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# The Banker's Oath in the Netherlands and Abroad

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## 1. INTRODUCTION

The banker's oath<sup>1</sup> was implemented in the Netherlands on 1 January 2013, and it applies to persons determining the policy and to members of supervisory organs in certain financial enterprises (i.e., management and supervisory board members).<sup>2</sup> The oath is a declaration of moral and ethical conduct by which the board members promise to uphold certain professional standards. The banker's oath has been implemented to restore and improve trust in the financial sector. The oath was developed in response to a legislative motion by two members of parliament<sup>3</sup> that called for the establishing of a legal base for the declaration of moral and ethical conduct that board members voluntarily make on the basis of the Dutch Banking Code.

The banker's oath is a much discussed topic in the Netherlands, as the following reactions show. Even before the introduction of the oath, the Dutch Labour Party (PvdA) believed that it should have a broader applicability than only the board members. The Dutch Council of State criticized it, claiming that those who do not carry the final responsibility and who have no 'public authority' should not be taking an oath as it would be an 'improper instrument'.<sup>4</sup> The Minister of Finance, Dijsselbloem, thinks differently about this; the Bill Amendments Financial Markets 2015 states that the banker's oath should be applicable to *all* employees who have customer contact and *all* employees whose activities (can) substantially influence the risk profile of the company.<sup>5</sup> In addition to the broader applicability of the oath, the Dutch Labour Party (PvdA) pleaded for civil and criminal

penalties for non-compliance.<sup>6</sup> The Dutch Christian Democratic Alliance (CDA) called for the establishment of a disciplinary tribunal. Although the Netherlands Bankers' Association (hereinafter: 'NVB') was initially very sceptical about disciplinary law, the new president, Chris Buijink, appointed as from June 2013, is now very positive about it.<sup>7</sup> Likewise, the government is in favour of disciplinary law and supports the intended initiatives of the NVB on this matter to make the oath with the proposed associated rules of conduct and the disciplinary law system applicable to all bank employees as of January 2015.

Recent developments and the criticisms call for more clarification. The goal of the oath is to change the behaviour of bankers; hence, clarity and acceptance are desirable. Since it has so far been decided to adopt the banker's oath on a broad scale, it is relevant to come up with a banker's oath that is future proof, widely accepted and an example for Europe. Moreover, the conclusions of this article can contribute to the ongoing European debate on the integrity of board members of financial enterprises. In section 2, a comparison is drawn with other professional oaths in the Netherlands. Section 3 discusses the current banker's oath as set out in the Regulations on Oaths and Declarations of Integrity in the Financial Sector ('Regeling eed of belofte financiële sector') (hereinafter: 'Rebfs'), how the oath was created, its contents and the current discussions. Section 4 describes the current enforcement and sanction possibilities. Section 5 discusses the oath abroad, concluding with recommendations for a future proof banker's oath in section 6.

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1 Annex 1 to Art. 2(1) of the Regulations on Oaths and Declarations of Integrity ('Regeling eed of belofte financiële sector') (hereinafter: 'Rebfs').

2 Article 1(1) Rebfs in conjunction with Arts 3:8(2) and 4:9(6) of the Dutch Financial Supervision Act ('Wet op het financieel toezicht') (hereinafter: 'Wft').

3 Parliamentary papers II 2010/11, 31 980, No. 43, p. 1.

4 Raad van State, 2012. Opinion W06.12.0382/III (available at [www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=10618](http://www.raadvanstate.nl/adviezen/zoeken-in-adviezen/tekst-advies.html?id=10618)).

5 Rijksoverheid, 2013. Uitbreiding bankierseed. 14 Aug. 2013 (available at [www.rijksoverheid.nl/nieuws/2013/08/14/uitbreiding-bankierseed.html](http://www.rijksoverheid.nl/nieuws/2013/08/14/uitbreiding-bankierseed.html)).

6 Volkskrant, 2012. PvdA: bankierseed moet breder gelden, 24 Sep. 2012 (available at [www.volkskrant.nl/vk/nl/2680/Economie/article/detail/3321382/2012/09/24/PvdA-bankierseed-moet-breder-gelden.dhtml](http://www.volkskrant.nl/vk/nl/2680/Economie/article/detail/3321382/2012/09/24/PvdA-bankierseed-moet-breder-gelden.dhtml)).

7 P. Couwenbergh, Draagvlak voor bankierseed. *Het Financieel Dagblad*, 24 Jun. 2013.

## 2. OTHER PROFESSIONAL OATHS IN THE NETHERLANDS

### 2.1. Lawyer's Oath<sup>8</sup>

The banker's oath is not the first of its kind. The Netherlands has known various professional oaths for a long time. Those will be compared with the banker's oath below. Criticisms of these oaths will also be discussed, as well as how these criticisms relate to the banker's oath.

With the lawyer's oath, lawyers declare allegiance to the King, obedience to the Constitution and acceptance of purely righteous cases (cases believed in all conscience to be fair). The lawyer's oath was introduced to enforce 'familiarity with the law',<sup>9</sup> without which no one could call himself or herself a lawyer.<sup>10</sup> At that time, laws that a lawyer had to obey did not exist – the Dutch Counsel Act was only introduced in 1952. The oath therefore served as a legal basis for the legal profession. This oath, which is very short compared to the banker's oath, has been in existence since 1531.<sup>11</sup> Frequently heard criticism is that the oath is not modern. Criticism is also expressed on the part that addresses loyalty to the King,<sup>12, 13</sup> as well as on the recommendation and defending of cases. It is said that 'believed in all conscience to be fair' cannot be properly assessed and hence the meaning of those words is disputable. This also applies to the broad standards of the banker's oath. Overall, the meaning of the lawyer's oath is not instantly clear, and the enforceability of the unclear standard is even considered dubious.<sup>14</sup> Due to the banker's oath's open standards, it could suffer the same fate. The wording of the lawyer's oath is very broad,<sup>15</sup> which is its strength yet also its weakness.

### 2.2. Doctor's Oath<sup>16</sup>

The doctor's oath was introduced in the Netherlands in 1878 as the formulation of the correct implementation of the civil service position that doctors hold. This happened under the upcoming role of the government in the late nineteenth century – a humanistic concept of the medical profession was being formed and likewise an oath. The oath was originally based on the Hippocratic Oath.<sup>17</sup> In 2003, the oath dating from 1873 was replaced by a new doctor's oath,<sup>18</sup> which resembles the form of the banker's oath. This renewed doctor's oath seeks to provide openness and improved testability for behaviour. This is something that the banker's oath also aims to achieve. In the Netherlands, there is no longer a legal obligation to take the doctor's oath.<sup>19</sup> The expectations of this oath are nowadays limited to it serving as a starting point for desired behaviour.

### 2.3. Comparison

Both oaths are much older than the banker's oath. For the lawyer's oath, the age is a source of criticism. The doctor's oath has been renewed in response to that same criticism. From the banker's oath, it is to be expected that it progresses with the times and stays up to date. It is remarkable that both the oaths are not legally enforceable. There are no sanctions for non-compliance, and precisely this is a point of discussion regarding the banker's oath.<sup>20</sup> In terms of accuracy, the banker's oath resembles the doctor's oath. The lawyer's oath has a very broad formulation, which is related to its short length. Although the banker's oath is more specific, the norms remain vague as well. The lawyer's oath and doctor's oath

- 8 This oath reads as follows: *I swear (promise) allegiance to the King, obedience to the Constitution, respect for the judicial authorities, and that I shall not recommend or defend a case that I do not believe in all conscience to be fair.* To be found in Art. 3(2) of the Dutch Counsel Act.
- 9 This was probably related to the fact that lawyers studied abroad at that time. The oldest university in the Netherlands, the Leiden University, was only founded in 1575 by Willem van Oranje. The establishment was forty-four years after the oath was introduced.
- 10 J. Gosselaar, Contribution of 31 Oct. 2011 (available at <http://www.oddfellows-groningen.nl/archiefverhaal170.htm>).
- 11 N. Christopoulos, *Advocaten need verdere beschouwing.* *Advocatenblad*, 9: 30 Apr. 1999 (available at [www.sdnl.nl/pdf/advocatenblad-advocatenneed.pdf](http://www.sdnl.nl/pdf/advocatenblad-advocatenneed.pdf)). The first document in which a full oath is recorded dates from this year. However, the lawyer's oath has great similarities with the French oath which dates from 1344. The document dating from 1531 did not yet mention 'loyalty to the King', this part was added during Napoleon's rule at the beginning of the nineteenth century. With this, he tried to control the influential position of lawyers.
- 12 G. Spong, *Lawyer's Oath*, in reaction to 'De advocaat geketend met den hals aan het hof?', *Nederlands Juristenblad*, 2006/42, No. 1860 (available at [www.njb.nl/website/data/artikel/art070642.html](http://www.njb.nl/website/data/artikel/art070642.html)).
- 13 Houtzagers believes that this section should not be interpreted literally, but that it should be seen as 'Fidelity to Parliamentary Democracy', see: G.J.H. Houtzagers, *De advocaat geketend met den hals aan het hof*, *Nederlands Juristenblad*, Afl. 2006/36 No. 1578 (available at [www.njb.nl/NJB2006/meri/archief/art070636.html](http://www.njb.nl/NJB2006/meri/archief/art070636.html)).
- 14 Christopoulos (1999).
- 15 F.A.W. Bannier & N.A.M.E.C. Fanoy, *Beroep Advocaat: in de ban van de balie*. Deventer 2005: Kluwer, en Nederlandse Orde van Advocaten, 2013. Juridische databank (available at [www.advocatenorde.nl/consumenten/juridische-databank/wetenregelgeving/details/290](http://www.advocatenorde.nl/consumenten/juridische-databank/wetenregelgeving/details/290)).
- 16 This oath reads as follows: *I swear/promise that I will, as well as I can, practise medicine to serve my fellowmen. I will take care of the sick, promote health and alleviate suffering. I will make the patient's interests my top priority and will respect his opinion. I will listen to him and advise him well. I will observe secrecy in respect of matters entrusted to me. I will promote my own and others' medical knowledge. I recognise the limits of my abilities. I will act openly, be willing to undergo review, and recognise my responsibility to society. I shall promote the availability and accessibility of healthcare. I will not misuse my medical knowledge, also not under pressure. In this way, I will uphold the reputation of the medical profession. This I hereby solemnly promise, so help me God almighty.*, presented in 2003 through collaboration between the Royal Dutch Medical Society (KNMG) and the Association of Universities in the Netherlands (VSNU).
- 17 To be found in Hermeneus 71/2, 1999, 128–129 translated from Ancient Greek by Anton van Hooff and Manfred Horstmannshoff.
- 18 According to Erkelens, Briet, Weijenberg & Homan, the oath was in need of revision as it was predominantly viewed as a remnant of the law that was no longer applicable to the practice of medicine. D.W. Erkelens, *Artseneed aan herziening toe. Wettelijke verantwoordelijkheid.* *Medisch Contact* 2001, 56:1461–1463. J.W. Briet, J. Weijenberg & J. Homan, *Artseneed aan herziening toe, ethisch kompas.* *Medisch Contact* 2001, 56:1463–1464.
- 19 Until 1993, the mandatory oath was regulated in the Dutch Medical Practice Act ('Wet op de uitoefening van de geneseskunst').
- 20 J.P.E. Brouwer, *Een bankierseed met sancties versterkt de positie van de consument en de financiële professional*, in: R. Houben e.a. (red.), *Jaarboek Compliance 2013*, Capelle aan den IJssel: NCI, 2012.

are both codes of conduct, just as the banker's oath is intended to be. However, they are often seen as mere points of reference due to the lack of legal justifiability. It is remarkable that medical and legal disciplinary law is not connected to the oaths of those professions, which will also be discussed further below. In short, the banker's oath is in some ways similar to the two oaths previously described. However, there are some differences as well; the banker's oath was created for a completely different reason, namely an attempt to restore trust in the financial sector in the wake of the recent financial crisis.

### 3. CURRENT BANKER'S OATH

#### 3.1. Development

In 2008, in the turmoil of the crisis, the idea of an entry ticket to the financial sector in the Netherlands<sup>21</sup> was suggested for the first time by Van Mierlo, a former director of ING and Rabobank. He argued for a declaration of moral and ethical conduct similar to the doctor's and lawyer's oaths, and expected the banker's oath to give a renewed sense of pride plus a new appearance to the financial sector as a whole.<sup>22</sup> His plea gave rise to a debate about restoring trust in the financial sector. To this end, the NVB installed an advisory committee on the subject; the Advisory Committee on the Future of Banks ('De Adviescommissie Toekomst Banken'). In 2009, this advisory committee published a report titled 'To Restored Trust', in which it argues that a fundamental change of mentality and reorientation in the banking system are necessary.<sup>23</sup> The report addresses the banks' own responsibility. The committee believes that banks should start paying more attention to their role in society by carefully balancing the needs of their stakeholders – customers, shareholders, employees and the community. The importance of the customer should consequently become paramount again. To give more power to these changes, the committee suggested that

board members of banks must sign a declaration of moral and ethical conduct.<sup>24</sup>

In response to the report, the NVB prepared a code of conduct for banks in 2010, the Banking Code, which was embedded in legislation via Article 391(5) of Book 2 of the Dutch Civil Code (hereinafter: 'BW'). The declaration of moral and ethical conduct as proposed by the committee was adopted in this Banking Code. However, after the enactment of the Banking Code, it turned out that the banks' declarations of moral and ethical conduct varied in substance. It furthermore appeared as if little had changed in the behaviour and ethos of bankers,<sup>25</sup> and some even spoke of a missed opportunity.<sup>26</sup> It was stated that the lack of development was caused by the flawed communication regarding the Banking Code, and that the introduction of the oath was perhaps 'the best kept banking secret of 2010'.<sup>27</sup> At the same time, the call for further regulation became stronger.

In March 2011, a legislative motion was filed by two members of parliament.<sup>28</sup> It called for the connecting of the declaration of moral and ethical conduct in the Banking Code with the suitability and reliability tests of banks' board members by the Dutch central bank, De Nederlandsche Bank (hereinafter: 'DNB'). As a result of the absence of this link and the associated own interpretations that banks gave to the oath at that point, the purpose of the banker's oath – which is to increase awareness among all board members, bank employees and the public about the responsibility that bankers have for their bank and society in general – was not sufficiently met, according to the motion. On top of that the then Minister of Finance argued that any person in any financial enterprise should make a declaration of moral and ethical conduct,<sup>29</sup> by which the minister went beyond what was being requested in the legislative motion. The intention to make all employees of banks take the oath is not included in the ministerial regulations containing the final formulation of the banker's oath ('Regeling eed of belofte financiële sector') (hereinafter: 'Rebfs'). The timeline below illustrates the events described.

21 H.L. Van Mierlo, *Gepast en ongepast geld: een zoektocht naar het geweten van banken*. Schiedam: Scriptorum 2008.

22 H.L. Van Mierlo, Beroepseed geeft financiële sector nieuw aanzien, 10-1-2013 (available at [www.eenvandaag.nl/economie/grootverdieners/43709/boepseed\\_geeft\\_financi\\_le\\_sector\\_nieuw\\_aanzien\\_](http://www.eenvandaag.nl/economie/grootverdieners/43709/boepseed_geeft_financi_le_sector_nieuw_aanzien_)).

23 Adviescommissie Toekomst Banken, 2009. *Naar herstel van vertrouwen* (available at [www.commissiecodebanken.nl/scrivo/asset.php?id=529376](http://www.commissiecodebanken.nl/scrivo/asset.php?id=529376)).

24 The committee proposes the following text to be an example of an appropriate oath: *I hereby declare that I will perform my function as a banker with integrity and care. I will carefully consider all the interests involved in the bank, namely those of the customers, the shareholders, the employees and the society in which the bank operates. In that balancing of interests I will make the client's interests my top priority and I will inform him as well as I can. I will conduct myself to the law, regulations and codes of conduct that apply to me as a banker. I will observe secrecy in respect of matters entrusted to me. I will not misuse my banking knowledge. I will act openly, be willing to undergo review, and recognise my responsibility to society. I will endeavour to maintain and promote trust in the banking system. In this way, I will uphold the reputation of the banking profession.* (Commissie Maas, 2009).

25 P. Couwenbergh & P. Lalkens, Beroepseed voor bankiers is ondertekend, maar wat is er nu door veranderd?. *Het Financieele Dagblad*, 20 Jan. 2011.

26 P. Couwenbergh & P. Lalkens, Bankierseed is 'gemiste kans'. *Het Financieele Dagblad*, 20 Jan. 2011.

27 H.L. Van Mierlo, *Bankiers zweren bij geld. Achtergrond, betekenis en toekomst van de bankierseed*. Schiedam: Scriptorum 2010.

28 Parliamentary papers II 2010/11, 31 980, No. 43.

29 Parliamentary papers II 2011/12, 31 980, No. 63.



Figure 1 Timeline Development of Banker's Oath

2008	2009	2010	2011	2012	2013
H.L. van Mierlo suggests the idea of a banker's oath.	Report 'To Restored Trust' of the Advisory Committee: 'mentality change and reorientation is necessary.'	The Banking Code containing a declaration of moral and ethical conduct.	The legislative motion which requested linking the banker's oath to the suitability test.	Drafting of the ministerial regulations containing the final formulation of the banker's oath (Rebfs).	Introduction of the banker's oath as described in the Rebfs.

### 3.2. The Contents of the Current Banker's Oath

The full text of the oath is:<sup>30</sup>

*'I swear/promise that I will perform my function as a banker with integrity and care. I swear/promise that I will carefully consider all the interests involved in the bank, namely those of the customers, the shareholders, the employees and the society in which the bank operates. I swear/promise that I will in the balancing of interests make the client's interests my top priority and that I will inform him as well as I can. I swear/promise that I will conduct myself to the law, regulations and codes of conduct that apply to me as a banker. I swear/promise that I will observe secrecy in respect of matters entrusted to me. I swear/promise that I will not misuse my banking knowledge. I swear/promise that I will act openly, be willing to undergo review, and recognize my responsibility to society. I swear/promise that I will endeavour to maintain and promote trust in the banking system. So help me God Almighty! This I declare/promise.'*

The banker's oath includes the following topics:

- truthful and careful job performance;
- balancing stakeholder interests;
- central focus on the client;
- abide by the laws, regulations and codes of conduct;
- confidentiality;
- no knowledge abuse;

30 Annex 1 to Art. 2(1) Rebfs.

31 Paragraph 3.3.2.1. and sec. 4.2.1. of the Wft state these requirements for financial enterprises in the Netherlands. In the Policy Rules on Suitability (Beleidsregel geschiktheid) 2012, Art. 1.2(1) specifies that suitability entails knowledge, skills and professional behaviour. Reliability is assessed on the basis of Ch. 2 of the Decree on Prudential Rules for Financial Undertakings and includes a background check and an investigation of intentions and acts. Integrity is assessed on the basis of Ch. 3 of the Decree on Prudential Rules for Financial Undertakings and mainly includes systematic review of procedures and measures.

32 C.W.M. Lieverse, *De bankierseed. Tijdschrift voor Financieel Recht*, No. 6 Jun. 2012: 183.

33 M.E.M. Van den Berg & A.C.M. van de Molen & C.W.M. Vergouwen, *Zo waarlijk helpe mij God Almachtig! Tijdschrift voor Financieel Recht*, No. 3 Mar. 2013: 75.

34 S.A. Gawronski & A.J.P. Tillema, *De Bankierseed: Panacee of symboolpolitiek? Tijdschrift voor Financieel Recht*, March 2013.

35 Rijksoverheid, *Uitbreiding bankierseed*, 2013 (available at [www.rijksoverheid.nl/nieuws/2013/08/14/uitbreiding-bankierseed.html](http://www.rijksoverheid.nl/nieuws/2013/08/14/uitbreiding-bankierseed.html)).

36 Raad van State (2012); Möller (2013); and Gawronski & Tillema (2013).

- openness, personal accountability and responsibility for society; and
- endeavour to ensure trust in the financial sector.

The above concepts partially overlap with the suitability, reliability and integrity requirements for persons determining the policy in financial enterprises (i.e., board members) as laid down in the Wft.<sup>31</sup> For example, careful job performance can be placed under suitability and also includes knowledge, skills and professionalism. However, the topics of the banker's oath also touch upon other themes, such as the focus on the customer, responsibility to society and striving for trust in the financial sector. It is described by whom and before whom the oath is taken, but it is remarkable that the Rebfs does not clarify whom the oath is directed at. This is also not clear from the government's correspondence on the banker's oath. However, it may be assumed that the oath is directed at the persons who take the oath, at the company this person works for, at the stakeholders of the bank and at society. The persons who take the oath promise to adhere to the codes of conduct, which also affects the company, and since the financial enterprise fulfils a utility function, society and the customer or consumer are addressed as well. In our view, it is of great value to have every person who takes the oath realize whom it is directed at. The desired awareness and sense of responsibility are thus made explicit.

### 3.3. Recent Discussion on the Banker's Oath

Many find the text of the current oath reasonable; however, considerable doubts are raised in the literature about the contribution that the oath in its present form provides to the improvement of business integrity and the focus on client's interests.<sup>32,33</sup> The discussion therefore focuses on the future and addresses ways in which the oath can contribute to preserving and promoting confidence in the financial sector.<sup>34</sup> The main points of the discussion are: (1) the potential wider implementation of the oath for more bank employees, and (2) the enforcement of the oath and the sanctions for non-compliance with the oath.

With regard to the first point, the current Minister of Finance already proposed in the Bill Amendments Financial Markets 2015 that the banker's oath should apply to all employees who have customer contact and to all employees who influence the risk profile of the company.<sup>35</sup> In the literature, many critics argue against widening the sphere of application.<sup>36</sup> Due to the wider

application of the banker's oath, the oath would lose effect and become merely symbolic legislation.<sup>37</sup>

Enforcement and sanctioning of the oath (the second point) is recognized as an important topic; clear regulations regarding such measures are still to be developed and regarded as necessary. Critics are inconclusive however; some believe the oath to be not concrete enough for sanctioning for non-compliance,<sup>38</sup> others designate today's oath as a 'toy of politics'<sup>39</sup> and believe that voluntary application of the oath is crucial to its success. On the other hand, the majority of the Second Chamber<sup>40</sup> as well as various authors<sup>41</sup> see merit in enforcing the banker's oath. Non-compliance with the oath might have a negative impact on the suitability assessment of the management and supervisory board members. Possible disciplinary sanctioning is currently being investigated.<sup>42</sup> Accordingly, these and other enforcement and sanctioning options are analysed below and where needed provided with our comments.

## 4. ENFORCEMENT AND SANCTIONING

### 4.1. Current Enforcement and Sanctioning Model

In the current model, the responsibility for the implementation and enforcement of the oath lies primarily with the financial enterprise of which the management and supervisory board members have taken the oath.<sup>43</sup> If it wishes to do so, such a company can take measures to ensure compliance, such as the internalization of norms and values, linking it to remuneration and/or assessment policies and providing education and training opportunities. When the oath is not taken or not complied with, this could have consequences for the suitability of the person concerned as it is linked to the suitability test. The financial enterprise itself can take the suitability of the person concerned into consideration and the Netherlands Authority for the Financial Markets (the AFM) and/or DNB may also proceed to (re)test a person,<sup>44</sup> as suitability is an ongoing requirement. The most serious consequence is that the person is no longer considered suitable, in which case he or she can no longer perform his or her duties.<sup>45</sup>

### 4.2. Enforcement Opportunities

Enforcement is preferred over sanctioning; therefore, a combination of various enforcement options<sup>46</sup> seems to be ideal. Internalizing the values of the oath in an organization, in the code of conduct for example, is evident to the persons who take the oath to keep its contents fresh in their memory.<sup>47</sup> Filling in the open standards of the oath and giving examples of best practices is the first step to take. Besides internalization of the oath, education<sup>48</sup> can help create a better understanding of why certain behaviour is desired. In this way, the person who takes the oath will have the opportunity actually to substantiate the meaning behind the words he or she says, turning paper into mentality. An annual evaluation of the behaviour of the persons who take the oath, accompanied by a rating and the addressing of points of improvement, is an option as well. In the literature, it has been proposed to include the oath in the remuneration and assessment cycle to provide an additional incentive and to reward good behaviour.<sup>49</sup> It has indeed been confirmed in the past that a monetary incentive may be decisive in an individual's choice to act correctly or incorrectly. Furthermore, screening for morality seems desirable prior to employment. Currently, many companies already subject candidates to a personality test; adding an extra dimension here is a small effort. This enables the hiring of people who are willing and able to do what is right. The tools mentioned are possibilities that financial enterprises and the government can start working with. The ideal combination of enforcement options will differ in each financial enterprise – 'one size does not fit all'.

### 4.3. Possibilities for Sanctioning

#### 4.3.1. Administrative Law

The next question that arises is how to approach the issue of non-compliance with the contents of the banker's oath. So far, the literature has mentioned several sanctioning possibilities to enforce the banker's oath. These options are set out per legal jurisdiction below.

Within the legal jurisdiction of administrative law, the financial enterprise is the addressee. *The administrative fine* is the first option and has been implemented together with the risk-based

37 E.D. Karssing, *Moet de wolf vegetariër worden? Mijmeringen over de bankierseed en de moraliteit van de financiële sector*, in: R. Houben e.a. (red.), *Jaarboek Compliance* 2013, Capelle aan den IJssel: NCI, 2012.

38 A.H.E.M. Wellink, in an interview with Pauw & Witteman on 9 Jan. 2013 (available at [pauwennitteman.vara.nl/Fragment-detail.1548.0.html?tx\\_ttnews%5Btt\\_news%5D=28609&tx\\_ttnews%5BbackPid%5D=116&cHash=fe802500eadecc54b3e68f3f6cc3e1a](http://pauwennitteman.vara.nl/Fragment-detail.1548.0.html?tx_ttnews%5Btt_news%5D=28609&tx_ttnews%5BbackPid%5D=116&cHash=fe802500eadecc54b3e68f3f6cc3e1a)).

39 Statement from Van Mierlo in an interview with BNR Radio on 31 Dec. 2012 (available at [www.bnr.nl/nieuws/107172-1212/mislukking-bankierseed-ligt-op-de-loer](http://www.bnr.nl/nieuws/107172-1212/mislukking-bankierseed-ligt-op-de-loer)).

40 Parliamentary papers II 2011/12, 33 235, No. 12.

41 Möller (2013); Van den Berg, van de Molen & Vergouwen (2013); and W. Lieve, 2012. *Het Portret. Tijdschrift voor compliance*, No. 4 Dec. 2012: 289.

42 Parliamentary papers II 2011/12, 33 235, No. 12.

43 AFM, 2013. *Bankierseed: algemeen* (available at [www.afm.nl/nl/professionals/diensten/veelgestelde-vragen/bankierseed.aspx](http://www.afm.nl/nl/professionals/diensten/veelgestelde-vragen/bankierseed.aspx)) Bezoekt 24 Apr. 2013.

44 The supervisors do this on the basis of the Policy Rules on Suitability (Beleidsregel geschiktheid) 2012.

45 Parliamentary papers 2011/12, 31 980, No. 63.

46 As described by Van den Berg, van de Molen & Vergouwen (2013); Lieve (2012); C.W.M. Lieve & J.M. Poelgeest, 2012. *De Bankierseed. Tijdschrift voor compliance*, No. 4 2012: 257; and E.D. Karssing, 2011. *Uit de boekenkast van de bedrijfsethiek. Tijdschrift voor compliance*, No. 40 2011: 66.

47 Van den Berg, van de Molen & Vergouwen (2013).

48 Lieve & Poelgeest (2012).

49 Van den Berg, van de Molen & Vergouwen (2013).

supervision of the AFM and DNB.<sup>50</sup> Due to the size and diversity of the group of persons who take the oath, the former Minister of Finance stressed that the responsibility for the banker's oath lies with the company itself. Therefore, the two supervisors (AFM and DNB) do not actively monitor missteps, and probably few companies will voluntarily report themselves to the supervisors because they may receive an administrative fine.

As stated above, the concepts in the banker's oath overlap with the *suitability standards for board members* as laid down in Articles 3:8 and 4:9 of the Wft. These standards and compulsory suitability assessments for board members are directed at the financial enterprise itself. If the financial enterprise does not comply with the suitability standards – and thus also not with the contents of the banker's oath – it can be sanctioned based on these provisions in the Wft. The management or supervisory board member may also be sanctioned for this, for example by no longer being allowed to perform his or her duties as a result of the unsuitability.

With respect to the jurisdiction of administrative law, it can be stated that all topics of the banker's oath are already laid down in the provisions of the Wft. Therefore, separate sanctioning through the jurisdiction of administrative law seems superfluous.

#### 4.3.2. Labour Law

Within the jurisdiction of labour law, the person who takes the oath (persons determining the policy and members of supervisory organs in certain financial enterprises) is the addressee.

The question arises whether not taking the oath or non-compliance with the contents of the oath can justify the dismissal of an individual. It is argued that it is up to the financial enterprise to take such a decision, with potential reviewing by a judge. Dismissal for refusing to take the banker's oath is, however, considered to be appropriate.<sup>51</sup> No concrete statements concerning dismissal on the basis of non-compliance have been made so far. Nevertheless, if the group of persons who take the oath expands, the legal position and legal certainty of employees and employers should be clarified.

#### 4.3.3. Civil Law and Liability

Within the jurisdiction of civil law, both the financial enterprise and the management or supervisory board member are the addressee. The banker's oath does not create any contractual relationship between the person who takes the oath, the financial

enterprise and the client. A client's action should therefore be a *tort action*. Such an action by the client could be directed at the whole financial enterprise and/or at the particular management or supervisory board member. When the actions of a management or supervisory board member can be qualified as serious blame for which he or she is to blame personally, this individual can be held personally liable too.<sup>52</sup> However, this is only the case if he or she attributably acts wrongfully in the performance of his or her duties towards a third party, for example in the case of reckless behaviour or wilful intent.<sup>53</sup> It is not plausible that not taking the oath or non-compliance with it will in itself lead to civil liability; it will be an additional argument in a more comprehensive civil liability case.<sup>54</sup>

Liability may also potentially arise through the *civil duty of care of a financial enterprise*. Financial enterprises have a special duty of care<sup>55</sup> because of their utility function in society.<sup>56</sup> The interpretation and scope of the duty of care partially depend on the circumstances, although the central focus on the client is implicitly incorporated in it. It is not likely that not taking the oath or not complying with it will in itself lead to the violation of the duty of care.<sup>57</sup> Again, it would mainly be an additional argument, on the basis of which eventually a violation of the duty of care could be determined. Because of the heavy burden of proof, civil liability is not the ideal route for sanctioning. However, the legislator takes the duty of care so seriously that there is a chance that these sanctioning possibilities will nevertheless be used or researched further in the future.

#### 4.3.4. Criminal Law

Within the jurisdiction of criminal law, the management or supervisory board member is the addressee. However, the use of criminal law in sanctioning non-oath taking or non-compliance with the oath has many disadvantages. The description of the criminal offence must be provided very accurately. Gawronski & Tillema<sup>58</sup> assume that the description of simply not taking the banker's oath is fairly easy. On the other hand, non-compliance is difficult to capture in such a precise description because of the open standards of the oath. Besides that, the AFM and DNB often explain the oath's open norms in their guidelines and interpretations, which makes criminal prosecution on this basis difficult because of the *lex certa* principle and the separation of

50 Article 1:8 of the Wft and the Act and the Administrative Fines (Financial Sector) Decree (Besluit bestuurlijke boetes financiële sector).

51 Letter to Parliament FM/2012/727 U (available at [www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2012/06/28/kamerbrief-over-consultatie-bankierseed.html](http://www.rijksoverheid.nl/documenten-en-publicaties/kamerstukken/2012/06/28/kamerbrief-over-consultatie-bankierseed.html)).

52 Gawronski & Tillema (2012).

53 See: 23 Nov. 2012, LJN BX5881 and Utrecht District Court 15 Feb. 2012.

54 Gawronski & Tillema (2012).

55 Financial firms have a special duty of care given their special expertise, with respect to their private clients, and the trust that the latter party derives from that. See A.C.W. Pijls, 2011. *De bijzondere zorgplicht van de financiële dienstverlener* (available at [repub.eur.nl/res/pub/31688/Pijls\\_Zorgplicht.pdf](http://repub.eur.nl/res/pub/31688/Pijls_Zorgplicht.pdf)).

56 See HR 23 May 1997, NJ 1998/192 (Rabobank/Everaars) and HR 24 Dec. 2010, JOR 2011/54 (Fortis Bank/Bourgonje).

57 Gawronski & Tillema (2012).

58 Gawronski & Tillema (2012).

powers (the trias politica).<sup>59</sup> Regardless of how badly some politicians wish it would, criminal law as a last resort does not correspond well with criminal sanctioning for not taking or not complying with the oath.

#### 4.3.5. Disciplinary Law

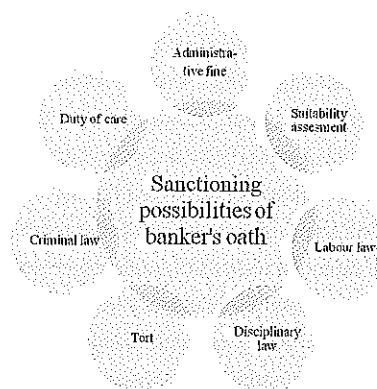
The former Minister of Finance promised at the time of implementation of the oath not only to investigate potential criminal sanctioning, but also disciplinary sanctioning.<sup>60</sup> The financial enterprise is the norm addressee in the Wft; however, the contents of the banker's oath are directed at the persons who take the oath (persons determining the policy and members of supervisory organs in certain financial enterprises). Disciplinary law can be qualified as the sanctioning law for moral or ethical norms, codes of conduct or an oath/promise;<sup>61</sup> in other words: within a defined group of persons disciplinary law imposes sanctions for ethically reprehensible actions. It is argued that disciplinary law can create a sense of individual responsibility for complying with the banker's oath.<sup>62</sup> However, the profession of banker – if it can even be regarded as such – has no definite shape such as the professions lawyers and doctors have. In addition, the professions in the financial sector have a joint responsibility, not a purely individual one. On the other hand, the oath dictates a balancing of interests, in which the interests of the customer are paramount. If the outcome of such an assessment proves ethically reprehensible and a management or supervisory board member consequently practises his or her profession in an unethical manner, it is appropriate to impose a disciplinary sanction on this person.<sup>63</sup> As likewise stated under 4.3.1, the question rises whether disciplinary law is actually necessary in addition to the possible sanctioning pursuant to the Wft provisions and the possible consequences of the suitability test, since not only the company but also the management or supervisory board members may be sanctioned on the basis of the Wft provisions.<sup>64</sup> Nevertheless, both the NVB and the government are in favour and are in the process of developing disciplinary rules.

#### 4.4. Future

Enforcement and internalizing the norms of the banker's oath are paramount and deserve to be the focus of the debate on the banker's oath. However, the existence of a set of sanctioning

instruments is needed in order to ensure enforcement and internalization. At the moment, the current sanctioning possibilities are too diverse, vague or superfluous since sanctioning is already possible on the basis of Wft provisions in many instances (see Figure 2).

Figure 2 Sanctioning Possibilities of Banker's Oath



In our opinion, the banker's oath is not future proof yet. According to the Dutch Council of State,<sup>65</sup> the oath is a personal commitment and agreement that the rules of a public or professional position will be respected. However, the oath will not change the world by itself and it is not a guarantee for good behaviour. The idea that the oath will have large cultural impact is an illusion.<sup>66</sup> Since many share these thoughts, the focus on a clear enforcement and sanctioning model is growing. Many advocate disciplinary law and if the sector regulates itself, the question is whether the statutory basis of the oath will be useful at all. Pure self-regulation may provide additional opportunities for the substance of the oath, as ethical compliance will become the main focus again.

## 5. THE OATH ABROAD

### 5.1. Belgium

The AFM refers to the Dutch supervision of behaviour within the financial sector as unique.<sup>67</sup> No other country has a banker's oath like the Netherlands.<sup>68</sup> Developments abroad are, however, continuing and therefore Belgium and Australia will be discussed

59 Some critics condemn the completion of open standards by regulators because this would disturb the separation of powers. They note that open standards in the law, such as in the Wft, are completed by the supervising authorities. If a company is then punished by the same supervisor, and if it wishes to appeal against that, it is often the case that the judge will look at the completion of the open standard in the supervising authorities' policy rules or the interpretation of the supervising authorities as a benchmark for his judgment. The interpretation of the supervisor is thus embedded in case law, whereas the supervisor should not be a legislator.

60 Legislative Conciliation on 24 Sep. 2012.

61 P. Eijlander & W. Voermans, 2000. *Wetgevingsleer*. Den Haag: Bju.

62 Gawronski & Tillema (2012).

63 Gawronski & Tillema (2012).

64 Parliamentary papers II 2011/12, 97 236, No. 6.

65 Dutch Council of State (2012).

66 C.A. Wielenga & H.T.J.M. van den Hout, 2012. De rol van de compliance officer ten aanzien van gedrag en cultuur. *Tijdschrift voor Compliance*, No. 4 Dec. 2012.

67 H. Oppelaar, 2012. Redactioneel: Ethiek en Cultuur. *Tijdschrift voor compliance*. No. 4 Dec. 2012: 221.

68 Van Mierlo (2008) and Karssing (2011).



briefly. Belgium and Australia are countries in which the ideas about the introduction of a banker's oath are in development. Nevertheless, almost only references to media sources can be made, since these developments are still very much in their infancy.

According to the governing Socialist Party,<sup>69</sup> there is certainly a demand in Belgium for certain elements of the banker's oath, and the government wants to include these elements in a number of pending bills. These laws would then have to be monitored by an official institution. No self-regulation should be involved; bearing in mind the financial crisis, little trust in the sector exists and the Dutch are considered to be naïve.<sup>70</sup> It is assumed that the Belgians are less obedient than the Dutch Calvinists and therefore no merit is seen in a soft banker's oath.<sup>71</sup> On the other hand, Geert Noels, chief economist of Econopolis,<sup>72</sup> sees the banker's oath as an encouragement and thinks that every little step helps in restoring confidence in the financial sector, although severe sanctions and possibly even imprisonment are necessary to make it a success. Belgium has a different view than the Netherlands of the supervision of behaviour within the financial sector. The law-making on this matter is slow, and will probably include tighter rules with tougher sanctions. To say that Belgium is behind the Netherlands with respect to the banker's oath is going too far. A debate is ongoing and if it is up to the current government, Belgium will not be introducing the banker's oath; it wants to regulate the financial sector tightly from above, leaving little to chance or to the financial companies themselves.

## 5.2. Australia

Six influential Australian company directors<sup>73</sup> designed a banker's oath<sup>74</sup> in 2012 that can be taken voluntarily by professionals in the Australian financial sector. This initiative is supported by the Australian authorities.<sup>75</sup> The president of this group of initiators, Stephan Dunne, describes their Banking and Finance Oath as a manner to restore the public's trust in the financial sector.<sup>76</sup> The oath is intended to be a guiding set of principles for human behaviour. The oath is taken online without any induction or screening. But once committed to the oath, the person who takes the oath will be required to undergo an annual renewal process.<sup>77</sup>

The oath is hence 'valid' for just twelve months. A Review Committee was established to assess the conduct of the persons who take the oath and to suspend or deny their membership, if necessary. Nevertheless, the powers of the Review Committee are limited, and it is more focused on providing education and support to people employed in the financial sector who are confronted with an ethical dilemma.<sup>78</sup> This Australian initiative somewhat resembles the start of the Dutch banker's oath. However, the Australian initiative has come from individuals, is voluntary and requires annual renewal. It is too early to discuss any hard results as registration for the oath has only been possible since the end of 2012. However, the oath was welcomed cynically,<sup>79</sup> and the sector's awareness of the oath is not yet strong at this point.<sup>80</sup> The initiators believe that word of mouth is the best way to become familiar with the oath, and they do not perform any marketing.

It seems that the Netherlands leads the way with a banker's oath that is regulated and has sanctioning possibilities being developed. European reforms in this area are not yet in the making. The task that lies before the Dutch is to develop a banker's oath that is future proof, widely supported, has a clear set of sanctioning instruments and is an example abroad.

## 6. CONCLUSION

It can be argued that the majority of businessmen are decent, and that decent manners are in someone's DNA. Decency cannot be enforced by an oath, although rules can help. If still in doubt: the banker's oath is no holy grail. It is a tool to restore trust in the financial sector by showing consumers that the financial management or supervisory board members will now behave according to set standards. However, implementing and taking an oath is not enough; enforcement and sanctioning are necessary to maintain the trust instilled.

Combining various enforcement options seems ideal to achieve this. Internalizing the values of the oath in an organization, in the code of conduct and through training, is evident to the person who takes the oath to keep its contents fresh in his or her memory. A disciplinary sanctioning mechanism seems to be the most

69 D. Van der Maelen, In an interview with Radio 1 België on 3 Dec. 2012 (available at [www.radio1.be/programmas/hautekiet/bankiersseed-ook-belgi%C3%AB](http://www.radio1.be/programmas/hautekiet/bankiersseed-ook-belgi%C3%AB)).

70 Van der Maelen (2012).

71 Van der Maelen (2012).

72 See [www.econopolis.be](http://www.econopolis.be).

73 See [www.thebfo.org](http://www.thebfo.org).

74 It reads as follows: *Trust is the foundation of my profession. I will serve all interests in good faith. I will compete with honour. I will pursue my ends with ethical restraint. I will create a sustainable future. I will help create a more just society. I will speak out against wrongdoing and support others who do the same. I will accept responsibility for my actions. My word is my bond.*, Banking and Financial Oath Limited, 2013. The oath (available at [www.thebfo.org/home](http://www.thebfo.org/home)).

75 Financial Review Australia, 2012. 'Trust me, I'm a banker': Oath. 27 Dec. 2012 (available at [www.afr.com/ff/free/markets/capital/cfo/trust\\_me\\_banker\\_oath\\_9qR2e1m5IxukAqYm17ZqGK](http://www.afr.com/ff/free/markets/capital/cfo/trust_me_banker_oath_9qR2e1m5IxukAqYm17ZqGK)).

76 Banking Day, 2012. Industry ponders 'oath' with an exit clause. 30 Jul. 2012 (available at [www.bankingday.com/nl06\\_news\\_selected.php?act=2&nav=13&selkey=13503](http://www.bankingday.com/nl06_news_selected.php?act=2&nav=13&selkey=13503)).

77 Financial Review Australia (2012).

78 BankingDay (2012).

79 Financial Review Australia (2012).

80 Financial Observer, 2013. Banking and Finance Oath board finalising policy council. 21 Mar. 2013 (available at [www.financialobserver.com.au/articles/banking-and-finance-oath-board-finalising-policy-council](http://www.financialobserver.com.au/articles/banking-and-finance-oath-board-finalising-policy-council)).

appropriate. A disciplinary tribunal will benefit from a sectoral approach, since it can then judge on the basis of the spirit of ethics instead of on the mere letter of the law. The ideal situation would be that disciplinary law is self-regulated. This is the most appropriate as the elements of the banker's oath are already included in the Wft. Because of this, making it enforceable by the law would not give it more force. A statutory basis would therefore add very little. Taking the oath should not be mandatory for each employee in the financial sector; with regard to this point, we agree with the Dutch Council of State.<sup>81</sup> Making it compulsory will unleash quite a commotion because an 'ordinary' employee cannot actually affect the policies of his or her company. Should the banker's oath nonetheless be broadened, which seems to be the case at this point since new legislation is in preparation and soon to be sent to the Dutch Council of State again for advice, we recommend developing a separate oath for new oath takers, centred on what these employees *can* influence. The merit of the banker's oath will furthermore be greater if it is clear to all parties *at* whom the oath is directed. The sense of proportions and responsibilities for all parties involved will thus be greater.

The ideal situation would be that the oath is taken on a completely voluntary basis, although we suspect that management

and supervisory board members will need a helping hand to take such a step, for the time being. That this helping hand is currently an obligation is not opportune, but perhaps a necessity. The enforcement options described above will help management and supervisory board members understand the values and norms of the oath.

Although the Netherlands is leading the way with the regulated banker's oath, the oath is still in its infancy. Wider support is needed and ambiguities must be removed in the near future, in order to prevent it becoming a dead letter or simply remaining symbolic legislation. The Netherlands – with its exemplary role – will benefit most from a (possibly self-regulated – a reversal seems unlikely to us) banker's oath with broad support for a limited group of bankers with a focus on enforcement and, if necessary, through disciplinary sanctioning. It takes a long time to build trust, and it takes one action to destroy that trust. The introduction of the banker's oath can contribute to the former, but the oath cannot be considered to be the solution to all evil. It is still important that the financial enterprises are aware of and behave according to their responsibilities, and that the government does not take over the role of the financial entrepreneur.

<sup>81</sup> Raad van State (2012).