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Introduction

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I. Introduction

In recent years, more and more clients and third parties have filed claims against banks such as for mis-selling financial products, poor financial advice, insufficient disclosure of and warning for financial risks. 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. Comparative law books on the topic are scarce. We therefore ventured to collect information about how various jurisdictions deal with a bank's duty of care and how answers are found or embedded in the national legal system. We also aimed to place a bank's duty of care in a European and comparative law perspective. We hope this book will facilitate cross-border discussion and exchange of ideas on the role and limitations of a bank's duty of care, both in theory and practice. The aim of this book is necessarily modest. Given the dynamic character of the topic, the best this book can offer is a snapshot in time.

II. Scope and Terminology

The book 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 chapters, 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 book 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 book 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 chapter and in Chapter 12, we will nevertheless use the term 'duty of care' as convenient shorthand.

III. MiFID

Banks providing investment services have been subject to the Markets in Financial Instruments Directive (MiFID I) since 1 November 2007.[1] On 3 January 2018—some 10 years later—the MiFID I regime will be replaced by MiFID II (in the remainder of this chapter, MiFID I and II are collectively referred to as MiFID).[2] MiFID contains a general duty of loyalty, which to some extent has been fleshed out in more specific conduct of business rules for banks (and others) providing investment services, including detailed duties to investigate (know your customer or KYC rules) and duties to inform.[3] In most of the EU jurisdictions included in this book, it is now commonly accepted that these regulatory rules, especially the conduct of business rules, help to define the pre-contractual and contractual duty of care of banks under private law. Moreover, in many jurisdictions, an infringement of national implementing provisions can constitute not only a breach of the civil duty of care but also a tort (unlawful act)

[1] The MiFID I regime at level 1 and 2 is composed of three measures: (1) Directive 2004/39/EC [2004] OJ L145/1; (2) Commission Regulation (EC) No1287/2006 [2006] OJ L241/1; (3) Commission Directive 2006/73/EC [2006] OJ L241/26. It should be noted that not all Member States of the European Union and countries forming part of the European Economic Area succeeded in implementing the MiFID regime as of 1 November 2007.

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

[3] MiFID I, Art 19(1); MiFID II, Art 24(1).

for breach of a statutory duty. It should also be noted that duties of care under public law and other regulatory provisions are regularly explicitly incorporated into the contract, with all the contractual consequences this entails. This is why the book starts with a detailed chapter on the conduct of business rules pursuant to MiFID.

IV. The National Legal Systems Studied

As for our choice for the national legal systems included in this book, 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 book, 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 book, 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 a chapter on 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 a chapter on 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 a chapter on the US strikes a better balance between the civil law and common law jurisdictions included in the book. 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. Methodology

It was important to us to provide the authors of the national chapters with flexibility in the preparation of their chapters. The instructions they received were limited to a brief questionnaire with some fairly general questions. We did not seek to impose a certain structure or uniformity in approach in general. We considered it important to allow the contributors to emphasise the principles and remedies which they deemed important in their own legal system. At times, one of the national chapters may discuss an issue not covered in the other chapters. We were happy to include such features, provided that they covered material that was relevant. We saw it as our duty to create the overall picture in our comparative law evaluation (Chapter 12). As long as each chapter provided us with the main ingredients, uniformity of approach in the national chapters themselves was not necessary.

In this book we have used the so-called successive comparative law method, according to which material from national legal systems is analysed first, followed by the comparative law evaluation.[4] In our view, especially in view of the fact that no fewer than nine legal systems are taken into account, this method is the best way of ensuring that the research is clearly organised and can be easily consulted and checked.

VI. Structure of the Book

This book is structured as follows. Part I consists of the present introductory chapter. Part II contains a chapter on the EU regulatory framework: MiFID (Chapter 2). Part III contains the civil law jurisdictions covered by this book: Germany (Chapter 3), Austria (Chapter 4), France (Chapter 5), Italy (Chapter 6), Spain (Chapter 7) and The Netherlands (Chapter 8). Part IV covers the following common law jurisdictions: England and Wales (Chapter 9), Ireland (Chapter 10) and the United States of America (Chapter 11).

Part V contains a chapter on a bank's duty of care from a European and comparative law perspective (Chapter 12). In this final chapter, we focus on 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 offer products. In some jurisdictions (Spain and Austria), financial disputes between investors and banks

[4] On this subject, see D Kokkini-Iatridou et al, *Een inleiding tot het rechtsvergelijkende onderzoek* (Deventer: Kluwer, 1988) 187–88.

are not so much resolved by reference to a bank's duty of care, but by reference to the traditional doctrine of error or mistake, and fraud. That is the second topic we discuss in this chapter. The third topic is the impact of MiFID on a bank's duty of care. The fourth topic focuses on the role of the financial regulator in settling disputes between banks and clients. Under the heading of a fifth topic we highlight some recent reform proposals which enable us to put the bank's duty of care into a larger perspective.

This book purports to describe the law as it stood on 1 February 2017.