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Facing the Powerful Non-State Actor in Consumer Law: A Multidisciplinary Analysis of the Legal Responsibility of Financial Services Providers

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1. Problem. Social structures have changed a great deal over the last century due to social, economic and political development. One consequence is that non-state actors have gained an increasing power over individuals. Examples of these powerful non-state actors include financial services providers who run the financial markets (such as the Franco-Belgian service provider Dexia).¹ Power imbalances hold the risk that its excrescences in some way affect an individual’s core interests and thereby also affect today’s society. However, in academia, the problem of power imbalances is always addressed from the perspective of the protection of the weaker party (e.g. the consumer).² Less attention has been paid so far to analyzing and problematizing the role of the powerful non-state actor. That is problematic since it is the powerful non-state actor who finds himself confronted with particular legal responsibilities.

2. Central questions. In this presentation the legal responsibility of the financial services provider will be explored on the basis of three questions:

   i. who is this powerful non-state actor?
   ii. why is a heavier burden of responsibility placed on the financial services provider? (legitimization)
   iii. how is this responsibility implemented in private law? (methods)

The first question (who) involves a search for indications in judgments of the Dutch Supreme Court (Hoge Raad) concerning the character of the financial services provider (aard van de partij). Sociological power theory, more particular Bierstedt’s “An analysis of social power”, will be used to further substantiate the idea that financial services providers can be considered powerful in relation to their clients.³ Sociological theory is considered to be most suitable for this purpose, since it is exactly relationships between people in society that are the centre of study in sociological research.

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The second and third question entail a case law analysis and an analysis of preparatory documents to find arguments on why particular responsibilities are given to the financial services provider and to find out how these responsibilities are implemented in law. In addition, attention will be paid to relevant case comments and academic literature.

3. **Conclusions.** In the end, Emaus will draw conclusions on the legal responsibility of financial services providers, on the value of sociological theory for the further development of the legal responsibility of powerful non-state actors, and indicate some lessons learned by studying power imbalances from a different perspective.

4. **Relevance.** Although the focus in this research is on Dutch law, the problem addressed, the approach taken and the conclusions derived from it are most relevant for many legal systems.

5. **Publication.** This presentation is the result of an explorative case study on the legal responsibility of one particular powerful non-state actor. The results are yet published in Dutch and will be updated.⁴