# A Bank's duty of care

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

DANNY BUSCH AND CEES VAN DAM*

**Abstract**

In this article we place a bank's duty of care in a European and comparative law perspective. 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. 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 article. The third topic is the impact of the European Markets in Financial Instruments Directive (MiFID) on a banks' duty of care. The fourth topic focuses on the role of the financial regulator in settling disputes between banks and clients. We conclude this article with the bigger picture and relevant reform perspectives.

## I. Introduction

The Great Financial Crisis sparked a flood of litigation across Europe and the United States. Banks have been subject to litigation and in a number of cases have been held

■ AQ: author: note numbering is one-off, please check cross references, if any

* Prof. Dr. Danny Busch, M.Jur. (Oxon.) is Chair of Financial Law and Director of the Institute for Financial Law (IFL), University of Nijmegen, the Netherlands, Visiting Professor at Université de Nice Côte d'Azur, Visiting Professor at Università Cattolica del Sacro Cuore di Milano, Visiting Professor at Università degli studi di Genova, Member of the Dutch Banking Disciplinary Committee (Tuchtcommissie Banken), and Member of the Appeal Committee of the Dutch Complaint Institute Financial Services (Klachteninstituut Financiële Dienstverlening, KiFiD). Prof. Dr. Cees van Dam is Chair of European Tort Law at Maastricht University, Chair of International Business and Human Rights at the Rotterdam School of Management, Erasmus University, and Visiting Professor at King's College London. This article has grown out of the work of the International Working Group on A Bank's Duty of Care consisting of Prof. Dr. Kern Alexander (Zürich/Cambridge), Prof. Dr. Jens-Hinrich Binder (Tübingen), Prof. Dr. Thierry Bonneau (Paris), Prof. Dr. Danny Busch (Nijmegen/Nice/Milan/Genoa), Prof. Dr. Blanaid Clarke (Dublin), Prof. Dr. Cees van Dam, (Maastricht/Rotterdam/London), Dr. Marco Garavelli (Milan), Prof. Dr. Eduardo Valpuesta Gastaminza (Navarra), Prof. Dr. Pedro-José Bueso Guillén (Zaragoza), Dr. George C Harris (San Francisco), Sabrina Larson (San Francisco), Dr. Jorge Noval Pato (Navarra), Dr. Julian Ring (Vienna), Filippo Rossi (Milan), Prof. Dr. Manuel Ãngel López Sánchez (Navarra), Prof. Dr. Martin Spitzer (Vienna), Prof.; Dr. Hannibal Travis (Florida), and Dr. Bart van der Wiel (Amsterdam). We thank Nina Peters (Nijmegen) for valuable research assistance. The complete research (including all the country reports) has been published in D Busch & CC Van Dam (eds), *A Bank's Duty of Care* (Hart/Bloomsbury, 2017) (450 pages).

Busch, Danny and Cees van Dam. 'A Bank's Duty of Care: Perspectives from European and Comparative Law Part I'. *European Business Law Review* 30, no. 1 (2019): 117-148.

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. There has been litigation 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 scope of the duty of care of banks seems to expand: from protection of consumers against unclear risks of complicated products to protection of professional parties and against more obvious risks of relatively straightforward products.

The duty of care of banks raises many questions, both at a theoretical and practical level. The topic is relatively novel and in a state of flux. Many important questions are still in search of clear answers.

In this article we place a bank's duty of care in a European and comparative law perspective. 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]

## II. The Subject-Matter of This Article

For this article, 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

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

products (section V). 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 article (section VI). The third topic is the impact of the European Markets in Financial Instruments Directive (MiFID) on a banks' duty of care (section VII). The fourth topic focuses on the role of the financial regulator in settling disputes between banks and clients (section VIII). We conclude this article with the bigger picture and relevant reform perspectives (section IX).

But before we can begin our treatment of the above topics we first need to clarify the scope of this article and explain the terminology we used (section III). Also, we will say a few words about the legal systems we included in our comparison (section IV).

## III. Scope and Terminology

This article is principally concerned with the duty of care in the area of the provision of investment services, ie execution-only services, investment advice and asset management. However, as will be seen in the next sections of this article, in many jurisdictions the duty of care applies well beyond this scope.

In all jurisdictions covered, banks offer investment services on a large, if not massive, scale. Nevertheless, independent investment advisers and asset managers may also provide investment services, even though they do not qualify as a bank from the perspective of the applicable regulatory framework. Most of what is said in this article on the duty of care of banks providing investment services equally applies to non-bank entities providing such services, at least as far as the European jurisdictions covered by this article are concerned.

'Duty of care' is not the term of art in all jurisdictions. In common law jurisdictions in particular the term is bound to cause confusion. We essentially aimed to focus on duties to investigate, duties to disclose or warn, and – in exceptional cases – outright duties to refuse to render financial services or offer products, no matter the nature of their legal source. In view of this we adopted a functional approach and also included discussion on fiduciary duties, common law duties (other than duties of care), as well as all kinds of statutory duties. In this article, we will nevertheless use the term 'duty of care' as convenient shorthand.

## IV. The National Legal Systems Studied

As for our choice for the national legal systems included in this article, the following factors were leading: (1) a focus on Europe; (2) inclusion of jurisdictions with a major banking sector; (3) inclusion of the most important representatives of the civil and common law legal systems; (4) a fair balance between civil and common law legal systems; and (5) specific substantive law reasons.

It seemed only natural to include the civil law jurisdictions of Germany, France and Italy. They all have a large domestic banking sector and are important representatives of the civil law tradition. Austria, Spain and the Netherlands are less obvious choices, but the inclusion of these civil law jurisdictions is justified for specific substantive law reasons. In Spain and Austria disputes with banks are often resolved by reference to the doctrine of error or fraud. This divergent approach provides an interesting contrast with the other jurisdictions covered by this article, where the focal point is a damages claim for breach of a bank's duty of care. The Netherlands is an interesting jurisdiction for specific substantive law reasons as well, because the Dutch Supreme Court succeeded in developing a coherent and very consumer-friendly body of case-law on a bank's 'special' duty of care (*bijzondere zorgplicht*).

As for the common law jurisdictions in this article, we note the following. The UK has the fourth largest banking sector in the world and the largest in Europe. England and Wales is the most important common law jurisdiction in Europe. Inclusion of England and Wales therefore goes without saying, although Brexit may well have an impact on its leadership in the banking sector. Common law jurisdictions are scarce in Europe so it seemed an obvious choice to include Ireland, which over the past few years has also emerged as a major international financial services centre. Both in Ireland and England and Wales the common law plays a more modest role with a stronger focus on statutory actions as compared to continental Europe. We completed the picture with the US. The US is clearly outside of Europe, but its inclusion is justified because it is the most important common law jurisdiction outside of Europe and it has a large banking sector. Finally, the inclusion of the US strikes a better balance between the civil law and common law jurisdictions included in this article. Moreover, the US and England and Wales are interesting because of the different balance between private and public enforcement and the active role of the regulators in forcing banks to provide remedies to investors.

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

### *A. General*

#### *i. The Imposed Duties*

The picture that emerges from the legal systems studied 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. 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

[2] 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*); HR 4 December 2009, *NJ* 2010/67 (*Nabbe/Staalbankiers*); HR 5 June 2009, NJ 2012/182 (*De Treek/Dexia*); HR 5 June 2009, NJ 2012/183 (*Levob/Bolle*); HR 5 June 2009, NJ 2012/184 (*Stichting Gesp/Aegon*); 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 (*Brouwers/ABN AMRO*); HR 9 January 1998, NJ 1999/285 (*Mees Pierson/Ten Bos*); HR 23 December 2005, NJ 2006/289 (*Fortis/Stichting Volendam*), HR 27 November 2015, RvdW 2016/88 (*ABN AMRO/SBGB*), HR 8 April 2011, NJ 2012/361 (*Befra/Rabobank*); HR 27 November 2009, NJ 2014/201 (*VEB c.s./World Online c.s.*); Court of Appeal Den Bosch 15 April 2014, *JOR* 2014/168, with annotation Van der Wiel en Wijnberg; Ondernemingsrecht 2014/92, with annotation Arons (*Holding Westkant B.V., in liquidatie/ABN AMRO Bank N.V.)*; Court of Appeal Den Haag 14 February 2017, ECLI:NL:GHDHA:2017:255; Court of Appeal Amsterdam 15 September 2015, JOR 2015/334 (*X/ING*); Court of Appeal Amsterdam 10 November 2015, JOR 2016/37 (*X./ABN AMRO*); Court of Appeal Amsterdam 11 October 2016, case no 200.153.823/01 *(X./ABN AMRO*)..

[3] See A-C Muller, *Dernières décisions relatives à la responsabilité des professionnels*, Rev dr bancaire et financier com n° 74, esp 76 (mars-avril 2010).

[4] Although arguably less so in French law. For a French lawyer, the main cases or affairs 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.

[5] This may be gleaned from the decisions of the Spanish Supreme Court of 21 November 2012, 18 April 2013, 9 May 2013, 3 June 2013, 29 October 2013, 20 January 2014, 17 February 2014, 20 February 2014, 26 June 2014, 2 July 2014, 8 September 2014 (in plenary session), 10 September 2014, 18 December 2014, 30 December 2014, 24 March 2015, 25 March 2015, 23 April 2015, 29 April 2015, 7 July 2015, 10 July 2015, 21 July 2015, 16 September 2015, 30 September 2015, 13 October 2015, 10 November 2015, 20 November 2015, 30 November 2015, 4 December 2015, 3 February 2016, 25 February 2016 and 14 April 2016. For decisions deriving from lower courts see, amongst others, the studies by F Mercadal Vidal / G Hernández Paulsen, *La comercialización de swaps de tipos de interés por las entidades de crédito. Estudio sobre la jurisprudencia de las Audiencias Provinciales* (Barcelona; Bosch, 2012) and I Raluca Stroie, *Deberes de información en los contratos de permuta financiera: un recorrido por la jurisprudencia civil de 2012* 5/2013 Revista CESCO de Derecho de Consumo 123 and following (<https://cesco.revista.uclm.es/index.php/cesco/article/view/264/229>) (2013); A Caba, *El contrato de permuta financiera (swap), modalidad de tipos de intereses, en las sentencias de las Audiencias Provinciales* 290 Revista de Derecho Mercantil 503 and following (2013); S Baz Barrios, *La problemática de los swaps o contratos de permuta financiera* 8/2013 Revista CESCO de Derecho de Consumo 146 and following (<https://www.revista.uclm.es/index.php/cesco/article/view/428/370>) (2013). See also the decisions of the Provincial Courts of Palma de Mallorca on 2 June 2005 and 21

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 VI below. The civil law jurisdictions included in this article 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. 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.

March 2011, Murcia of 1 April, Zaragoza of 17 April 2012, Pontevedra of 25 April, Madrid of 26 June 2012, Cordoba of 30 January 2013, Pontevedra of 4 April 2013. However, based on SR Bachs and ED Ruiz, *Ch. 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] 6 Ob 116/11v; ÖBA 2012, 67; 4 Ob 65/10b (= ecolex 2010,952 (*Wilhelm*) = EvBl 2011,28 = ZFR 2011,25 (*Pletzer*) = RdW 2010,767 = ÖBA 2011,582); 8 Ob 25/10z (= EvBl 2011, 31). See for a case where the defect of consent of fraud was successfully invoked, 6 Ob 203/13s. In Italy, some lower courts previously resolved disputes between banks and their customers by applying the doctrines of mistake and fraud (see Trib. Pinerolo, 14 October 2005; Trib. Lanciano, 30 April 2007; Trib. Ancona, 12 April 2007; Trib. Parma, 6 December 2006; Trib. Napoli, 7 November 2006; Trib. Parma 17 November 2005), but after a clear ruling by the United Chambers of the Italian Supreme Court (19 December 2007, no. 26724) this is no longer the case. See for more detail s VI 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*).

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'.[89] In the context of a duty of care in contract, in Ireland, the 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.[10]

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.[11]

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 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.[12]

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

---

8 See *Bankers Trust International plc v. PT Dharmala Sakti Sejahtera* [1996] CL.C 531, per Mance J.

9 See further section V.B, V.C, V.D, V.E and VII.E.

10 See *Tradax (Ireland) Ltd v. Irish Grain Board Ltd* [1984] IR 1; *Irish Bank Resolution Corporation Ltd v. Morrissey* [2013] IEHC 208; *Zurich Bank v. McCon* [2011] I.E.H.C. 75. See also *Friends First Finance v. Cronin* [2013] IEHC 5.

11 See also ss V.B.ii, V.C, V.D and VII.B.

12 See generally David H Carpenter & M Maureen Murphy, *Permissible Securities Activities of Commercial Banks Under the Glass-Steagall Act (GSA) and the Gramm-Leach-Bliley Act (GLBA)*, Congressional Research Service, CRS Report for Congress R41181 (Apr. 12, 2010).

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.[13] While holding that the Advisers Act 'establishe[d] 'federal fiduciary standards to govern the conduct of investment advisers',[14] 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'.[15] 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.[16]

*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 organization (SRO) rules.[17] 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 the Advisers Act.[18] 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'.[19]

[13] See Investment Advisers Act, 15 U.S.C. § 80b-3(m), 15 U.S.C. § 80b-6(1), 15 U.S.C. § 80b-6(2).

[14] *Transamerica Mortg Advisors*, *Inc*, 444 U.S. at 17.

[15] *Ibid.*, 24. 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).

[16] 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."). See also, e.g., *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).

[17] See SEC*, SEC Study on Investment Advisers and Broker-Dealers,* at 47 (Jan. 2011).

[18] See DA DeMott and AB Laby, *Ch. 13 – United States of America*, in Busch and DeMott (eds), *Liability of Asset Managers* (n 6) § 13.67, in fn 83 referring to Advisers Act Release, No 1406.

[19] *Ives v. Ramsden*, 142 Wash. App. 369, 390, 174 P.3d 1231, 1242 (Wash. Ct. App. 2008) (collecting cases); see, e.g., *Scott v. Dime Sav. Bank of N.Y., FSB*, 886 F. Supp. 1073, 1080-81 (S.D.N.Y. 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 (D.D.C. 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").

*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 V.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 VII.J).

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 V.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 V.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.[20]

### *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 article. Owing to their lack of knowledge and experience when it comes to financial products and services, they are considered most worthy of protection.

---

[20] C van Dam, *European Tort Law*, above at s 902-1, 903 and 904 (Oxford; Oxford University Press, 2013); WHV Rogers (ed), *Winfield and Jolowicz on Tort*, para. 7.1 (18th edn, London; Sweet & Maxwell, 2010), 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. See, however, also A Burrows, *The Relationship between Common Law and Statute in the Law of Obligations* 128 Law Quarterly Review 232-59 (2012).

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.[21]

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.[22]

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 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.[23]

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.[24] The same is true for the US, where this likewise depends on the circumstances.[25]

---

[21] See in particular 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*). 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.

[22] See Cass. com., 10 May 1994 et 2 November 1994, RJDA 1/95, nº 31 (1re et 3e esp.); Cass. com., 18 February 1997, Bull. civ. IV, nº 51, p 45 ; Banque, nº 581, mai 1997. 91, obs. J-L. Guillot; Cass. com., 27 January 1998, Bull. civ. IV, nº 41, p 31; Banque et droit, mars-avril 1998, nº 58, p 31, obs. de H Vauplane ; Cass. com., 8 July 2003 (*aff. Vantrou*), Dr. sociétés, janvier 2004, nº 13, note Th. Bonneau; Cass. Com. 1 October 2013, pourvoi n° P 12-24. 118, arrêt n° 885 F-D, *Baudesson versus Société Générale*; Cass. Com. 13 May 2014, arrêt n° 489 FS-P+B, pourvoi n° S 09-13.805, *Talibi and alii versus société Dubus*; Cass. Com. 30 September 2010, arrêt n° 1203 F-P+B, *Société Farrucci constructions*.

[23] BGH 22 March 2011 – XI ZR 33/10, reported in BGHZ 189, 13.

[24] For England, see *Caparo Industries plc v. Dickman* [1990] 2 AC 605. For examples of claims by third parties against banks, see *IFE Fund SA v. Goldman Sachs International [2007]* All ER (D) 476; *Raiffeisen Zentralbank Osterreich AG v. Royal Bank of Scotland plc* [2010] All ER (D) 111; *Cassa di Risparmio della Repubblica di San Marino SpA v. Barclays Bank Ltd* [2011] EWHC 484 (Comm). In Ireland, 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 in particular *Securities Trust Ltd. v Hugh Moore & Alexander Ltd,* [1964] I.R. 417.). Where 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 (*Bank of Ireland v. Lennon,* unreported, High Court, February 17, 1998, Lavan J.; *Allied Irish Banks Plc v. Pierse & Anor* [2015] IEHC 136).

[25] The general rule is that a fiduciary duty does not exist between commercial parties operating at arm's length. See, e.g., *Kitsap Bank v. Denley*, 177 Wash. App. 559, 312 P.3d 711, 719 (Wash.

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*,[26] 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.[27] 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.[28] 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 some of the conduct-of-business rules it contains.

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.[29]

---

App. Ct. 2013) (internal quotation and citation omitted) ("As a general rule, participants in a business transaction deal at arm's length and do not enter into a fiduciary relationship."); *Bank of Am., N.A. v. Corporex Realty & Inv., LLC*, 875 F. Supp. 2d 689, 705 (E.D. Ky. 2012) ("In an arms-length commercial transaction, where each party is assumed to be protecting its own interest, no such duty arises."). Special circumstances, however, even in commercial transactions in the banking context, can give rise to fiduciary duties. Most 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. For a review of case law, see *Existence of fiduciary relationship between bank and depositor or customer so as to impose special duty of disclosure upon bank* 70 A.L.R.3d 1344 (originally published in 1976).

[26] [2010] EWHC 211.

[27] See the UK Law Commission (LAW Com No 350), *Fiduciary Duties of Investment Intermediaries* § 11.12 (2014). 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.

[28] Section 3(1) 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." It thus would include non-retail customers such as large corporate customers.

[29] Perrone & Musitelli, *La giurisprudenza milanese sul "risparmio tradito": un'analisi quantitativa*, *Giur. comm.*, I, 162 (2014).

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.[30]

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. In French law, 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 situa-

[30] See the decisions of the Spanish Supreme Court of 21 November 2012, 29 October 2013, 20 January 2014 and 17 February 2014. About the decisions of the Supreme Court on swaps, see, amongst others, the comments of MC Juan Gómez*, Interest Rate Swaps. A vueltas con el error vici* 55 El Notario del Siglo XXI 38 and following (<http://www.elnotario.es/index.php/opinion/opinion/3759-interest-rate-swaps-a-vueltas-con-el-error-vicio>) (May – June 2014); P Franquet, *Swaps: de lo visible a lo invisible (Comentario a la STS 46/2014, de 17 de febrero de 2014),* Revista de Derecho del Mercado Financiero (<http://www.jausaslegal.com/resources/doc/140424-pablo-franquet-swaps-de-lo-visible-a-lo-invisible-8231842439527539206.pdf>) (23 April 2014); J Alfaro Águila-Real, *La sentencia sobre swaps del Tribunal Supremo* (<http://derechomercantilespana.blogspot.com.es/2014/02/la-sentencia-sobre-swaps-del-tribunal.html>) (Thursday, 20 March 2014); L Sanz Acosta, *La evolución de la jurisprudencia del TS en materia de swaps y su culminación en la sentencia de 20 de enero de 2014* 2 La Ley mercantil 92 and following (2014), and E Valpuesta, *Incumplimiento de la normativa comunitaria MiFID en cuanto a los deberes de información y evaluación del cliente: consecuencias en el ámbito contractual según la jurisprudencia española* 8/1 Cuadernos de Derecho Transnacional 271-299 (<http://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3030/1736>) (March 2016). For decisions deriving from lower courts see, amongst others, the studies by F Mercadal Vidal / G Hernández Paulsen, *La comercialización de swaps de tipos de interés por las entidades de crédito. Estudio sobre la jurisprudencia de las Audiencias Provinciales* (Barcelona; Bosch, 2012), and I Raluca Stroie, *Deberes de información en los contratos de permuta financiera: un recorrido por la jurisprudencia civil de 2012* 5/2013 Revista CESCO de Derecho de Consumo (<https://cesco.revista.uclm.es/index.php/cesco/article/view/264/229>) (2013); A Caba, *El contrato de permuta financiera (swap), modalidad de tipos de intereses, en las sentencias de las Audiencias Provinciales* 290 Revista de Derecho Mercantil 503 and following (2013); S Baz Barrios, *La problemática de los swaps o contratos de permuta financiera* 8/2013 Revista CESCO de Derecho de Consumo 146 and following (<https://www.revista.uclm.es/index.php/cesco/article/view/428/370>) (2013). For Austria, it is not yet clear whether a bank's duty of care can extend beyond consumers. However, the open norms contained in § 1299 and § 1300 ABGB would appear to be able to facilitate any such development.

tion. So debtors must be warned only if there is excessive risk, unless he knows of the risk.[31]

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 in which a bank must have noticed that a foreign currency loan was not suitable for its customer, but failed to warn accordingly.[32] 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.[33] 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.[34]

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.[35] In Ireland the approach is similarly reluctant. This may be gleaned from

[31] Com., 7 July 2009, Banque et droit, n° 127, septembre-octobre 2009. 26, obs. Th. Bonneau ; JCP 2009, éd. E, 1948, note D. Legeais et 2010, éd. E, 1496, n° 14, obs. N Mathey; Rev. trim. dr. com. 2009. 795, obs. D Legeais; D. 2009, p 2318, note J Lasserre Capdeville; Cass. civ. 1re, 19 November 2009, Banque et droit n° 129, janvier-février 2010. 21, obs. Th. Bonneau ; JCP 2009, éd. E, 2140, note D Legeais ; Rev. dr. bancaire et financier janvier-février 2010. 38, obs. D Legeais et mars-avril 2010. 46, obs. F-J. Crédot et Th. Samin; Cass. com., 30 November 2010, Banque et droit n° 135, janvier-février 2011. 33, obs. Th. Bonneau; Cass. com., 2 October 2012, Banque et droit, n° 146, novembre-décembre 2012. 29, obs. Th. Bonneau; Cass. com., 12 mars 2013, arrêt n° 233 F-D, pourvoi n° E 10-30335; Cass. com. 29 avil 2004, arrêt n° 397 F-D, pourvoi n° F 13-15.789; Cass. civ. 1, 4 June 2014, arrêt n° 668 F-P+B, pourvoi n° Y 13-10.975; Cass. com. 23 September 2014, arrêt n° 830 F-D, pourvoi n° Y 13-22.475; Cass. civ. 1, 13 November 2014, arrêt n° 1345 F-D, pourvoi n° A 13-26.295; Cass. com. 13 January 2015, arrêt n° 20 F-D, pourvoi n° H 13-24.875, Société Générale c. Gourgeau; Cass. civ. 1re, 12 July 2005, Bull. civ. I, nº 324, 325, 326 et 327, p 268 et s.; Banque et droit nº 104, novembre-décembre 2005. 80, obs. th. Bonneau; D. 2005, act. jurisp. 2276, obs. X. Delpech; JCP 2005, éd. E, 1359, note Legeais et éd. G, II, 10140, note A Gourio; Rev. dr. bancaire et financier nº 6, novembre-décembre 2005 nº 203, note F-J. Crédot et Y Gérard; Rev. trim. dr. com. 2005 820, obs. D Legeais; D. 2006, pan. 167, obs. D-R . Martin; Cass. civ. 1re, 2 novembre 2005, Banque et droit, mai-juin 2006, obs. Th. Bonneau.

[32] 8 Ob 66/12g, EvBl 2013, 922 (*Cach*).

[33] See SNB, *Swiss National Bank discontinues minimum exchange rate and lowers interest rate to –0.75%,* available at: www.snb.ch/en/mmr/reference/pre_20150115/source/pre_20150115.en.pdf (15 January 2015) .

[34] See <http://bruegel.org/2015/10/foreign-loan-hangovers-and-macro-prudential-measures-in-central-eastern-europe/>.

[35] A considerable body of precedents in case law has always stressed that, within a loan contract, the lender does not assume any responsibility towards the borrower for the ultimate viability of either

the Irish case *ACC Bank plc v. Deacon & anor*,[36] 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.[37]

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 and France the bank has a duty to warn such guarantor for the risks involved.[38] 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.[39] 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.

---

the loan itself in view of its conditions, or the investment to be funded with it. E.g., Bundesgerichtshof (Federal Supreme Court), 29 October 1952 – II ZR 283/51, reported in Amtliche Sammlung des Bundesgerichtshofs in Zivilsachen (BGHZ) 7, 371, at pp 374 et seq.; Bundesgerichtshof, 8 June 1978 – III ZR 136/76, reported in BGHZ 72, 92, at p 104; Bundesgerichtshof, 28 February 1989 – IX ZR 130/88, reported in BGHZ 107, 92, at p 101; Bundesgerichtshof, 3 December 1991 – XI ZR 300/90, reported in BGHZ 116, 209, at p 213; Bundesgerichtshof, 14 June 2004 – II ZR 393/02, reported in BGHZ 159, 294, at p 316; Bundesgerichtshof, 26 October 2004 – XI ZR 255/03, reported in BGHZ 161, 15, at p 20; Bundesgerichtshof, 16 May 2006 – XI ZR 6/04, reported in BGHZ 168, 1, at pp 19-20. And see, for further discussion and an overview of the relevant case law, Jens-Hinrich Binder, *§ 488 BGB,* in B Gsell et al., eds*, Beck'scher Online Großkommentar zum BGB,* at paras. 6, 167 (Munich; C.H. Beck, 2015).

[36] [2013] IEHC 427.

[37] See [2010] IEHC 17; [2012] I.R. 449; [2014] IEHC 134.

[38] See for the Netherlands 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 for France Banque et droit n° 129, janvier-février 2010. 20, obs. Th. Bonneau; JCP 2009, éd. G, 422, obs. L Dumoulin, éd. G, 482, note S Piedelièvre et éd. E, 2053, note D Legeais; Rev. dr. bancaire et financier janvier-février 2010. 39, obs. D Legeais D. 2009, p 2607, obs. X Delpech et p 2971, note D Houtcieff.

[39] 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.

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.[40]

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*,[41] 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)*,[42] 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.

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 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

---

[40] 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*, 630 (3rd edn Vienna; MANZ, 2016).

[41] [2012] IEHC 166. See also *ACC Bank Plc v. Connolly & anor* [2015] IEHC 188.

[42] [2002] 2 AC 773.

[43] See HR 5 June 2009, JOR 2009/199, annotated by Lieverse (*Treek v. Dexia Bank Nederland*), consideration 5.2.1. See s IX.C, *in fine*.

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]

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*,

44 See e.g., 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,* 16-21 (Cambridge; Cambridge University Press, 2003). See also H Bernstein, *Civil Liability for Economic Loss* 46 American Journal of Comparative Law 111, 126-28 (1998).

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

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 article 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 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.

---

[47] van Dam (n 21) s 710-1.

[48] About liability vis-à-vis third parties, see A Couret, Ph. Goutay and B Zabala, *Ch. 3 – France* in Busch and DeMott (eds), *Liability of Asset Managers* (n 6), spec. n° 3.64 and 3.103 and following; Cass. Ass. Plenary, 6 October 2006, D. 2006, p 2826, note G Viney; J.C.P. 2006, éd. G, 10181, avis A Gariazzo et note M Billau. For Spain, Ruiz and Bachs seem to consider it in theory possible, at least in the context of asset management. See Bachs and Ruiz, *Ch. 9 – Spain* (n 6) § 9.73.

[49] See e.g., Supreme Court, decision no 6091 of 20 March 2006; Supreme Court decision no 19166 of 29 September 2005.

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.

A final important judgment on a bank's liability towards third parties concerns World Online's IPO.[54] 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 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.

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.[55] 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 provi-

---

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

[55] *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).

sion 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.[56] 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 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.[57]

In these cases, 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.[58]

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

[56] van Dam (n 21) ss 503-4 and 710-4.

[57] English courts have generally followed the doctrine of *Hedley Byrne* ([1963] 2 All ER 575, [1964] AC 465) and *Caparo Industries* ([1990] 1 All ER 568, [1990] 2 AC 605) in holding that a claimant does not have a legal claim against a third party with whom the claimant does not have a direct relationship (i.e., privity of contract), unless there are facts to show that the third party has made some representations to, or established some type of direct relationship with, the claimant in respect of its claim.

[58] The *Hedley Byrne* case also seems to be generally accepted case law in Ireland (see *Securities Trust Ltd. v Hugh Moore & Alexander Ltd* , [1964] I.R. 417). So a similar approach as in England and Wales seems feasible in Ireland, at least in theory.

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'.[59] 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.[60]

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.[61]

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

[59] See *Jackson v. Jackson*, 47 Ga 100, 109 (1872).

[60] See *Fraternity Fund Ltd v. Beacon Hill Asset Mgmt, LLC*, 479 F Supp 2d 349, 367-68 (SDNY 2007).

[61] *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).

and tort. The tenet has not only been applied in the area of liability of auditors and attorneys,[62] 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.[63]

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).[64]

### *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.[65] 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.[66] 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,

[62] van Dam (n 21) s 710-3.

[63] Cf Oberlandesgericht (Regional Court of Appeals) Munich, 27 July 2010 – 5 U 2100/10, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht 2010, 385, at p 387; G Spindler, *Wertpapier– und Anlagegeschäft, Grundlagen*, at. para. 53, in: K Langenbucher, D Bliesener and G Spindler eds., *Bankrechts-Kommentar* (München; 2013).

[64] Graf in Gruber/N. Raschauer *WAG* § 38 Mn 53 (2011).

[65] See Supreme Court no. 18039, October 19th, 2012; Trib. Terni, June 10th, 2005; Trib. Roma, October 8th, 2004; Trib. Lecce, October 29th, 2004; Trib. Firenze, February 18th, 2005; Trib. Firenze, April 18th, 2006.

[66] Bundesgerichtshof (Federal Supreme Court), 6 July 1993 – XI ZR 12/93, reported in BGHZ 123, 126.

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.[67]

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.[68] 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.[69] 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 V.D below). This is also apparent from French law, where initially the French Supreme Court (Cour de Cassation) referred to a duty of advice rather than a duty to warn.[70]

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.[71]

As already indicated in section V.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.[72] In England and Wales, as previously mentioned, *private* (not: commercial) investors

[67] Cf Bundesgerichtshof (Federal Supreme Court), 12 November 2013 – XI ZR 312/12, reported in BKR – Zeitschrift für Bankrecht und Kapitalmarktrecht 2014, 77, at p 79; Oberlandesgericht (Regional Court of Appeals) Saarbrücken, 18 December 2012 – 4 U 234/11, reported in MdR – Monatsschrift für deutsches Recht 2013, 612, at p 612; Bundesgerichtshof (Federal Supreme Court), 11 November 2003 – XI ZR 21/03, reported in BKR – Zeitschrift für Bankrecht und Kapitalmarktrecht 2004, 124, at p 125; Bundesgerichtshof (Federal Supreme Court), 25 October 2007 – III ZR 100/06, reported in WM Wertpapiermitteilungen – Zeitschrift für Wirtschafts– und Bankrecht 2007, 2228, at p 2230. See generally, V Lang and P Buck-Heeb, *Anlageberatung*, at paras. 281-347, in: B Gsell et al. eds., *Beck'scher Online-Großkommentar zum BGB* (2015).

[68] But see s V.B.iii.c, above.

[69] See HR 5 June 2009, JOR 2009/199, annotated by Lieverse (*Treek v. Dexia Bank Nederland*), consideration 5.2.1.

[70] Cass. com., 24 September 2003 (aff. Hélias), Bull. civ. IV, n° 137, p 157 ; Banque et droit n° 93, janvier-février 2004. 57, obs. Th. Bonneau ; Rev. trim. dr. com. 2004. 142, obs. D Legeais. Cass. civ. 1re, 8 juin 2004, Bull. civ. I, n° 166, p 138 ; Banque et droit n° 98, novembre-décembre 2004. 56, obs. Th. Bonneau ; D. 2004, act. jurisp. p 1897 ; Rev. dr. bancaire et financier n° 4, juillet-août 2004. 245, obs. F-J. Crédot et Y Gérard ; Rev. trim. dr. com. 2004. 581, obs. D Legeais ; JCP 2004, éd. E, 1442, note D Legeais.

[71] Cass. Com. 12 February 2008, Droit des sociétés July 2008, n° 162, observations Th. Bonneau; Cass. Com. 2 February 2010, arrêt n° 147 F-D, pourvoi n° T 08-20.150, *Gouarec versus Société Dubus*; Cass. Com. 13 May 2014, arrêt n° 489 FS-P+B, pourvoi n° S 09-13.805, *Talibi and alii versus société Dubus*.

[72] At least in England and Wales, see *Caparo Industries plc v. Dickman* ([1990] 1 All ER 568, [1990] 2 AC 605). It seems likely that this is also the case in Ireland.

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.[73]

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 V.A above, this obligation is known as a duty of suitability.[74] 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.[75] 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'.[76] 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'.[77] It is not relieved of the duty to make suitable recommendations by a client's consent to an unsuitable transaction.[78] 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'.[79]

[73] Interestingly, in *Allied Irish Bank PLC v. Fahey* [2016] IEHC 182, a defendant sought rely on the provisions of s.44 in relation to a bank's failure to comply with its obligations under the Consumer Credit Act 1995 and the Consumer Protection Code. This was rejected on the basis that the defendant had not provided any actual or legal basis upon which such a conclusion could be reached.

[74] See DeMott and Laby, *Ch. 13 – United States of America* (n 19) § 13.66, at fn 80 referring to NASD, r 2310 (1996), which, effective 9 July 2012, has become FINRA, r 2111; SEC, *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).

[75] See DeMott and Laby (n 19) § 13.66.

[76] SEC Study (n 18) at 47.

[77] SEC Study (n 18) at 61.

[78] SEC Study (n 18) at 62. See also on suitability DeMott and Laby (n 19) § 13.66-13.69.

[79] See *Ives v. Ramsden*, 142 Wash App 369, 390, 174 P3d 1231, 1242 (Wash Ct App 2008) (collecting cases); see e.g., *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.[80] In Germany, it follows from the *Bond* judgment[81] 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,[82] the courts have so far denied that such duties exist in cases where the market price of a proposed investment deteriorated[83] 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.[85] In

[80] See Cass. Com. 5 November 1991, bull. Joly bourse mai-juin 1993 § 56 p 292, Buon. Also see A Couret, P Goutay and B Zabala (n 49) § 3.68; Cass. Com. 13 July 2010, arrêt n° 772 F-D, pourvoi n° E 09-69.638, *Bayle v. Caisse d'épargne et de prévoyance d'Auverge et du Limousin*; Cass. Com. 9 November 2010, arrêt n° 1110 F-D, pourvoi n° F 09-71.065, *Perrin v. Société Georget courtage européen* (GCE); Cass. Com. 12 June 2012, arrêt n° 666 F-D, pourvoi n° X 11-21.661, *Bayle v. Caisse d'épargne et de prévoyance d'Auverge et du Limousin*.

[81] BGH 6 July 1993 – XI ZR 12/93, reported in BGHZ 123, 126.

[82] See, for detailed discussion, J.-H. Binder, *Nachsorgende Vertragspflichten? Begründung und Reichweite fortdauernder Schutzpflichten nach Leistungsaustausch in Schuldverhältnissen*, AcP – Archiv für die civilistische Praxis 211, 587 (2011).

[83] Bundesgerichtshof (Federal Supreme Court), 8 March 2005 – XI 170/04, reported in BGHZ 162, 306, at p 311.

[84] Bundesgerichtshof (Federal Supreme Court), 21 March 2006 – XI ZR 63/05, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht, 2006, 256, at p 257.

[85] Bundesgerichtshof (Federal Supreme Court), 6 July 1993 – XI ZR 12/93, reported in BGHZ 123, 126, at p 129; Bundesgerichtshof, 9 May 2000 – XI ZR 159/99, reported in NJW-RR – Neue Juristische Wochenschrift-Rechtsprechungsreport 2000, 1497, at p 1498; Bundesgerichtshof, 21 March 2006 – XI

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.[86] So if the bank is aware of adverse information concerning the respective issuer or the investment itself, it must not conceal it.[87] 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.[88] Nevertheless, as a rule banks are required to inform the client both of the general risks associated with any type of investment in given market circumstances and specific types of risk associated with the proposed investment.[89] The more complex the structure of the recommended investment is, the higher the required standard of information will be in this context.[90] Likewise, banks will generally be required to inform their client if the proposed investment entails the risk of full loss of the invested capital.[91] It follows from German case-law that, as a rule, clients must be made aware of the speculative nature of an investment.[92] 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 inappro-

ZR 63/05, reported in BKR – Zeitschrift für Bankrecht und Kapitalmarktrecht 2006, 256, at p 257; Bundesgerichtshof, 22 March 2011 – XI ZR 33/10, reported in BGHZ 189, 13, at p 21. See generally, Lang and Buck-Heeb, *supra* n 68, at paras. 297-337.

[86] Bundesgerichtshof (Federal Supreme Court), 18 April 2013 – III ZR 83/12, unreported.

[87] Bundesgerichtshof (Federal Supreme Court), 13 January 2004 – XI ZR 355/02, reported in NJW – Neue Juristische Wochenschrift (2004), 1868, at p 1869.

[88] See Bundesgerichtshof (Federal Supreme Court), 11 June 1996 – XI ZR 172/95, reported in BGHZ 123, 126, at p 128; Bundesgerichtshof, 14 May 1996 – XI ZR 188/95, reported in NJW-RR – Neue Juristische Wochenschrift-Rechtsprechungsreport (1996), 947, at p 947; Bundesgerichtshof, 4 April 2002 – III ZR 237/01, reported in BKR – Zeitschrift für Bankrecht und Kapitalmarktrecht (2002), 397, at p 398. See also Bundesgerichtshof , 27 October 2009 – XI ZR 337/08, reported in BKR – Zeitschrift für Bankrecht und Kapitalmarktrecht (2010), 35, at p 36.

[89] E.g., Bundesgerichtshof (Federal Supreme Court), 6 July 1993 – XI 1993, reported in BGHZ 123, 126, at p 129; Bundesgerichtshof, 9 May 2000 – XI ZR 159/99, reported in NJW-RR – Neue Juristische Wochenschrift-Rechtsprechungsreport (2000), 1497, at p 1498; Bundesgerichtshof, 7 October 2008 – XI ZR 89/07, reported in BGHZ 178, 149, at p 153; Bundesgerichtshof, 14 July 2009 – XI ZR 152/08, reported in NJW – Neue Juristische Wochenschrift (2009), 3429, at p 3433.

[90] See, again, the recent landmark case Bundesgerichtshof (Federal Supreme Court), 22 March 2011 – XI ZR 33/10, reported in BGHZ 189, 13, at pp 25-6.

[91] Cf, e.g., Bundesgerichtshof (Federal Supreme Court), 6 March 2008 – III ZR 298/05, reported in NJW – Neue Juristische Wochenschrift-Rechtsprechungsreport (2008), 1365, at p 1368; Bundesgerichtshof, 27 September 2011 – XI ZR 182/109, reported in BGHZ 191, 119, at p 128; Oberlandesgericht (Regional Court of Appeals) Frankfurt, 21 September 2010 – 9 U 151/09, reported in WM Wertpapiermitteilungen – Zeitschrift für Wirtschafts– und Bankrecht (2010), 2111, at p 2113; Oberlandesgericht Munich, 28 May 2010 – 19 U 1932/10, reported in WM Wertpapiermitteilungen – Zeitschrift für Wirtschafts– und Bankrecht (2010), 1945, at p 1945; Oberlandesgericht Nuremberg, 19 December 2001 – 12 U 1297/01, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht (2002), 738, at p 739.

[92] E.g., Bundesgerichtshof (Federal Supreme Court), 27 September 2011 – XI ZR 182/10, reported in BGHZ 191, 119, at p 138.

priate for the client to assume that the bank's services are offered pro bono.[93] 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.[94] 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.[95]

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.[96] 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 VI below.

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 V.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 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.[97]

---

[93] E.g., Bundesgerichtshof (Federal Supreme Court), 22 March 2011 – XI ZR 33/10, reported in BGHZ 189, 13, at p 30; Bundesgerichtshof, 27 September 2011 – XI ZR 182/10, reported in BGHZ 191, 119, at pp 122-3; Bundesgerichtshof, 26 June 2012 – XI ZR 355/U11, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht (2013), 17, at p 21.

[94] See Bundesgerichtshof (Federal Supreme Court), 22 March 2011 – XI ZR 33/10, reported in BGHZ 189, 13, at p 27 (complex currency swap whose formula includes a negative market price to the advantage of the bank); Oberlandesgericht (Regional Court of Appeals) Düsseldorf, 7 October 2013 – I–9 U 101/12, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht (2014), 80, at p 81 (same).

[95] Bundesgerichtshof (Federal Supreme Court), 9 March 2011 – XI ZR 70/91, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht (2011), 299, at p 300.

[96] See Court of Novara, 23 June 2011.

[97] 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*).

As already indicated in section V.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.[98] *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.

As for the US, as already indicated in section V.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.[99] While holding that the Advisers Act 'establishe[d] 'federal fiduciary standards to govern the conduct of investment advisers',[100] 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'.[101] 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.[102]

[98] The duty of care arises if one of three tests are met for establishing a duty of care: (1) assumption of responsibility; (2) a threefold test showing whether the loss to the claimant was a reasonably foreseeable consequence of what the defendant did or failed to do; whether the parties' relationship was sufficiently proximate; and whether it was fair, just and reasonable to impose a duty of care; and (3) the incremental or policy test: that the law should develop novel categories of negligence incrementally and by analogy with established categories. Lord Bingham cited the three tests in an important House of Lords decision, *Commissioners of Customs and Excise v. Barclays Bank plc* (2006), Times Law Reporter, 22 June; [2006] UKHL 28.

[99] See the seminal *Capital Gains* case (375 US 180 (1963)).

[100] See *Transamerica Mortg Advisors*, *Inc*, 444 US at 17.

[101] See *Transamerica Mortg Advisors*, *Inc*, 444 US at 24. 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).

[102] 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'.) 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).

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.[103]

### *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 article – 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.[104] German law is no different in this respect.[105] Irish law is also similar. In the case of *Allied Irish Banks Plc v. Pierse & Anor*,[106] 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.[107] In the literature on England & Wales and the US the possibility of a duty to refuse is not even mentioned as a theoretical option.

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

[103] See sections 9(a), 10(b), 15(c)(1) and 15(c)(2).

[104] 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 Graf, *Zur Aufklärungspflicht der Bank bei Einschaltung eines weiteren Finanzdienstleisters*, ÖBA 229 (2012); according to this opinion, the investment firm may sell the product if it informs client so that he can understand its risks. The OGH generally assumes that one assessment of appropriateness conducted by the first entity suffices.

[105] 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 BGH 11 November 2003 – XI ZR 21/03, reported in BKR – Zeitschrift für Bank– und Kapitalmarktrecht (2004), 124, 126.

[106] [2015] IEHC 136.

[107] The Court also found that in seeking and obtaining loan finance to acquire jointly with her husband two apartment blocks in Corsica, the second named defendant was not concluding that contract for the purpose of satisfying her individual needs in terms of private consumption. The couple were found to be acquiring the properties for profit and engaging in business and thus outside the definition of consumer in the Consumer Credit Act 1995.

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.[108]

Furthermore, in the Italian and French literature it is mentioned that the national implementation of Article 35(5) 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.[109] 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).

## VI. 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. Under Spanish law, 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 it is explained in the Spanish literature 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 literature, 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-

[108] 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)*. 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.

[109] See D Spreafico – D Pennati, *L'adeguatezza e l'appropriatezza*, in L Zitiello (eds.), *La MiFID in Italia*, 349 (Turin; 2009); see extensively on the private law effect of MiFID I and II, s VII below.

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.[110]

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.[111] 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.[112] 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, so it may be assumed that MEL will continue to be subject of a vast number of disputes in the future.[113]

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.[114] At the time of writing it is not clear whether the Dutch Supreme Court agrees with this approach. In another

---

110 As regard this decision see amongst others the comments of J Alfaro Águila-Real, *La sentencia sobre swaps del Tribunal Supremo,* in <http://derechomercantilespana.blogspot.com.es/2014/02/la-sentencia-sobre-swaps-del-tribunal.html> (Thursday, 20 March 2014), and L Sanz Acosta, *La evolución de la jurisprudencia del TS en materia de swaps y su culminación en la sentencia de 20 de enero de 2014*, 2 La Ley mercantil 92 and following (2014), and E Valpuesta, *Incumplimiento de la normativa comunitaria MiFID en cuanto a los deberes de información y evaluación del cliente: consecuencias en el ámbito contractual según la jurisprudencia española* 8/1 Cuadernos de Derecho Transnacional 271-299 (<http://e-revistas.uc3m.es/index.php/CDT/article/viewFile/3030/1736>) (March 2016). Based on Bachs and Ruiz (n 6) 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.

111 See 4 Ob 20/11m, EvBl 2011, 825 (*Klausberger*) = RdW 2011,474 = JBl 2011,708; see also: Graf, *Sind Drachen wirklich so harmlose Tiere?* ecolex (2011),506; 6 Ob 116/11v; ÖBA 2012, 67 ; 4 Ob 65/10b = ecolex (2010), 952 (*Wilhelm*) = EvBl 2011,28 = ZFR (2011), 25 (*Pletzer*) = RdW (2010),767 = ÖBA (2011),582; see also: Graf, *Zur Schadenersatzhaftung des schuldhaft Irrenden*, ecolex (2010), 1131; Leupold/Ramharter, *Ausgewählte Aspekte der Irrtumsanfechtung beim Wertpapierkauf,* ÖJZ (2011),107; Oppitz, *Zur irrtumsrechtlichen „MEL"-Judikatur des OGH*, ÖBA (2011),534; Riedler, *Schadenersatzpflicht irregeführter Anleger?* ecolex (2011),194; Vonkilch, *Von Geschäftsirrtümern und Sollbeschaffenheiten beim Wertpapierkauf, irrtumsrechtlichen Kausalitätsbeweisen und Mitverantwortlichkeiten von Irrenden*, JBl (2011), 2 ; 8 Ob 25/10z Zak (2010), 377 = EvBl 2011, 31.

112 6 Ob 116/11v.

113 6 Ob 203/13s.

114 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*).

prominent case regarding the bank's duty of care, the argument of 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.[115]

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.[116] 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.

(TO BE CONTINUED in Part 2)

[115] 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.

[116] See Trib. Pinerolo, 14 October 2005; Trib. Lanciano, 30 April 2007; Trib. Ancona, 12 April 2007; Trib. Parma, 6 December 2006; Trib. Napoli, 7 November 2006; Trib. Parma 17 November 2005.