banks and retail clients and small business customers. Part XVI of FSMA established the FOS, which provides a scheme to allow customer complaints to be adjudicated against financial services firms in cases involving general insurance, banking and credit, and investment. The Ombudsman regime has been extensively utilised to file millions of claims against banks for mis-selling financial products, including payment protection insurance (PPI) and derivative products such as interest rate swaps.[225]

In Ireland, section 43(1) of the Central Bank (Supervision and Enforcement) Act 2013 grants the Central Bank power to direct that redress be afforded to customers of a regulated financial services provider where they have suffered or

[220] ibid, 181. See US Chapter, s III.C.ii.a.

[221] See US Chapter, s III.C.ii.b.

[222] *Transamerica Mortg Advisors*, *Inc*, 444 U.S. at 24, see US Chapter, s III.C.ii.a and n 221. As amended in 1970, the Advisers Act also 'impose[s] upon investment advisers a "fiduciary duty" with respect to compensation received from a mutual fund, 15 U.S.C. § 80a-35(b), and grant[s] individual investors a private right of action for breach of that duty, *ibid*'; *Jones v Harris Assocs LP*, 130 S Ct 1418, 1423 (2010). See US Chapter, s III.C.ii.a, n 221.

[223] See US Chapter, s III.C.ii.a. See *Davis v Merrill Lynch, Pierce, Fenner & Smith*, *Inc*, 906 F.2d 1206, 1215 (8th Cir 1990) ('The question of whether a fiduciary relationship exists is a question of state law'.); *Stokes v Henson*, 217 Cal App 3d 187, 265 Cal Rptr 836 (Cal Ct App 1990) (affirming judgment against investment adviser for breach of fiduciary duty under California law), referred to in US Chapter, s III.C.ii.a, n 222.

[224] See extensively G McMeel and J Virgo, *McMeel and Virgo on Financial Advice and Financial Products*, 3rd edn (Oxford: Oxford University Press, 2014) § 18.228–§ 18.292.

[225] See Chapter on England and Wales, s I.C. See for an in-depth analysis McMeel and Virgo, *McMeel and Virgo on Financial Advice and Financial Products* (n 224) § 19.22–§ 19.113.

will suffer a loss as a result of widespread or regular relevant defaults by a regulated financial services provider.[226] Furthermore, section 54 the Central Bank (Supervision and Enforcement) Act 2013 empowers the Central Bank to apply to the High Court for a 'restitution order' in cases where a sanction has been imposed on a person pursuant to specified statutory provisions or where the person has been convicted of an offence under financial services legislation and there has been unjust enrichment or loss. The restitution order will require the regulated financial service provider concerned to provide to the Central Bank an amount equal to the unjust gain or loss, which the Central Bank would then distribute.[227]

The French financial regulator—formerly the Commission des opérations de bourse, now the Autorité des marchés financiers—has also played an active role in settling disputes between financial institutions and clients since 1991. However, it was only in 2003[228] that the French lawmaker passed a law that has given it a legal basis. According to Article L 621-19, Monetary and Financial Code,

> The Autorité des Marchés Financiers is authorised to deal with claims from any interested party relating to matters within its competence and to resolve them appropriately. Where the conditions so permit, it proposes a friendly settlement of the disputes submitted to it, via arbitration or mediation.[229]

In Spain, the so-called Claims Service of the Bank of Spain draws up an annual report which includes a description of the claims received and a determination of what it considers as reasonable banking practices. The annual report is not formally binding on the banks it concerns, but the report has some persuasive authority. It is also worth mentioning Real Decreto-ley 6/2013, of 22 March, specifically designed to resolve disputes on claims concerning the sale of preferred stock and subordinated debt issued by banks being the subject of a state-controlled restructuring process.[230] Real Decreto-ley 6/2013 created a special arbitration process and constituted the so-called 'Commission for Monitoring Hybrid Capital and Subordinated Debt Instruments' (CMHC). CMHC determined the basic criteria to give the investor guidance as to whether his claim will be upheld by the arbitrators. It should however be noted that the CMHC criteria were not formally binding on the arbitrators. The arbitrations took place under private law conducted by private arbitrators. The arbitration procedures did not formally constitute dispute settlement by financial regulators, but the proceedings were established by law and to some extent controlled by the framework set up by CMHC.[231]

[226] See Irish Chapter, s VI.
[227] See Irish Chapter, s VI.
[228] Law n° 2003-707, 1er August 2003, *de sécurité financière*. Referred to in the French Chapter, s VIII, n 101.
[229] See French Chapter, s VIII.
[230] The public body in charge of the restructuring process is the Fund for Orderly Bank Restructuring (FROB), regulated by Act 9/2012, of 14 November 2012, the Act on restructuring and resolution of banks. See Spanish Chapter, s VI.
[231] See Spanish Chapter, s VI.

In the Italian chapter, mention is made of (1) the Banking-Financial Arbitrator (Arbitro Bancario Finanziario, ABF), which is part of the Bank of Italy, and (2) the Conciliation and Arbitration Chamber (Camera di Conciliazione e Arbitrato, CCA), replaced as of 9 January 2017 by the Financial Disputes Arbitrator (Arbitro per le Controversie Finanziarie, ACF), which are both part of financial markets regulator Consob. Both the ABF and the CCA were established in 2005 by Law no 262, enacted as a reaction to certain corporate scandals. ACF was instead established in 2016 in light of the modest success of CCA. While ABF is however not competent for dispute settlement on investment services and investment activities, CCA and ACF are competent to deal with such disputes, but only with respect to retail investors. In 2010, a few years after the introduction of ABF and CCA, the Italian legislator took a further initiative affecting ADRs (also) in financial law matters, by enacting Legislative Decree 4 March 2010, no 28. For many years Italian courts have been experiencing great workloads, whose main effect is that, on average, first instance civil proceedings take not less than three years, so the legislator decided to introduce a mandatory regulation of mediation in civil and commercial matters. Indeed, failure to proceed with this attempt shall result in the preclusion of the claim before ordinary courts. 'Insurance, banking and financial agreements' are included in the list of matters to which such obligation is imposed. It is further provided that the attempt for conciliation under Legislative Decree no 28/2010 shall take place before a body entered in the register kept by the Ministry of Justice. As regards disputes concerning 'Insurance, banking and financial agreements', it has been established that this condition could be satisfied also by using proceedings before the ABF or before the CCA/ACF.[232]

Finally, in the Netherlands, neither the conduct of business regulator AFM, nor prudential regulator DNB, have formal powers to settle disputes between banks and their clients. The same is true for the Dutch Ministry of Finance. Nevertheless, both the AFM and the Ministry of Finance played an active role in settling the massive mis-selling of interest rate swaps to SMEs. In a first stage, the AFM investigated individual interest rate swap contracts with SMEs and concluded that in many cases the MiFID rules pertaining to interest rate swaps had not been complied with. In many cases the client had been insufficiently informed about the mechanics of interest rate swaps in general, and the benefits and risk of any such product for their individual situation. The AFM requested the banks concerned to re-evaluate individual interest rate swap contracts and to the extent necessary compensate their clients. However, the process was badly managed by the AFM and the banks did not fully cooperate. As a result, under pressure from the Dutch Minister of Finance, and in line with the advice of the AFM, the Ministry of Finance appointed a Derivatives Committee (Derivatencommissie), consisting of three independent experts to draw up a uniform settlement framework for derivatives with SMEs (*Uniform Herstelkader Rentederivaten MKB*). On 5 July 2016,

[232] See Italian Chapter, s IV.

the committee published the framework. Under considerable pressure from the Ministry of Finance, the relevant banks in the end accepted the framework.[233] In the view of many commentators, the whole process was far too lengthy. In view of this, some commentators propose a law reform to the effect that the AFM obtains true powers to settle disputes between banks and clients, very much like the UK FCA.[234] The Dutch Ministry of Finance recently solicited stakeholder views on whether the AFM should have formal powers to settle disputes between banks and their clients.[235]

So, all in all, the picture that emerges is that the traditional distinction between public and private law is increasingly blurred. We do not perceive this as a bad development. Doctrinal distinctions should never hinder practical outcomes. In view of the massive scale on which mis-selling of financial products takes place, it seems like a natural step to grant settlement powers to financial regulators.

It may gleaned from the foregoing that when it comes to damages claims from investors, courts in continental Europe are generally more investor friendly than courts in the common law countries. Courts impose duties of care on banks in a more extensive way and it also looks like the threshold for breaching such a duty is more easily reached than in common law countries. The same goes for the breach of a statutory duty. Under United States federal law, the breach of a statutory rule is not even privately enforceable.

However, this does not necessarily mean that private investors in continental European jurisdictions are better off than in common law countries. In the latter countries, regulatory authorities generally play a more active role than their continental European counterparts. In the United States, the SEC enforces statutory duties that apply to broker-dealers and in the United Kingdom, the Financial Conduct Authority has similar legal powers (and uses these powers) to apply for injunctions and restitution orders, hence pushing banks to deal with claims of investors for mis-sold services and products and to provide them with fair compensation. This effect is also facilitated by the role of the Financial Ombudsman Service. Particularly when it comes to claims regarding similar financial products and services, it may very well be that private investors are better off in common law jurisdictions, as they do not need to go to court (individually or as a group), saving time and money in litigation. In individual cases this may mean that an investor is less well off than if he had gone to court but overall the protection for investors may be stronger.

In continental European jurisdictions, regulators do not have the same legal powers as a private claims enforcer or they do not use their powers as forcefully as

[233] See for further information: www.derivatencommissie.nl/.

[234] See *Financieele Dagblad*, 'Juridisch gat bij swaps moet dicht' (6 July 2016) 2.

[235] See p 12 of the consultation document mentioned in § II.5, last para: Ministerie van Financiën, *Consultatiedocument—Effectiviteit en gewenste mate van bescherming voor zzp-ers en mkb-ers bij financiële diensten en producten* (1 September 2016) (available at: www.internetconsultatie.nl/consultatiebeschermingkleinzakelijk). See Dutch Chapter, s XI.

the UK and the US regulators. In France, where conditions permit, the 'Autorité des Marchés Financiers' proposes friendly settlements of the disputes submitted to it, via arbitration or mediation. The annual report of the Claims Service of the Bank of Spain lists the claims received and a determination of what it considers as reasonable banking practices but these determinations are not formally binding on the banks it concerns. In the Netherlands, the financial regulators do not have legal powers to settle disputes between banks and their clients. An attempt to informally nudge banks to provide redress to buyers of mis-sold products went awry and induced calls to provide the regulators with effective legal powers. In some countries, like in Spain and Italy, regulators only recently obtained new powers and it is not yet clear how effective these powers are or how effectively they are and will be used.

The lack of legal powers of continental regulators makes private litigation by individual investors or by group actions the only effective avenue to obtain redress. As this litigation is costly and lengthy many investors will refrain from it and bear their losses. This increases the social costs of mis-sold financial products and exacerbates the externalising effect of the banks' wrongful conduct.

To a considerable extent, group actions may make up for this negative effect but most jurisdictions do not allow such actions or make them very cumbersome. Remarkably, bar the Netherlands, the strongest limitations on group actions are again in continental European jurisdictions. In countries where both the regulators have limited powers to settle disputes and force banks to provide redress to customers and group actions are not or only very limitedly possible, it is likely that there is a large enforcement deficit when it comes to compliance with the banks' statutory duties of care.

This picture coincides with the generally more active and repressive approach of Anglo-American regulators and prosecutors when it comes to violating the rules of the free market. When it comes to criminal prosecution, the number of convictions in the framework of the financial industry with respect to mis-sold financial products and rigged interest rates is relatively low in the United States and the United Kingdom, but they are still considerably higher than the number of convictions in continental Europe. The same goes for the regulatory fines imposed on financial institutions.

Although links between governments and the corporate world are generally close,[236] it seems that these links work out differently in the Anglo-American world than in continental Europe. Whilst the political influence of big money seems to be bigger in the Anglo-American world, this love affair usually comes

[236] eg in 2016, the OECD concluded that many economically advanced countries are failing to fully enforce regulations on political party funding and campaign donations or are leaving loopholes that can be exploited by powerful private interest groups, in particular big corporations and their lobbyists: *Funding Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (Paris: OECD, 2016) www.oecd.org/governance/financing-democracy-9789264249455-en.htm.

to an end where fundamental principles of the free market are violated. In continental Europe, the criminal and administrative response is weaker. This calls into question the independence of continental European prosecutors with respect to crimes related to national corporate interests.

One explanation for this may be that the inherent support for the principle of the free market is weaker and, perhaps for that reason, violation of this principle is considered to be less severe and serious and therefore less eligible for punishment. This difference in approach may also be linked to a generally more consensual approach in politics and society in continental Europe, and a more adversarial approach in the Anglo-American world.

VI. The Bigger Picture and Reform Perspectives

A. General

This book has been concerned with a bank's duty of care, a private law device geared to investor protection. But as we have seen, in not all the jurisdictions covered by the book is this the term of art. Especially in common law jurisdictions the term 'duty of care' is bound to cause confusion. Therefore, we also included discussion on more or less functionally similar concepts, such as fiduciary duties and all kinds of statutory duties. Also, it was not the legal concepts as such that we focused on, but rather the essential duties which typically flow from these concepts, ie duties to investigate, duties to disclose or warn, and—in exceptional cases—outright duties to refuse to render financial services or products. In the remainder of this section we will nevertheless use the term 'duty of care' as a convenient shorthand.

Of course, the bank's duty of care does not operate in a vacuum. A bank's duty of care should also be viewed against the backdrop of the bigger picture. Section IV on the private law effect of MiFID already made this clear and the same is true for the previous paragraph on financial regulators settling disputes between banks and their customers. In this final section, we would like to highlight some recent reform proposals which enable us to put the bank's duty of care into a larger perspective.

B. Product Governance and Product Intervention

First of all, the case-law mentioned in this book clearly shows that some of the financial products sold in recent years have not been in the interests of the client, such as interest rate swaps sold to SMEs in many European countries. This is why consideration has been given to ways of nipping this problem in the bud, in other words by preventing harmful products from even reaching the market. Under

MiFID II this has taken the form of a mandatory product approval process.[237] But, as usual, firms will look for ways around these requirements. It would be naive to think that product approval schemes could in practice guarantee that harmful products are no longer marketed. This is why the existence of safety nets continues to be of paramount importance. The bank's duty of care is one of those safety nets and will therefore continue to play its part. MiFID II also introduces another safety net, taking the form of a power for the national competent authorities (NCAs) and also for the European Securities and Markets Authority (ESMA) and European Banking Authority (EBA) to remove harmful products from the market—a system known as product intervention.[238]

The following is also noteworthy. As we have seen, the bank's duty of care very much revolves around duties of disclosure and duties to warn so as to enable the investor to make an informed investment decision. In other words, an essential aim of the bank's duty of care is to safeguard that the investor understands the characteristics and the risks of the product or service involved. In addition, KYC rules—the other essential ingredient of a bank's duty of care—aim to make sure that a product or service meets the investor's needs and is also otherwise appropriate for him. To effectively meet the bank's duty of care, the relevant bank staff must have the necessary expertise. This should go without saying, but the financial crisis revealed that in many cases bank staff did not fully understand the bank's products and services, and the same was true for the needs of the investors concerned. In view of this, the new product governance rules explicitly stipulate that manufacturers of financial products must ensure that relevant staff involved in the manufacturing of products possess the necessary expertise to understand the characteristics and risks of the products they intend to manufacture.[239] Distributors have a comparable obligation. However, they must ensure not only that relevant staff understand the characteristics and risk of the products they are distributing, but also the needs, characteristics and objectives of the identified target market.[240]

[237] MiFID II, Art 9(3)(b), 16(3), second to seventh subparas, 24(2). See also the Draft Commission Delegated Directive, C(2016) 2031 final, 7 April 2016, Arts 9 and 10.

[238] MiFIR, Arts 39–43. See also of the Draft Commission Delegated Regulation C(2016) 2860 final, 18 May 2016, Arts 19–21. See also MiFID II, Art 69(2)(s) and (t). See for more detail on product governance and product intervention: D Busch, 'Product Governance and Product Intervention under MiFID II/MiFIR' in D Busch and G Ferrarini, 'Regulation of the EU Financial Markets: MiFID II and MiFIR' (Oxford: Oxford University Press, 2017) 123–46.

[239] Draft Commission Delegated Directive, C(2016) 2031 final, 7 April 2016, Art 9(5) (financial instruments), in conjunction with Art 1(2) (structured deposits). See also ESMA/2014/1569, *Final Report—ESMA's Technical Advice to the Commission on MiFID II and MiFIR* (19 December 2014) 56 (no 6). *Cf* also the corporate governance requirement that the management body should approve the internal organisation of the firm, including criteria for the selection, training, knowledge, skills and experience of the staff. See MiFID II, Art 9(3)(a) (financial instruments) in conjunction with Art 1(4), opening words and (a) (structured deposits); see also Recital (54) to MiFID II.

[240] Draft Commission Delegated Directive, C(2016) 2031 final, 7 April 2016, Art 10(7), (financial instruments), in conjunction with Art 1(2) (structured deposits). See also ESMA/2014/1569, *Final Report—ESMA's Technical Advice to the Commission on MiFID II and MiFIR* (19 December 2014) 60 (no 27). See also MiFID II, Art 24(2), second para, (financial instruments) in conjunction with Art 1(4), opening words and (b) (structured deposits), which provides that 'an investment firm shall understand the financial instruments they offer or recommend'.

This duty ties in with developments reported in some of the previous chapters. In Germany, banks may only recommend investments whose characteristics and risk they understand, whereas in the Italian chapter the Know your Merchandise rule is alluded to.[241]

C. Reclassification of Dealing on own Account to Dealing on Behalf of the Client

Another important innovation of MiFID II clearly geared to better investor protection is the following. MiFID II reclassifies certain cases of dealing on own account (an investment activity) as dealing on behalf of the client (an investment service). In consequence, all kinds of MiFID conduct-of-business rules will become applicable to cases of dealing on own account that are reclassified as dealing on behalf of the client. This reclassification has important consequences for investor protection. If a bank deals wholly or partly on behalf of the investor (as intermediary or representative), it is subjected to all kinds of conduct-of-business rules. If, on the other hand, a bank enters into a transaction with an investor solely as a contractual counterparty, it owes few if any conduct-of-business rules pursuant to MiFID. Once it has been established that the firm is acting on behalf of the client, the level of protection depends next on the classification of the client and the exact framework in which the transactions are carried out (ie whether the transactions involve execution-only, investment advice or portfolio management services). In any event, this reclassification concerns the following two situations.

First, the definition of 'execution of orders on behalf of clients' has been modified to such an extent that some instances of dealing on own account have been reclassified and brought within its ambit, with the result that the definition of 'dealing on own account' is now much narrower. Likewise, under MiFID II the phrase 'the conclusion of agreements to sell financial instruments issued by an investment firm or credit institution at the moment of their issuance' comes within the definition of 'execution of orders on behalf of clients'.[242] What is the exact scope of this change? Some examples may help to clarify this. If a bank sells an investor shares in its own capital at the time of issuance and the sale does not involve the provision of any form of investment service, the bank acts solely as the investor's contractual counterparty. Under MiFID this is an instance of dealing on own account. Under MiFID II, however, it is reclassified as acting on behalf of the client and is suddenly treated as a form of investment service. Issuance is usually taken to mean the issuance of marketable shares and bonds, but in MiFID II it has a broader meaning. In the terminology of MiFID II the concept of issuance is linked to financial instruments. This means that where a bank acts as contractual

[241] See German Chapter, s III.B.iv; Italian Chapter, s II.B, where reference is made to the 'know your merchandise rule'.

[242] MIFID II, Art 4 lid 1 sub (5).

counterparty in an interest rate swap this too is treated as the conclusion of an agreement for the sale, at the time of issuance, of a financial instrument issued by a bank. After all, an interest rate swap is a financial instrument, like many other derivatives. This interpretation also benefits investor protection, which is one of the key objectives of MiFID and MiFID II. Recital (45) in the preamble to MiFID II explicitly states that this reclassification is intended 'to eliminate uncertainty and strengthen investor protection'.

Second, although this is not apparent from the broadening of the definition of 'execution of orders on behalf of clients' but from Recital (24) in the preamble to MiFID II, matched principal trading (back-to-back trading) is regarded, inter alia, as execution of orders on behalf of the client, although under MiFID it was treated solely as dealing on own account. In Article 4(1), point (38), of MiFID II matched principal trading is defined as

> a transaction where the facilitator interposes itself between the buyer and the seller to the transaction in such a way that it is never exposed to market risk throughout the execution of the transaction, with both sides executed simultaneously, and where the transaction is concluded at a price where the facilitator makes no profit or loss, other than a previously disclosed commission, fee or charge for the transaction.

In terms of economic result, matched principal trading resembles the position in which the firm acts on both sides of a transaction for the client, ie matching opposite client orders (agency crosses).[243]

These two instances of reclassification enhance investor protection, but in our view this is not sufficient. If a bank sells a financial instrument that it has not issued itself, we cannot see any reason why the investor should not enjoy the protection of the MiFID conduct-of-business rules that apply to execution-only services. This approach is also in keeping with the reasonable expectations of the investor, certainly in the case of a retail investor. An investor may reasonably expect the bank used by him to look after his interests adequately and thus to observe certain conduct-of-business rules towards him. The bank is, after all, ideally placed to use its expertise. Its fund of knowledge is bound to be superior to that of an investor, particularly a retail investor.[244] Nor is this any different where

[243] More precisely, Recital (24) in the preamble to MiFID II provides that 'dealing on own account when executing client orders [ie (systematic) internalisation] should include firms executing orders from different clients by matching them on a matched principal basis (back-to-back trading), which should be regarded as acting as principal and should be subject to the provisions of this Directive covering both the execution of orders on behalf of clients and dealing on own account'. Equating matched principal trading with (systematic) internalisation is in fact based on a fallacy. In economic terms, matched principal trading much more closely resembles agency crosses, as opposite client orders are in fact matched with one another.

[244] In fact, the European Commission acknowledges in its letter to the Committee of European Securities Regulators (CESR) of 19 March 2007 that the investor's reasonable expectations play an important role in answering the question of whether in a given case the bank transacts as agent or solely as principal. That is understandable, since whether or not the bank transacts as agent or solely as principal is a matter of interpretation of the legal relationship. But this approach has its limits. If it is

the bank acts purely as the investor's contractual counterparty. In such cases, the investor is reasonably entitled to expect the bank to observe the same conduct-of-business rules that would apply if it were providing an execution-only service. Moreover, the distinction between dealing on own account (principal dealing) on the one hand and trading on behalf of the client (and other forms of investment service) on the other is tenuous, arbitrary and easy to manipulate. This is all the more so where a contractual clause providing that a bank acts solely as contractual counterparty is claimed to apply even where an employee of the bank advises the investor, contrary to the terms of the agreement.[245] Clearly, MiFID II also provides no practicable criterion. Indeed, to achieve an adequate level of investor protection MiFID II resorts to the artifice of reclassifying certain types of dealing on own account as acting on behalf of the client. Moreover, as already became clear in the Dutch chapter and in this chapter, the Dutch Supreme Court has already extended the special civil duty of care to dealing on own account. In a case involving the offering of risky and complex financial products to retail investors, it held that it followed from the special civil duty of care that there was a duty to warn investors of the risks involved and a duty to comply with KYC rules, even though the bank was only acting as contractual counterparty.[246] Finally, the UK government (in response to the Kay Review) takes the view that duties of care must also apply where a bank acts solely as an investor's contractual counterparty.[247] Under a future MiFID III, a bank which acts solely as contractual counterparty should be required to observe the same conduct-of-business rules as apply in the case of an execution-only service.[248]

absolutely clear on the facts that the bank transacted solely as principal, it is not possible to argue that the bank in fact transacted as agent. Preferably, therefore, the distinction between acting as agent and acting as principal should simply no longer be treated as relevant in determining the degree of investor protection. For the European Commission's letter, see: Working Document ESC- 07- 2007, Commission answers to CESR scope issues under MiFID and implementing directive (Appendix to CESR, Best Execution under MiFID, Questions & Answers, May 2007, CESR/ 07- 320.

[245] This may be illustrated by the Scottish case *Grant Estates Ltd v The Royal Bank of Scotland plc*, Court of Session 21 August 2012 [2012] CSOH 133. In this case Lord Hodge (now one of the Justices in the UK Supreme Court) held that a clause providing that the bank acted solely as contractual counterparty was valid, despite the fact that an employee had advised the investor. See extensively on this case: D Busch, 'Agency and Principal Dealing under MiFID I and MiFID II' in Busch and Ferrarini, *Regulation of the EU Financial Markets* (n 238) 227–49; D Busch, 'Agency and Principal Dealing under the Markets in Financial Instruments Directive' in D Busch, L Macgregor and P Watts (eds), *Agency Law in Commercial Practice* (Oxford: Oxford University Press, 2016) 141–75.

[246] See HR 5 June 2009, *JOR* 2009/199, annotated by Lieverse (*Treek v Dexia Bank Nederland*), consideration 5.2.1. See Dutch Chapter, s II.B; ch 2, s III, *in fine*; this chapter, s II.B.iii.c.

[247] BIS, *Ensuring Equity Markets support Long-term Growth*. The Government response to the Kay review (November 2012) para 2.8.

[248] For an in-depth analysis of this issue see Busch, 'Agency and Principal Dealing under MiFID I and MiFID II' (n 245) 227–49; Busch, 'Agency and Principal Dealing under the Markets in Financial Instruments Directive' (n 245) 141–75.

D. Plain Language

Information provided in plain language is essential for consumers and other inexperienced investors. The reality is very different. Information on the characteristics and risks of financial products and services normally takes the shape of very detailed information, expressed in complex language containing highly complex legal and financial terms. MiFID I does not remedy this and the same is true for MiFID II. Under MiFID II, the information paradigm is still predominant. Investor protection is therefore still about providing investors with the information that will enable them to make an informed investment decision. Under MiFID II the amount of information that must be provided to investors is set to increase rather than decrease and the information will also have to be more detailed. This is despite the fact that many people doubt whether the huge volume of information provided really helps investors to make informed and well-considered decisions.[249]

But there is hope. On a national level, it is notable that the Italian Supreme Court emphasises that information should be provided in plain language and that contractual documents should be written in plain language.[250] The Bank of Spain follows a similar path. The Bank of Spain has developed and systematised in detail the issues which contracts should explicitly and clearly explain (sixth standard of Circular 5/2012, 27 June). This standard specifies that contracts should be drafted in clear and understandable language. Banks should avoid using technical jargon, and when its use is inevitable, they must properly explain the meaning.[251]

On a European level, we refer to the Commission draft of the Prospectus Regulation published on 30 November 2015 which will replace the current Prospectus Directive. Consideration (23) of the Draft Commission Prospectus Regulation states the following:

> The summary of the prospectus should be short, simple, clear and easy for investors to understand. It should be drafted in plain, non-technical language, presenting the information in an easily accessible way. It should not be a mere compilation of excerpts from the prospectus. It is appropriate to set a maximum length for the summary in order to ensure that investors are not deterred from reading it and to encourage issuers to select the information which is essential for investors.[252]

[249] See eg N Moloney, *How to Protect Investors—Lessons from the EC and the UK* (Cambridge: Cambridge University Press 2010) 288 et seq; L Enriques and S Gilotta, 'Disclosure & Financial Markets Regulation' in N Moloney, E Ferran and J Payne, *The Oxford Handbook of Financial Regulation* (Oxford: Oxford University Press, 2015) 511–36; V Colaert, 'Building Blocks of Investor Protection—All-embracing Regulation Tightens its Grip (draft paper, to be published); K Broekhuizen, 'Klantbelang, belangenconflict en zorgplicht' (The Hague: Boom juridische uitgevers, 2017).

[250] Italian Chapter, s II.C.

[251] Spanish Chapter, s IV.

[252] See for the proposal and further information: http://ec.europa.eu/finance/securities/prospectus/index_en.htm.

E. Financial Literacy and Financial Education

Finally, there is the importance of financial literacy and financial education. Their importance in enhancing investor protection is widely accepted by the stakeholders in this discussion.[253] The Organisation for Economic Cooperation and Development (OECD) is especially active in this field. OECD, with the guidance of the International Network on Financial Education, and in consultation with a wide range of stakeholders, develops best practices and principles to help increase financial literacy and raise awareness.[254] The European Commission and the European Parliament also have a keen interest in this topic, but according to Article 165 of the Treaty on the Functioning of the European Union, EU Member States are responsible for legislation on education. Therefore, actions in the field of financial education at EU level can only take the shape of incentive measures.[255] In 2015 the European Banking Federation published a useful report listing national good practices in 32 European countries.[256]

[253] See for an overview EP briefing May 2015, 'Improving the Financial Literacy of European Consumers' available at www.europarl.europa.eu. See extensively on investor education: Moloney, *How to Protect Investors—Lessons from the EC and the UK* (n 249) 374 et seq.

[254] See www.financial-education.org/standards.html.

[255] See for an overview of these measures EP briefing, 'Improving the Financial Literacy of European Consumers' (n 253).

[256] See the document 'Financial Education—National Strategies in Europe—Good Practices Report', European Banking Federation (March 2015) available at: www.ebf-fbe.eu.