SUPREME COURT OF NORWAY

J U D G M E N T

given on 31 May 2024 by a division of the Supreme Court composed of

Justice Aage Thor Falkanger
Justice Wenche Elizabeth Arntzen
Justice Borgar Høgetveit Berg
Justice Erik Thyness
Justice Are Stenvik

HR-2024-990-A, (case no. 23-101291SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 19 April 2023

I.

Danske Bank	(Counsel Olav Fredrik Perland)
Finans Norge (intervener)	(Counsel Henning Harborg)
v.	
Edison International S.p.A.	(Counsel Nils Christian Langtvedt)

II.

Edison International S.p.A.	(Counsel Nils Christian Langtvedt)
v.	
Danske Bank	(Counsel Olav Fredrik Perland)
Finans Norge (intervener)	(Counsel Henning Harborg)

(1) Justice **Høgetveit Berg:**

Issue and background

(2) The case concerns a bank's liability for damages towards a professional business customer, where the customer's general manager had been manipulated by fraudsters into transferring large sums of money to accounts in Hong Kong. The question is whether the bank is liable for not having warned the customer about the transfers.

(3) In 2019, Edison Norge AS was part of an energy group. The parent company Edison International S.p.A. – Edison – is headquartered in Italy and is indirectly owned by more than 99 percent by Électricité de France (EDF).

(4) In the autumn of 2019, the general manager of Edison Norge was deceived by external fraudsters into transferring approximately NOK 130 million from the company's account in Danske Bank to two accounts in Hong Kong, controlled by fraudsters.

(5) The fraud began when the general manager of Edison Norge – A – received an email from a fraudster pretending to be the general manager of the parent company – B – with a notification of a company acquisition. A was instructed to reply in writing. The fraudster used an email address that was almost identical to B's. A has stated that at this time, he had an unanswered call from B on his phone. He tried to call back, but B did not answer. He then wrote to the false B to tell him that he had tried to call.

(6) The false B replied that A was not to call, but read the following email in a place where no one could see it him. In the email, the fraudster informed A of an upcoming acquisition in China and that a lawyer would send him payment instructions related to the acquisition. The false B asked A to maintain total confidentiality, even internally, and to communicate only through the advocate. A accepted this and contacted the false advocate, who instructed him to communicate solely via Gmail. The false advocate then gave instructions regarding account numbers and the amounts to be transferred to Hong Kong.

(7) A total of 13 payments were made through Danske Bank from 24 September to 8 October 2019. All transactions were carried out as A, who had authority, acting alone, to commit Edison Norge, gave written instructions to the bank via email. The transfers were split so as to keep each transaction within A's internal amount limitation of EUR 1 million for each single transaction. Edison Norge's financial manager – C – was also involved in the contact with the bank, and actively pushed for the transactions to be completed.

(8) Danske Bank had an automated system for detecting suspicious transactions, known as a *fraud engine*. The system is activated when a transaction raises "red flag" due to one or several unusual circumstances. For reasons unknown, the fraud engine was not activated for payments from Edison Norge. The first transaction was nonetheless stopped, but this was due to a clerical error within the bank that caused the amount to be directed to an internal account. The bank clarified with A that he had authorised the transaction, and then completed it.

(9) The payments were financed by Edison Norge by means of *cash calls* from the parent company. The requests for the transfer of these funds from Italy were justified in general terms without any mention of the fabricated acquisition in China.

(10) The aggravated fraud was detected on 10 October 2019. Most of the money was lost. In 2022, two fraudsters were sentenced to six years of imprisonment for the crime, see case TSRO-2021-134092-1. Both accepted the sentence.

(11) Edison Norge AS brought an action against Danske Bank in Oslo District Court in August 2020. At the turn-of-the-year 2020–2021, Edison Norge AS was sold to Sval Energi AS and renamed Sval Norge AS. Edison International S.p.A. retained the claim for damages against Danske Bank in connection with the sale, and entered the case as the sole claimant against Danske Bank.

(12) On 8 February 2022, Oslo District Court ruled as follows:

> "1. Danske Bank NUF will pay damages of NOK 31,410,109 to Edison International S.p.A. with the addition of statutory default interest from 19 April 2020.
>
> 2. Costs are not awarded."

(13) The District Court concluded that the transfers were authorised by Edison Norge, but that Danske Bank had acted negligently with regard to the anti-fraud control and could be held accountable. The Court identified a causal link between the bank's omissions and Edison Norge's loss.

(14) The District Court nonetheless found that Edison Norge's general manager and financial manager had been negligent, and reduced the damages by three-fourths due to the contributory negligence of the injured party, see section 5-1 of the Tort Claims Act. Both parties appealed against the judgment.

(15) On 19 April 2023, Borgarting Court of Appeal ruled as follows:

> "1. The appeals from Danske Bank NUF and Edison International S.p.A. are dismissed.
>
> 2. Each of the parties carries its own costs in the Court of Appeal."

(16) The Court of Appeal concluded that the transfers were authorised by Edison Norge since A had the necessary authorisations. The majority in the Court of Appeal, like the District Court, found that Danske Bank had acted negligently in the anti-fraud control. The majority also found a causal link to be proven and that the claim was not precluded, but reduced the damages by three-fourths due to contributory negligence. The minority was of the opinion that that the bank had neither breached the agreement nor acted negligently, and was therefore not liable.

(17) Danske Bank has appealed against the judgment to the Supreme Court. The appeal challenges the Court of Appeal's application of the law and findings of fact. Edison International has submitted a derivative appeal, challenging the Court of Appeal's application of the law and findings of fact.

(18) In the Supreme Court, Finans Norge has intervened in favour of Danske Bank.

(19) The case stands as it did in the Court of Appeal.

The parties' contentions

(20) The appellant, and respondent in the derivative appeal – *Danske Bank* – contends:

(21) There is no basis for liability. Edison must bear the risk of the loss. All transactions were authorised. The payment instructions by email from the general manager constituted both adequate consents and independent payment orders. In addition, the company's financial manager was involved in all the payments.

(22) There was no agreement between Edison Norge and Danske Bank that required payment transactions to be approved by two authorised persons in connection with manual instructions. Legally, the general manager could in any case override this with his sole signing authority. In fact, all transactions were also approved by the financial manager through his interactions with the bank. Edison Norge therefore validly authorised all transactions and is consequently responsible for the loss.

(23) Internet banking agreements have no relevance. The general manager alone was authorised to act for the company towards the bank, see sections 6-30 to 6-32 of the Companies Act and section 1 of the Procuration Act. Possible internal restrictions, which were not communicated to the bank, have no bearing on the customer relationship between Edison Norge and Danske Bank. The bank acted in good faith, and the transactions are valid.

(24) Neither Danske Bank nor any of its employees acted in a manner that would lead to liability under the general negligence principle or by means of employer's liability under section 2-1 of the Tort Claims Act. Danske Bank is under no statutory obligation to prevent such fraud as that experienced by Edison Norge. Nor did the bank breach any other norms that would give rise to a claim under general tort law in respect of authorised payments. Anti-money laundering rules are not relevant in the negligence assessment, as they are not suited to give private parties compensatory protection. In any case, these rules were not violated. Possible violations of Danske Bank's internal anti-fraud control procedures do not entitle Edison to damages as long as the procedures comply with or are stricter than applicable legal provisions and other norms.

(25) It follows from clauses 23 and 24 of the bank's standard terms and conditions that section 35 of the Financial Contracts Act 1999 is waived. In any case, neither section 35 nor clause 23 covers the fraud. Section 35 subsection 1 applies to losses that occur when a third party misuses the customer's account or payment instruments. This is not the case here since Edison Norge itself executed the transactions.

(26) Furthermore, there is no causal link between the alleged tortious omissions and the financial loss. It has not been demonstrated that the loss would have been avoided if the bank had made further inquiries about the payments. Finally, Edison has, in any case, lost the potential claim due to late notification or inaction.

(27) Regardless, Edison Norge's own actions provide a basis for a complete or partial reduction of damages, see section 5-1 of the Compensatory Damages Act.

(28) Danske Bank asks the Supreme Court to rule as follows:

> "In the main appeal:
>
> 1. Danske Bank NUF, branch of Danske Bank A/S, is not liable.
>
> 2. Danske Bank NUF, branch of Danske Bank A/S, is awarded costs in the District Court, the Court of Appeal and the Supreme Court.
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> In the derivative the appeal:
>
> 1. Danske Bank NUF, branch of Danske Bank A/S, is not liable.
>
> 2. Danske Bank NUF, branch of Danske Bank A/S, is awarded costs in the District Court, the Court of Appeal and the Supreme Court."

(29) The intervener – *Finans Norge* – contends:

(30) The intervener fully endorses the appellant's grounds for appeal and makes a corresponding claim. In addition, the intervener emphasises:

(31) The damage compensation rules in the Financial Contracts Act 1999 carry significant weight in determining the standard of liability. There is little room for liability based on negligence beyond the banks' liability under statutory provisions. The rules on damages in the Financial Contracts Act 1999 incorporate fully harmonised EEA rules. These rules make a sharp distinction between a bank's responsibility for the execution of payment orders that are approved by the customer and orders that are not. Section 43 subsection 2 of the Financial Contracts Act 1999 provides that the customer is responsible for his own mistakes in executing authorised transactions, while the bank is only responsible for the correct execution of the authorised payment to the account number provided by the customer. Nor will the bank, in a case like this, be liable for damages under the current or upcoming rules on damages in EEA regulations on payment services systems.

(32) The sources of law do not indicate that the banks are required to have monitoring systems in place to protect commercial customers against fraud in connection with manually authorised transactions. Even less so do they indicate that the banks must engage in manual interventions with the customer and ask control questions. There is no obligation to verify whether the customer's decision to make a payment is free from social manipulation by external parties.

(33) Industry practice does not require fraud monitoring or manual verification of authorised payments. It is crucial to balance the banks' efforts to reduce fraud in payment transactions with the need for a time- and cost-efficient payment system. It would be a task for the legislature to shift the risk of verifying whether the payment decision is based on the correct assumptions onto the banks.

(34) Finans Norge asks the Supreme Court to rule as follows:

> "1. Danske Bank NUF, branch of Danske Bank A/S, is not liable.
>
> 2. Finans Norge is awarded costs in the Supreme Court."

(35) The respondent, and appellant in the derivative appeal – *Edison International S.p.A.* – contends:

(36) Principally, Danske Bank is liable on an objective basis because bank employees carried out unauthorised transfers to the fraudsters, violating the authorisation requirements in sections 24 and 35 of the Financial Contracts Act 1999, clauses 4, 5 and 23 of the bank's standard terms and conditions, as well as the agreement between parties on dual authorisation for transfers from Edison Norge's account.

(37) Despite section 2 of the Financial Contracts Act 1999 stating otherwise, section 35 subsection 1 is mandatory. This is because section 35 implements Article 60 of Directive 2015/2366/EU into Norwegian law. The implementation contains an error, as section 2 makes section 35 declaratory. Either section 2 and/or section 35 should be interpreted, in accordance with the principle of presumption, to make section 35 mandatory, or EEA law must take precedence.

(38) A payment transaction is not authorised if the customer has not consented to it. Section 35 of the Financial Contracts Act refers to section 24, subsection 3 of which sets out that consent to payment transactions must be given in the form and manner agreed between the payer and the bank. Section 15 subsection 2 of the Financial Contracts Act 1999 requires that, before a framework agreement is entered into between the customer and the bank, information must be provided about the form and procedure for consenting to a payment transaction. This information is exhaustive, and section 24 subsection 3 must be interpreted in line with this. According to the framework agreement, Appendix F, only three named individuals "jointly" could use the relevant account. Therefore, the general manager could not use the account alone as was done in this case. Thus, all the 13 payment transactions were unauthorised.

(39) Regardless, Danske Bank, or its employees, acted negligently. A bank is subject to a stringent professional responsibility. There are several sets of rules designed to prevent fraud like that in the case at hand. Danske Bank had inadequate anti-fraud routines. The bank failed in its duty to ensure that the transactions were not part of a fraud. Employees in Danske Bank should have detected and reacted to the suspicious circumstances in connection with the transfers. The bank had negligently deactivated the automatic fraud control system. In addition, the bank violated rules of the Anti-Money Laundering Act, which is an independent basis for liability since the fraud could have been prevented without these violations. Internal guidelines were also violated.

(40) In the light of the bank's conduct, Edison Norge's potential own negligence cannot lead to a reduction of the bank's liability. The company cannot be identified with the employees responsible for these payment transactions, as they, by acting contrary to their granted authority, internal procedures and the company's interests went far beyond what Edison Norge could reasonably expect.

(41) There is a causal link between the circumstances giving rise to liability and Edison Norge's financial loss. The claim for damages is neither precluded nor otherwise lost. Edison Norge submitted the claim against Danske Bank as soon as there was a reason to do so.

(42) Edison International S.p.A. asks the Supreme Court to rule as follows:

> "1. Danske Bank NUF's appeal is dismissed.
>
> 2. Danske Bank NUF will pay damages to Edison International S.p.A. in an amount determined by the Court with the addition of statutory default interest from 9 April 2020.
>
> 3. Danske Bank NUF will pay the costs of Edison International S.p.A in Oslo District Court, Borgarting Court of Appeal and the Supreme Court."

My opinion

Liability for unauthorised payments?

(43) The three fundamental conditions for damages are basis for liability, financial loss and causation between the two. In the case at hand, Edison has undoubtedly suffered a loss of up to NOK 130 million.

(44) Edison contends that the payment transactions were unauthorised and thus triggered liability under section 35 subsection 1 of the Financial Contracts Act 1999, which read as follows at the time of the fraud:

> "The institution is liable for losses arising from unauthorised payment transactions, unless otherwise provided by this section. A payment transaction is unauthorised if the customer has not consented to the transaction, see section 24."

(45) Finally in section 35 subsection 1 second sentence, there is a reference to section 24, which reads:

> "(1) The customer may use account and payment instrument for deposits, withdrawals and other payment transactions in accordance with the framework agreement.
>
> (2) A payment transaction is considered authorised only if the payer has given consent to the transaction. The consent may be given before the payment transaction is carried out, or, if agreed between the payer and their institution, after the transaction is completed.
>
> (3) Consent to carry out a payment transaction or repeated payment transactions is given in the form and manner agreed upon between the payer and their institution.
>
> (4) Consent may be withdrawn, but not later than the times specified in section 28. Consent to carry out repeated payment transactions may be withdrawn so that future transactions are considered unauthorised, see also section 26, subsection 5."

(46) Section 35 of the Financial Contracts Act 1999 was introduced in 2009 as part of the implementation of the first Payment Services Directive – Directive 2007/64/EC. The second Payment Services Directive – Directive 2015/2366/EU – builds on the first Directive and similarly aims to establish a uniform legal framework for payment services across the EEA. Norwegian rules implementing the public law provisions of the second Directive, as well as the private law provisions concerning the use of third-party service providers, entered into force on 1 April 2019. The Financial Contracts Act of 1999 remained in force until the Financial Contracts Act of 2020 took effect in 2023.

(47) The basis for the claim of liability under section 35 of the Financial Contracts Act 1999 presupposes that the framework agreement between Edison Norge and Danske Bank, Appendix F – "Account Mandate and Business Online – Corporate Customers" – *exhaustively* regulated who could operate the account. I cannot see that this is the case.

(48) Section 15 subsection 2 (b) (3) of the Financial Contracts Act 1999 provides that, before the customer becomes bound by a framework agreement, the bank must inform the customer of the "form and procedure for giving and withdrawing consent to carry out a payment transaction, see section 24 subsection 3". In my view, this does *not* imply that the framework agreement is exhaustive. Nor can it be derived from section 2 subsection 3 of the Financial Contracts Act that payment authority must be exhaustively regulated in the framework agreement, since this provision only refers to "the form and manner agreed upon" between the parties. On the contrary, section 23 of the Financial Contracts Act 1999 contains rules on "single payment transactions that are not covered by a framework agreement" – which clearly implies that the framework agreement does not need to be exhaustive.

(49) Specifically and read in context, Appendix F to the framework agreement between Edison Norge and Danske Bank is a power of attorney authorising specific individuals to make electronic payments through "Business Online". Appendix F does not exclude other bases for authorisation, nor does it limit A's general authority as the general manager.

(50) Therefore, one must fall back on the general rules of corporate representation. According to section 6-30 of the Companies Act, the board of directors represents the company and has the power to sign on its behalf. The board can delegate this power under section 6-31 subsection 1, including to the company's general manager. Article 6 of Edison Norge's articles of association of 18 November 2014 provides that the "the chair of the board acting alone or by the general manager acting alone may sign for the company".

(51) The general manager A was authorised to instruct all 13 payments. It does not make any difference that the company may not have used this sole authority on some previous payments. It has not been demonstrated that the parties had an agreement requiring dual approval when A authorised payments without using the online bank.

(52) For individual payment transactions, where no formal consent procedures have been agreed in advance, the starting point must be that the payment request includes the required consent, see Børge Grøttjord and Karl Rosén: *Commentary on the Financial Contracts Agreement*, 2014 page 150.

(53) My conclusion is thus that that all 13 payments to the accounts in Hong Kong were authorised by Edison Norge. Accordingly, I do not need to consider take a view on whether the term "unauthorised" in section 35 subsection 1 of the Financial Contracts Act 1999 covers personal flaws on the part of the account holder or whether the rule only applies to transactions completed by third parties. Nor do I need to consider whether section 35 could be waived. Finally, I do not need to consider whether liability can be based on the part of the framework agreement between parties that regulated unauthorised transactions – or whether financial manager C's contact with the bank in connection with the transactions in September and October 2019 can be equated with a formal authorisation. In any case, my conclusion implies that the rules on strict liability for unauthorised payments are *not* applicable.

(54) Against this background, Edison's principal basis for its claim cannot be heard.

Liability based on negligence?

Contractual or non-contractual liability rules?

(55) Edison contends in the alternative that Danske Bank is liable even if the payments were authorised, because the bank is liable due to negligence.

(56) A distinction is often made between contractual and non-contractual liability. However, this distinction is not sharp. Rules on contractual and non-contractual liability coincide and overlap to a large extent. The methodical approach is also largely the same.

(57) The negligence rule is the fundamental liability rule in both contractual and non-contractual relationships. The question is whether Danske Bank or its employees should have acted differently; that is, whether the bank had an obligation to monitor the transactions and take measures if there were indications of fraud, although it was clear that the payments were authorised by the general manager in Edison Norge.

(58) This case involves a pure financial loss. At the same time, the alleged tortious act is an omission that is not related to a risk created by the bank. If one takes the assessment of non-contractual negligence as a starting point, liability for damages can only arise from a breach of an established standard of conduct.

(59) The agreement on payment processing and its purpose is therefore, regardless of perspective, key to the assessment of negligence.

Breach of contractual obligations?

(60) In addition to the claim related to dual authorisation, which I have discussed above, Edison has not contended that Danske Bank otherwise breached the written contractual provisions.

(61) I note, however, that the framework agreement/account agreement, Part C – "General Terms and Conditions for Deposits and Payment Services – Business Relationships" – includes provisions regarding the opening of accounts and identification, account information and control, use of the account for payment transactions, receipt of payment orders, transfer time for payment transactions, rejection of payment orders, the bank's responsibility for executing payment orders, errors by the account holder when executing payment orders and liability for unauthorised payment transactions.

(62) Neither in part C of the framework agreement/account agreement nor elsewhere in the agreement is it stated that Danske Bank has an obligation to monitor the customer's payment decisions to prevent internal or external fraud. A preliminary conclusion is, therefore, that the bank has not breached any explicit contractual obligation.

(63) I will return to the non-statutory duty of loyalty in contractual relationships.

Breach of obligations in Acts, Regulations or Directives?

(64) The question is, then, whether banks are required under Acts, Regulations or Directives to protect customers against fraud in connection with *authorised* payments.

(65) According to section 40 of the Financial Contracts Act 1999, the bank must execute transactions initiated by the customer, but the Act has no provisions on the obligation to monitor transactions. On the contrary, section 43 subsection 1 exempts the bank from liability if the customer has entered an incorrect account number. The bank is also exempt from liability if the customer has written the correct name of the recipient, but the wrong account number, see section 43 subsection 2. Certain modifications follow from section 43 a, but this provision only applies to online payment services. The Financial Contracts Act 1999 does not contain any obligation to monitor and control payment transactions to detect fraud linked to the customer's payment decisions. On the contrary, the Act reflects, as I see it, a principle that the customer is responsible for his own mistakes.

(66) I find support for this in Proposition to the Odelsting No. 94 (2008–2009), which served as the Norwegian preparatory works for the implementation of Directive 2007/64/EC in Norwegian law. On pages 157–158 of the Proposition, the Ministry writes that the Directive builds on the principle that the customer must bear losses resulting from his own mistakes. The Ministry further writes that national law cannot have solutions that result in losses, which under a full harmonisation Directive should be borne by the customer, being systematically shifted onto the banks in a way that undermines the Directive's solution.

(67) Edison has invoked section 2 subsection 2 of Regulations concerning the system for payment services of 15 February 2019 No. 152. However, this provision also does not require a bank to have a data system or specific routines to prevent internal or external fraud against a customer in connection with *authorised* transactions. Section 2 of the Regulations implements Article 95 of the Directive 2015/2366/EU on the *Management of operational and security risks*. This is aimed at *payment services*, see Article 95 (1). According to article 95 no. 3, the European Banking Authority – EBA – can draw up *guidelines*. In the guidelines presented in this case, which have been in effect since June 2020, there is no mention of fraud monitoring in situations where the customer itself initiated the transfer.

(68) However, Edison has invoked guidelines set out in in Article 96 on *Incident reporting*. These guidelines concern reporting – and do not give rise to any kind of duty that could serve as a basis for liability in tort.

(69) Against this background, I cannot see that section 2 of the Regulations concerning the system for payment services or Directive 2015/2366/EU, imposes any obligation on banks to develop general systems or routines to prevent or reduce the risk of financially dishonest conduct in an undertaking or fraud initiated by a third party. I add that the parties agree that Commission Delegated Regulation 2018/389, which supplements Directive 2015/2366/EU Article 97 on *Authentication*, contains rules on transaction monitoring. However, these only apply in case of strong customer authentication and not where the payment has been made according to email instructions, as in the case at hand.

(70) However, I note that the EBA in report EBA/REP/2022/14 page 81 identifies social manipulation as an area "where further improvements ... are needed". In the same place, the EBA presents some suggestions for what can be done to reduce the risk of such manipulation. Based on this, I find it clear that the EBA cannot have meant, either in 2019 or 2022, that banks had an obligation to develop systems and procedures to prevent or reduce the risk of financial misconduct both internally with the customer and of third-party fraud in connection with authorised payments.

(71) I also mention that the EU Commission in June 2023 presented a draft Regulation on payment services, COM (2023) 367, see COD 2023/0210. The following is set out in the Preamble's paragraph 79:

> "Consumers should be adequately protected in the context of certain fraudulent payment transactions that they have authorised without knowing these transactions were fraudulent. The number of 'social engineering' cases where consumers are misled into authorising a payment transaction to a fraudster has significantly increased in recent years. 'Spoofing' cases where fraudsters pretend to be employees of a customer's payment service provider and misuse the payment service provider's name, mail address or telephone number to gain the customers' trust and trick them into carrying-out some actions, are unfortunately becoming more widespread in the Union. Those new types of 'spoofing' fraud are blurring the difference that existed in Directive (EU) 2015/2366 between authorised and unauthorised transactions. Means through which the consent may be assumed to be granted are also becoming more complex to identify, as fraudsters can take control of the whole consent and authentication process including of the strong customer authentication completion. The conditions under which the customer authorised a transaction by giving his or her permission to it should be taken into due consideration, including by courts, to qualify a transaction as being authorised or unauthorised. A transaction may indeed have been authorised in circumstances where such authorisation was granted on manipulated premises affecting the integrity of the permission. It is therefore no longer possible, as was the case in Directive (EU) 2015/2366, to limit refunds to unauthorised transactions only. It would however be disproportionate and financially very costly to payment services providers to open every fraudulent transaction, authorised or unauthorised, to a systematic refund right. It might also cause moral hazard and a reduction in the customer's vigilance."

(72) Here, consumer fraud through "social engineering" is described as an increasing problem. Constantly more sophisticated fraud methods wipe out the distinction between authorised and unauthorised transactions – which means that the regulation in Directive 2015/2366/EU is no longer adequate. The proposal that is being put forward for a new liability rule in Article 59 (1) is still limited to consumers – and cases where the fraudsters pretend to be employees of the bank. The proposed new legislation would therefore not apply in this case.

(73) The proposal is somewhat similar to the current regulation in section 3-49 subsection 3 of the Financial Contracts Act. This provision stipulates that the bank, on specific terms, is liable for the customer's loss if someone without agreement pretends to be or represent the bank. But, again, that is not the situation in our case.

(74) I add that if a legal obligation for banks to implement anti-fraud systems or routines in connection with authorised transactions could be derived from Directive 2015/2366/EU, we would likely see traces of this in legislation or case law from EU countries. No such traces have been demonstrated.

(75) In summary, I cannot find any requirements in Acts, Regulations or Directives at the time of the loss that imposed banks to take systematic measures against possible fraud in connection with *authorised* payments.

The anti-money laundering rules

(76) If a rule in a particular area setting out rules of conduct is to have relevance in the context of a negligence assessment, its primary aim must be to protect the interest affected by the loss. The rule must be interpreted to determine which interests it seeks to protect. Violations of rules intended only to safeguard public interests will not normally trigger liability.

(77) The purpose of the anti-money laundering rules, as outlined in section 1 subsection 1 of the Anti-Money Laundering Act, is to prevent and detect money laundering and terrorist financing. Money laundering involves acts described in sections 332 and 337 of the Penal Code, i.e. receiving of proceeds from crime and money laundering. Neither is at issue in the case at hand. The measures in the Act are intended to protect the financial and economic system and society as a whole, see section 1 subsection 2 of the Anti-Money Laundering Act. The purpose of the Act is not to prevent or detect other criminal acts, such as fraud or other economic crime. The Anti-Money Laundering Act is primarily to ensure that the obliged entity carries out customer measures and ongoing monitoring based on an assessment of the risk for money laundering and terrorist financing, see the Anti-Money Laundering Act section 9 subsection 1. According to section 25, the bank must examine circumstances that may indicate that funds are specifically associated with money laundering or terrorist financing. This is not a duty to examine and report other possible criminal acts, such as fraud. According to section 26, the bank must report to Økokrim [the national authority for economic crime] if, after further examinations, there are circumstances giving grounds for suspicion of money laundering or terrorist financing.

(78) According to section 27 subsection 1 of the Anti-Money Laundering Act, a suspicious transaction must not be carried out before Økokrim has been informed. The bank is obliged not to disclose information on examinations, submission of information to Økokrim or investigation under the Anti-Money Laundering Act, to the customer, see section 28 subsection 1.

(79) In my view, a bank customer that has been a victim of fraud cannot base a claim for damages solely on violations of anti-money laundering regulations. I do not rule out that aggravated violations may be relevant in a negligence assessment when combined with violations of other provisions or norms, but this is not the case here.

Industry standards and internal routines

(80) Beyond the specific obligations under applicable agreements, a bank's duty of care and diligence must be assessed based on industry standards. A key factor is the adequate protection of the customer's interests in connection with payment transactions. The bank has a duty of loyalty towards the customer, and a duty of care within the scope of each assignment. In the individual situation, the customer may also have legitimate expectations of being informed of matters at the core of the assignment, for instance where the bank in some way or another has acquired positive knowledge of irregularities. Therefore, industry standards will be relevant when assessing whether Danske Bank or its employees have been negligent.

(81) I assume that all banks have systems and routines for handling unauthorised payment transactions in internet banking solutions. The banks are liable for losses resulting from inadequacies in such systems, see section 35 of the Financial Contracts Act 1999 – section 4-30 of the current Financial Contracts Act.

(82) I also assume that banks, to prevent authorised transactions from being carried out by or under the influence of dishonest employees or third parties, to some extent also have routines for handling such events. However, no industry standard – or possible "security level" in this regard – has been substantiated. When no such industry standard exists, the banks are in principle left to act in the manner they see fit. This includes developing systems, and drafting and complying with internal guidelines. A good anti-fraud control system will give a competitive advantage.

(83) Without an industry standard, possible violations of Danske Bank's internal control routines for authorised payment transactions cannot form a basis for liability. In any case, this must be clear when the routines have not been presented to the customers, as is the situation in the case at hand. When Edison Norge from November 2015 and for a period thereafter was erroneously excluded from the bank's *fraud engine*, this in itself does not trigger liability.

(84) Against this background, Edison's alternative basis for its claim cannot succeed.

Conclusion and costs

(85) The appeal is upheld. The derivative appeal is not upheld. Since there is no basis for liability, I find no reason to discuss causation, the contributory fault of the injured person or loss due to lack of complaint or passivity.

(86) Danske Bank has won the case. According to the main rule in section 20-2 subsection 1 of the Dispute Act, Edison is liable for the costs of Danske Bank and the intervener Finans Norge in the Supreme Court. I see no reason to grant an exemption under section 20-2 subsection 3.

(87) Danske Bank claims costs of NOK 2,749,398 in the Supreme Court while Finans Norge claims NOK 1,014,020. The amounts are mainly legal fees – in total 680 hours at an average of NOK 4,725 – plus VAT for Danske Bank. An appeal charge is added of NOK 42,141. Edison has not had any objections to the size of the claims.

(88) The appeal proceedings were extensive. The hearing in the Supreme Court lasted for four court days. I find that the claims must be accepted, see sections 20-5 and 20-6 of the Dispute Act.

(89) The Supreme Court must base the liability for costs in the District Court and the Court of Appeal on the result, see section 20-9 subsection 2 of the Dispute Act. Also on this point, I do not find a reason to deviate from the main rule in section 20-2 subsection 1 of the Dispute Act.

(90) Danske Bank claims NOK 8,455,317 for the hearing in the District Court, of which NOK 6,524,144 is legal fees and NOK 213,100 is fees to expert witnesses, exclusive of VAT. The bank has also claimed NOK 5,935,356 for the hearing in the Court of Appeal, of

which NOK 3,332,980 is legal fees and NOK 1,404,350 is fees to expert witnesses, exclusive of VAT. In addition, there is an appeal charge for the Court of Appeal of NOK 58,704.

(91) The case covered a broad spectrum of issues in the District Court and the Court of Appeal. I find that the claims must be accepted for both instances, see section 20-5 of the Dispute Act.

(92) I vote for this

J U D G M E N T :

1. Danske Bank is not liable.
2. The derivative appeal is dismissed.
3. In costs in the District Court, the Court of Appeal and the Supreme Court, Edison International S.p.A. will pay Danske Bank NOK 17,240,916 within two weeks of service of the judgment.
4. In costs in the Supreme Court, Edison International S.p.A. will pay Finans Norge NOK 1,014,020 to Finans Norge within two weeks of service of the judgment.

(93) Justice **Stenvik:** I agree with Justice Høgetveit Berg in all material respects and with his result.

(94) Justice **Thyness:** Likewise.

(95) Justice **Arntzen:** Likewise.

(96) Justice **Falkanger:** Likewise.

(97) Following the voting, the Supreme Court gave this

J U D G M E N T :

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4. In costs in the Supreme Court, Edison International S.p.A. will pay Finans Norge NOK 1,014,020 to Finans Norge within two weeks of service of the judgment.