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Towards the Obligation of Warning Imposed on Banks: A Reading of French Judicial Decisions

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ABSTRACT

The financial crisis and its consequences on households have led the judge to strengthen borrower protections in terms of granting credit. Whether these are granted to professionals or to non-professionals, this is how the concept of uninformed borrower and the duty to warn gradually emerged.

The result of hesitant jurisprudential developments, the duty to warn is not applied in the same way depending on the status of the borrower. Therefore, it must be about the legal frameworks.

If it appears that the bank's warning commitment comes into conflict with the bank's principle of non-interference in the client's affairs, then in reality its intervention in this obligation is primarily through the elaboration a plan and technical support in the form of warnings, which consists of exercising caution in accordance with what is contained in banking practices.

It imposed new obligations on the banker in granting credit, since he was successively subject to the obligation to inform, then to the obligation to advise to guide the borrower, and finally to the obligation to warn, thus giving the bank an active role. Based on this information, the following question arises: What are the legal controls to comply with the warning, the violation of which entails the bank's liability?

INTRODUCTION

The banking sector is one of the most important pillars of the economy. The credit function is also considered the most important of all, given its role in generating profits for banks in particular and for the economy in general. While the credit function of banks contributes to economic development by financing various projects, it is also a fundamental factor in economic collapse, as it involves assuming risks that cause banking crises that threaten the stability of the country's banking and financial sector.

Although banks are committed to upholding high ethical standards in the distribution of credit, they can behave in ways that violate legal or customary requirements, making this process an opportunity to violate their obligations.

The financial crisis and its aftermath have led to the strengthening of borrower protection measures regarding credit, whether granted to professionals or non-professionals. This is how the concept of the unsophisticated borrower and the banks' obligation to warn gradually emerged. The bank's duty to warn arose from a firm desire to make credit less risky for the borrower, since the latter does not enter into a contract with the bank on an equal footing, and thus to restore a fair balance between the parties.

Within the framework of the bank's duty to warn, the constructive role of the judiciary in the name of good faith and fairness, and its impact, were manifested by the legal recognition of the bank's obligation to warn the borrower, the guarantor, and the investor.

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Based on this information, the following question arises: What are the legal controls for complying with the duty to warn, the violation of which entails the bank's liability?

To address this issue, we will adopt a descriptive and analytical approach, analyzing relevant legal texts. We will also use a comparative approach, drawing on French case law addressing the topic.

To address this issue, we will divide our research into two areas. In the first area, we will address the subjectivity of the bank's customer warning obligation, and in the second area, we will address the scope of the warning obligation.

1. THE BANK'S OBLIGATION TO WARN ITS CUSTOMERS

The bank's commitment is to warn of the natural consequences of the effectiveness of legal thinking by keeping pace with modern scientific and technological developments, thus working to achieve effective protection of customers by warning them of the dangers that may arise from banking operations.

1.1. The concept of the bank's obligation to warn

The bank's duty to warn is defined as a preventive measure aimed at assisting the customer by warning them and drawing their attention to enable them to protect themselves against perceived risks.[1]

It is also referred to as a "subsidiary obligation for one party to warn the other party or draw their attention to certain circumstances or information, to inform them of the material or legal risks surrounding or arising from this contract".[2]

Thus, the bank must warn its customers by any means if certain financial activities indicate that they are unable to repay the borrowed money. Similarly, if the customer's activities are suspicious, dangerous, or present negative aspects, the bank must warn them not to carry out these activities.[3]

Banks take the form of a warning if the situation leads to this, and the bank or credit broker must warn of the risks of the transaction, explain-

1 Khalifi, M. (2011). Commitment to Electronic Media and Transparency in E-Commerce. Policy and Law Notebooks, University of Ouargla, 3 (4), p. 206.

2 Zarwaq, A. (2018). Protection of Bank Customers in Algerian Law. PhD Thesis, Faculty of Law and Political Science, Mouloud Mammeri University, Tizi Ouzou, Algeria, p. 180.

3 Mughbghab, N. (2009). The Principle of Non-Liability of the Bank Distributing Credits and Its Exceptions. Al-Halabi Legal Publications, Beirut, Lebanon, p. 137.

ing its expected risks. The lender, therefore, warns the faithful and prudent borrower about their financial capacity and the debt risks associated with granting loans.[4]

To assist the borrower, the French Court of Cassation included in its ruling of July 12, 2005, the bank's obligation to provide a warning, based on an analysis corresponding to the borrower's repayment capacity.[5]

The French courts have also demonstrated their contribution to the inclusion of this obligation and the clarification of its characteristics by issuing two other decisions: The first ruling handed down by the French Court of Cassation on June 29, 2007, determined the right to benefit from the obligation to notify a borrower who has not provided notice.[6]

The second ruling handed down by the French Court of Cassation on May 31, 2011, clarified that a professional is not necessarily a risk-averse borrower.[7] A pharmacist or a business manager is, therefore, not, by right, a person who is informed about financing.[8]

Thus, the bank must inform the borrower of the risks associated with the loan, taking into account that the bank's obligation to notify falls on the borrower even if another bank has previously notified them. Adherence to a warning can be equated with negative advice, not doing something accompanied by an explanation of the dangers, or simply the problems that could be faced if the advice is not followed.[9]

1.2 The distinction between the obligation to warn, the obligation to inform, and the obligation to advise

The obligation to inform differs from the obligation to warn, as the latter aims to draw attention to or bring to the attention of the other contracting party a negative impact on the contract, or on the subject matter of the contract, which involves a danger or risk of which the other party must be warned.[10] The information commitment requires neutral, objective, and general information that includes only the conditions of the requested service, without addressing the question of the suitability or otherwise of that service.[11] This means that this transfer process takes place without the bank's intervention. It consists of transmitting raw information in its simplest form, without any intervention from the bank.[12]

The effectiveness of warnings regarding bank loans is achieved when the expected or likely risks of entering into these transactions are identified, risks that the customer might reject if they were aware of them. Conversely, the bank's reluctance to explain these risks and warn of their dangers constitutes a breach of its duty to warn.[13]

If the obligation to advise and guide is considered a positive act, the bank is entitled to provide its client with whatever is convenient for them, and the client is free to follow this advice or not, to remain in compliance with the bank's instructions. However, the situation must be changed, and the obligation to advise and guide must be replaced by the obligation to warn, which the bank imposes on its client if it discovers the existence of unavoidable errors.

The essence of the obligation to advise is that the bank must align the raw information at its disposal with the client's objective in the financing.[14]

Compliance with the warning entails legal con-

4 Heisser-Vernet, J-M. (2014). Banks and the granting of credit: from advice to warning. Experts, no (14), p. 27, states: "Takes [at banks] the form of an alert: If the situation leads to it, the banker or credit intermediary must warn of the dangers of the operation, detailing its foreseeable risks".

5 Court of Cassation, Civ.1er, July 12, 2005, Jurisdata 2005-029447.

6 Court of Cassation, Mixed Chamber, June 29, 2007, Jurisdata 2007-039908.

7 Court of Cassation, Com., May 31, 2011, Jurisdata 2011-010665; Court of Cassation, Civ.1er, April 25, 2007, n°06-15.258.

8 Heisser-Vernet, J-M. op.cit, p. 27.

9 Boukhrs, A. (2017). Obligation to Warning in Bank Credit Contracts. Legal and Political Studies, University of Boumerdes, Algeria, 2 (1), p. 125.

10 Rafika, B. (2018). Obligation to Inform Consumers in the Field of Bank Loans. Policy and Law Notebooks, University of Kasdi Merbah, Ouargla – Algeria, 10 (10), p. 14.

11 Boukhrs, A.A. Op. cit, p. 125.

12 Misqawi. L.O. (2006). Banking Responsibility in Financial Credit. Al-Halabi Legal Publications, Beirut, Lebanon, p. 169.

13 Rafika, B. op. cit., p. 14.

14 Misqawi, L.O. op.cit, p. 169.

sequences that are contrary to the obligation to advise and guide. While it is up to the client to choose whether to follow the bank's advice and guidance, the situation is different regarding the obligation to warn: the client is not free to choose whether or not to comply. Rather, they must do what is requested, as failure to comply with this obligation could result in risks.

However, if the customer fails to respond, the bank has the right to take any precautions it deems appropriate, including stopping or reducing the credit or refusing any increase in it.[15]

In some cases, the bank's obligation is not limited to informing its consumer client, but it must also offer them the optimal solution for their needs. In other words, its obligation goes beyond mere information and includes the need to explain the most appropriate course of action. This involves advising the client on whether or not to enter into the contract, or on adopting a particular position. In this case, the bank is positively influencing the formation of its borrowers' opinions.

Regarding compliance with the warning, this is negative advice intended to draw attention to the possible consequences of failure to comply with the advice provided. However, the obligation to warn is considered less stringent than the obligation to advise, as it does not involve guiding the contracting party as to the intended objective. The second obligation is more stringent, requiring, in addition to warning the client about the risks of the transaction to be concluded, more specific and detailed advice than the warning.

Accordingly, the criterion for distinguishing between the previous obligations is the risk criterion, which determines the degree of intervention required by the professional, where the obligation to warn is considered a strict obligation to inform, and if the risk decreases, then we are dealing with a simple obligation to inform, and with the increase in the degree of risk, the degree of the required obligation increases.[16]

15 Mughbghab, N. Op.cit, pp. 136-137.

16 Rafika, B. Op.cit, p. 14.

2. THE EXTENT OF THE BANK'S OBLIGATION TO WARN ITS CUSTOMERS

Based on the French Court of Cassation's decision issued on April 22, 2017, which defined the scope of a bank's obligation to warn the borrower, and its confirmation that this obligation is limited and determined according to two basic criteria: one related to the borrower's status, and the second related to the borrowing risks.[17]

2.1 Professional status of the borrower

The obligation to warn is closely linked to the borrowing client, and its scope is therefore determined by their status. On this basis, French courts have distinguished between informed and uninformed clients, with the bank's obligation to warn only the latter. An informed client is one who has repeatedly demonstrated their knowledge of the financial markets. This is considered an informed client, and the bank has no obligation to warn them.[18]

The person who provides the warning is also the one who possesses the necessary skills to assess the content, scope, and risks associated with the loans granted by the bank.[19] The French Court of Cassation once again confirmed in a ruling handed down on March 18, 2014, that the person who provides a warning is not subject to the bank's obligation to warn.[20]

Thus, among borrowers, French law has distinguished between informed and uninformed borrowers and has reserved the obligation to warn only to uninformed individuals. French case law

17 Court of Cassation, Civil Commercial Chamber, April 20, 2017, 15-16.316, unpublished, provides that: "The obligation to warn a credit institution with regard to an uninformed borrower before granting him a loan only concerns the adaptation of the loan to the financial capacities of the borrower and the risk of indebtedness resulting from its granting, and not the risks of the financed transaction"; Court of Cassation, October 11, 2011, no. 10-19091.

18 Cass.com., November 9, 2010, No. 09-69.997, F-D: Review of banking and financial law, Juris Data No. 2010-020804.

19 Cass.1er Civ., November 28, 2012, n°11-26.477.

20 Cass.com., March 18, 2014, no. 12-28.784, Magniem C/ sté BNP Paribas.

has gradually developed criteria for considering and classifying a client as a high-risk borrower. The warning obligation only applies to uninformed borrowers and guarantors; it is therefore up to credit institutions to verify the borrower's status to determine whether or not they are subject to the warning obligation.

In this regard, the French Court of Cassation confirmed on November 19, 2009, that credit institutions must prove that the borrower was warned and was not required to benefit from the duty to warn.[21]

Professional standards are also taken into account, as executives or managers cannot benefit from the duty to warn, and it has been ruled that a doctor cannot benefit from the duty to warn.[22]

In this case, the bank granted a loan to a professional partnership composed of a doctor and two partners. Then, as the partners were prohibited from practicing, the bank granted another loan to the doctor. Due to the expiration of the deadline, the bank called the doctor to pay.

The doctor sued the bank for breaching his duty to warn, and the Toulouse Court of Appeal found that the doctor was a knowing borrower. The Court of Cassation upheld the Court of Appeal's findings, finding that "the doctor, a high-level medical specialist, could not have been unaware of the risks inherent in the transactions he had undertaken. He had gained experience with the first loan taken out over the past three years and was better placed to assess the prospects for the development of his professional activity and, consequently, his repayment capacity". The Court of Cassation, therefore, considered that the Toulouse Court of Appeal's decision was legally justified.

We also add that when two people borrow from a bank, the prudential nature of the loan is assessed individually for each of them, and the bank cannot be exempted from its duty to warn of the presence of an informed person on the borrower's side, whether a third party or a party[23]. Furthermore, the French Court of Cassation has clarified that it is up to the lending institution to determine whether the borrower was aware or not.[24] The status of a borrower, whether aware or not, of a registered company is assessed by the person of its manager.[25]

It should be noted that a manager may be considered unwarned, and the bank is obligated to warn him/her in exceptional circumstances, such as in the absence of experience or personal expertise in the field of credit.[26]

The French Court of Cassation has held that a person who owns 80% of the capital of the project, which is the guarantor, and who is a manager, must be considered warned.[27]

Thus, a client who holds a senior position in a company or has a regular income can easily be viewed as someone who regularly conducts banking transactions and is therefore presumed to be a warned client.

The French Court of Cassation also relied on the criterion of knowledge and experience in the financial field as a criterion for determining his/her status. It held that the execution of a similar transaction several years prior and repeated practice in the stock market entail the person performing it being considered a warned client.[28]

The most appropriate criterion for achieving the required protection for the client and distinguishing between warned and unwarned clients is the degree of experience in the financial field. This allows professionals and others to benefit from the obligation to warn, depending on the circumstances of each case.

2.2 Risks in banking operations

Credit risk is determined based on a personal criterion. If, at the time the loan is granted, it appears that the loan is not suitable for the client's financial situation, either because it represents a significant financial burden or because their sources of income are unstable, the bank must warn the

21 Cass.com., November 19, 2009, n°07-21.382: Juris Data: n° 2009-050333.

22 Cass.com., May 26, 2010, n°562, 08-10.274: Juris Data: n° 2010-007391.

23 Cass.1er Civ., April 30, 2009: JCPE 2009.

24 Cass.com., November 17, 2009: Juris Data: n° 2009-050458.

25 Cass.com., May 22, 2013, n°11-20.398: Juris Data: n° 2013-010117.

26 Cass.com., April 11, 2012, n°446, 10-25.904: Juris Data: n° 2012-007024.

27 Court of Cassation, Joint Chamber, June 29, 2007, 05-21.104; Bulletin 2007, Joint Chamber, No. 7.

28 Cass.com., January 12, 2010, no. 08-17.956, Juris Data: no. 2010-051089.

client to avoid liability.

To fully fulfill this obligation, the bank must not rely solely on the information and data provided by the client regarding their financial situation, as the client could provide false information to obtain credit. It must inquire about the client's financial situation and their ability to pay the monthly installments within the allotted time before granting credit. If the bank determines that the loan is not restrictive and does not carry any risk, it has no obligation to the borrowing client, regardless of their situation, and therefore, its liability is not incurred in this case.

We can draw inspiration here from the case of Mr. and Mrs. Hoareau, where a credit institution, by notarial deed dated October 23, 2001, granted a loan of €76,224 to Mr. and Mrs. Hoareau to obtain a cash flow loan.

Later, believing that the bank should not have granted them such credit without warning them of the risks of the transaction, the couple filed a lawsuit against the bank seeking compensation for their loss. However, the Rennes Court of Appeal dismissed the case in a judgment handed down on January 11, 2008.

The Hoareaus then filed an appeal. They criticized the Court of Appeal, which recognized their status as unsophisticated borrowers, for, firstly, not having verified whether the warning obligation had been complied with, and secondly, for not having investigated whether the credit institution had done so. In other words, it seriously examined the borrowers' actual financial capacity without focusing solely on their salaries.

The couple's appeal was dismissed by a decision of the Commercial Division of the French Court of Cassation on July 7, 2009.[29] The Court of Appeal ruled that, after noting that the monthly loan payments amounted to €1,510.41, the borrowing couple owned the property and that Mr. Hoareau's income had increased by September 1, 2001, to €3,811 per month, while his wife's salary was €1,226.

The appeal judges also noted that Mr. Hoareau's redundancy in October 2002 and his subsequent divorce were the cause of their financial difficulties.

Thus, for the French Court of Cassation, these investigations demonstrated that "on the date the contract was entered into, the credit was appropriate for the borrowers' financial capacity and the debt risks arising from the granting of this loan". It follows that the bank, "in the absence of such a risk, had no obligation to warn them", and the Court of Appeal therefore legally justified its decision.

For information, the duty to warn is defined as the professional's duty to draw the attention of the person entering into a contract with them to the negative aspects of the contract or its purpose.[30] Thus, in the context of a loan, the banker must inform his client of the risks of the planned transaction, that is to say the risk of not being able to meet the deadlines due to insufficient income and financial solvency.

However, in this case, the term "uninformed", which was not challenged in this case by either the Court of Appeal or the Court of Cassation, takes on particular significance. All the decisions rendered to date imply that the borrower classified as uninformed, or the ordinary person, i.e., considered to be insufficiently informed of the prior transaction, is the creditor of this obligation to notify.

Credit institutions face risks related to the possibility of debtor insolvency. The recovery of borrowed funds is threatened when the latter encounter financial difficulties. Therefore, to reduce these risks, banks conduct a number of inquiries before granting a loan to assess the risk.

First, the borrower is interviewed and must provide various written information to assess their financial capacity. In addition, the Foundation obtains information through documents whose publication is required by law. The trade register, companies, and accounting documents therefore constitute a particularly reliable source of information, particularly when the accounts are subject to audit by the statutory auditor. In addition, the bank may be required to access certain files held by the Banque de France, such as individual loan repayment statements. However, for loans granted for large amounts for professional use, the credit institution may require its

29 Cass.com., July 7, 2009: Hoareau and others v. Société Crédit Lyonnais – Appeal no. 08.13.536 D – Dismissal (C. app. Rennes, January 11, 2008) – gr. no. 735P+B.

30 Fabre-Magnan, M. (1992). On the obligation to provide information in contracts. Essay on a theory, LGDJ, nos. 11 and 467.

clients to conduct specific investigations, particularly by an audit firm.[31]

On this basis, the French Court of Cassation ruled on July 3, 2012, that since the borrower had not claimed that his pledge was disproportionate to his resources and assets, the Poitiers Court of Appeal was not required to determine whether he qualified as an unsophisticated borrower.[32]

CONCLUSION

Considering that the obligation to warn aims to ensure more effective client protection than a specialized professional bank, by requiring the latter to intervene in the client's affairs to warn them of the risks surrounding the banking process.

Among the findings we have reached:

- Not every professional is necessarily a risk advisor. The most appropriate criterion for ensuring the required client protection and distinguishing a risk advisor from a non-specialized advisor is the degree of experience in the financial field. This is evident from the conflicting decisions of the French Court of Cassation. It is worth noting that the Franco-Algerian legislature and judiciary have not adopted the criterion of distinguishing between an informed and an uninformed client;
- If the bank's commitment to warnings appears to conflict with the principle of non-interference in the client's affairs, then in reality, its intervention in this commitment is achieved by implementing a plan and providing technical support in the form of warnings, which translates into the exercise of due diligence in accordance with banking practice;
- Like the obligation to inform and the obligation to advise, the obligation to warn is only one part of the general obligation of prudence and diligence, and may occur before the conclusion of the contract or during its execution. We also recommend that the Algerian legislator, to protect the borrowing consumer, enact legal provisions to determine the controls on the obligations of banks, in particular the warning obligation, by specifying to what extent the status of the borrower is verified (warned or not), and by specifying to what extent the loan granted is sufficient, not onerous, concerning the financial capacity of the borrower, to exclude the liability of the bank due to the absence of a warning obligation on its part.

31 Gavalda, C., Stoufflet, J., Banking Law, Litec, 2008, 7th ed., no. 497.

32 Cass.com., July 3, 2012, no. 11-33.665.

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