

Johann Wolfgang Goethe-Universität Frankfurt am Main

Theodor Baums

Changing Patterns of Corporate Disclosure in Continental Europe: the Example of Germany

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Abstract

Changing Patterns of Corporate Disclosure in Continental Europe: the Example of Germany, by Theodor Baums

This article presents a structural overview of corporate disclosure in Germany against the background of a rapidly evolving European market. Professor Baums first makes the theoretical case for mandatory disclosure and outlines the standard, regulatory elements of market transparency. He then turns to German law and illustrates both how it attempts to meet the principle, theoretical demands of disclosure and how it should be improved. The article also presents in some detail the actual channels of corporate disclosure used in Germany and the manner in which German law now fits into the overall development of the broader, European Community scheme, as well as the contemplated changes and improvements both at the national and the supranational level.

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by

Theodor Baums*

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*Prof. Dr. Dr. h.c. Theodor Baums, Johann Wolfgang Goethe - Universität, Institute for Banking Law, Frankfurt. The article was presented as a paper at the conference „Disclosure to Shareholders and Investors in a Post-Enron World“, held on June 20, 2002 at the Università degli Studi, Milan. The Author would like to thank his assistant, David C. Donald, for his help in brushing up the manuscript's English.

I. Introduction

A 2001 study by the European Corporate Governance Institute, entitled "The Control of Corporate Europe," shows that the control of most corporations in certain Continental European countries (including Austria, Belgium, Germany and Italy) is highly concentrated, with individual holders of share blocks ("blockholders") controlling more than 50 % of voting rights in many corporations. This presents a strong contrast to the United Kingdom, where a majority of listed companies have no blockholder owning more than 10 % of the voting rights, and to the United States, where a majority of listed companies have no blockholder owning more than 6 % of the voting rights.¹ It is important to note, however, that in recent years both the structure of the capital markets in Continental Europe and the shareholding structures of the largest corporations in Continental Europe have undergone dramatic changes, changes that bring them in the direction of the U.K and U.S. markets. At this time, the apparent reasons for these changes may be summarized as follows:

- the privatisation of numerous state companies;
- the globalisation of the demand for capital (dual and multiple listings) and the supply of capital (global investment strategies). This tendency has been accelerated by the European Union's initiatives for creating a single capital market in Europe, as well as by the increasing harmonization of securities laws and accounting rules worldwide;
- the need to significantly supplement state pension plans through private capital investment plans and asset accumulation; and
- the appearance of a new status for investors through improved investor protection, developments in information and communication technologies, and the development of a services sector focusing on offering consumers capital investments.

This article will focus on the transition of corporate disclosure and market transparency in Continental Europe, including changes that have already been implemented and those that still need to be brought about, using Germany as an example.

II. The Case for Mandatory Disclosure

To what extent must law mandate the disclosure of investor relevant information? This question leads to the theory of regulation, which in its normative part deals with problems of market failure.² If a market failure arises because of externalities, asymmetric information, the dominant position of a market participant, or the production of "public goods", an appropriate state

intervention in the market process can lead to an increase in social welfare. A rule of law requiring disclosure would thus be advisable where the market for the information to be disclosed is characterized by market failures. I will discuss this question in following, distinguishing between (1) an undiversified investor and (2) an investor who ascribes to the rules of portfolio theory, investing in a number of diverse companies.

1. The Undiversified Investor

The traditional investor who contributes capital to a corporation in Continental Europe is an investor who places a substantial portion of his assets into a single company (as owner-entrepreneur, member of a family business, or owner of a strategic holding in an affiliated undertaking). Also in such cases, a legal requirement to make disclosure can be meaningful.

Economic theory discusses a number of incentives for governing disclosure by private agreement³ or by market mechanisms. It is argued on the basis of agency theory that a contract to make a contribution to the equity capital of a company will be concluded (or be concluded at a reasonable price) only if the uncertainties the transaction presents can be reduced to a satisfactory level. A rational investor will realize his informational disadvantage vis-à-vis management. The investor will only be willing to make an investment if asymmetric information problems that disadvantage the investor are reduced to a satisfactory level before the contract is closed or if he is adequately paid for bearing the remaining risks, and the same applies to informational problems during the contract term.

Even in the absence of legally required disclosure, a company's own interest would lead it to effect disclosure at the time of an emission. When offering its securities to the public, an issuing company thus has an incentive voluntarily to commit itself to effect disclosure.⁴ Thus, state regulation need not provide for disclosure *as such*, but, in the first instance, must protect against the release of misleading or deceptively incomplete information. There is, however, a risk that a company will not respect its initial promise to disclose information at a later point in time, in particular, if the information could prejudice the interests of the management. Since potential shareholders would see this risk at the time of considering an investment, they would demand adequate assurance of performance of the duty to disclose. Such assurance could perhaps be provided by concluding an appropriate contract with the management, or by including a provision to this effect in the company's articles of association. Further possibilities are present in the form of market controls.

The *negotiation of a contract* expressing the interests of the parties places burdens on investors that, as a rule, such investors will not be in a position to carry. The bounded rationality of the contracting parties and the transaction costs, which increase in relation to the complexity of the

contract, lead to a situation where only imperfect contracts will be concluded.⁵ In the case of a public offering, a further problem is that numerous investors would have to be party to the contract. Moreover, in the case of a purchase of shares on the secondary market, the investor would not enter into a purchase contract with either the issuer or its management.

If disclosure requirements were to be written into the *articles of association*, such provisions could later be removed by amendments to the same articles. The ability to remove such provisions depends upon whether the majority shareholder who has privileged access to information holds enough voting rights to amend the articles of association. An investing shareholder may be similarly disadvantaged if management controls the procedure through which shares are voted (i.e., the proxy system, as provided for in U.S. law, or voting by custodian banks in Germany).⁶

It also appears unlikely that adequate, voluntary disclosure will result from management's desire to maximize total economic return on shares; given the often conflicting interests of management, such desire does not always exist. A *market discipline mechanism* (such as the market for corporate control, the market for executive management, or the market for the company's products) is also unlikely to provide investors with a guarantee that they will receive current, relevant and material information regarding the state of their investment. All this supports the argument that disclosure policies should be enforced by a mandatory rule of law. Such legal disclosure requirements can serve to reduce the risk premium demanded by investors and ease the acquisition of equity capital from investors.

2. *The Diversified Investor*

As mentioned at the outset of this paper, equity holdings and investment behaviour in Continental Europe is gradually shifting towards the patterns found in the U.K. and U.S. markets. In large, publicly listed companies with widely dispersed ownership, individual investors no longer hold controlling blocks the way they did in the case of owner-managers or family businesses, but rather hold fractional interests. In accordance with portfolio theory, such investors distribute their capital over the entire market. A diversified investor himself can no longer collect and evaluate all investment relevant information on each company in his portfolio. He thus turns to support from new players in the investment market: buy side analysts, asset managers, and intermediaries such as investment companies and pension funds. These companies process investment-relevant information regarding the portfolio companies and, on the basis of their findings make recommendations to, or even investment decisions for, the investor. This system certainly does not obviate the need to disclose material information to investors. Rather, the addressee of the disclosure has changed from the investor himself to the buy side analyst.

This division of labour points to another important theme for our discussion: disclosure requirements need not be tailored to the knowledge of every, average person. An annual financial statement for instance is meaningful only to a "financially literate" investor. No more is required.⁷

In his article, Prof. Macey explains why, especially in a market characterized by diversified investors, it is necessary to compel disclosure of investment-relevant data.⁸ An investment strategy that aims to minimize firm specific risk by spreading investment over a diversified portfolio does not eliminate the need to disclose company data:

- if all companies seeking capital on a market refrained from disclosing relevant investment information on a regular basis, investors would either refuse to invest in the market or demand a high risk premium;
- thus, at least some companies – even without regulatory disclosure requirements – would disclose the relevant information. Other companies, by contrast, would attempt to hide risks. As discussed above, it is difficult for "honest" companies to convince investors that they belong to the first rather than the second category. The all companies would be punished with a corresponding risk premium, which they would have to pay instead of increased disclosure costs (negative externalities); and
- the "dishonest" companies would be able to benefit from the reputation of the "honest" companies up to a certain point; hence the market attributes equal risks to both.

In general, there can thus be good reasons for a continuous disclosure of company data that is necessary for an investor to make a decision to buy or to hold. To the extent that such information is not publicly accessible, the company must disclose it. Even when the information is generally available to the public, albeit with a substantial expenditure of time and money, it is advisable to spare individual investors this cost, and to have the disclosing company gather the information once at a central source for distribution to investors – it is the "cheapest cost avoider". Absent mandatory disclosure, investors will engage in duplicative and inefficient searches for information about public companies. Requiring companies to disclose this information publicly eliminates duplication and inefficiency.⁹

The economic literature names another advantage of required disclosure that only arises if the legislator promulgates mandatory rules: the advantage of standardization.¹⁰ Because an investor must compare a number of investment alternatives (a number of companies) before deciding on an investment, it is to the investor's advantage if the information that is relevant for the investment decision is presented in a standardized format that can be readily compared. Standardized formatting saves investors time and money, and explains why listing prospectuses or annual reports should follow identical guidelines and schema in a standardized manner.

III. Content and Principles of Disclosure

1. *The Facilitating Function of Disclosure*

Corporate disclosure aims not only at investors, but also at creditors, employees, regulatory agencies, and the public at large.¹¹ As a rule, disclosure performs a facilitating function: it is designed to facilitate, assist or enable the decision-making of the persons to whom it is addressed. This applies, in particular, to disclosure directed to persons making decisions whether to contribute capital, general investors, and existing shareholders, who are the primary addressees of the disclosure.

2. *Primary Market (Ex Ante) Information*

An initial, important distinction is that between disclosure requirements designed to provide information to persons who subscribe to shares in an initial or secondary public offering (*ex ante* disclosure; primary market information) and the continuing disclosure requirement of listed companies (secondary market disclosure).

As a general matter, *ex ante* disclosure seeks to give the investing public all material information regarding the financial condition and results of operations of the company, including the risks regarding such operations, that they require to make a reasoned investment decision. The primary tool for disclosure in this regard is the securities prospectus, which is used in various forms both in connection with listing securities on an exchange (*Börsenzulassungsprospekt*) and for other public offerings of securities (*Wertpapierverkaufsprospekt*). German laws on prospectuses incorporate the general European standards set forth in the relevant EC Directives.

Following the steep decline of the Frankfurt Stock Exchange's *Neuer Markt* during late 2000 and 2001, the Deutsche Börse AG investigated how it might improve primary market publicity even before adoption and implementation of the EC Prospectus Directive.¹² The Exchange has issued prospectus guidelines ("Going Public Principles")¹³ that exist parallel to the requirements of law and the exchange rules¹⁴, and will be voluntarily adopted by issuers and their underwriters. The Exchange's recommendations aim at improving the quality of securities prospectuses, with a particular focus on the prospectus structure, the detail into which it is broken down, clarity of expression, presentation of risk factors and forward looking statements, disclosure of related party transactions, the use of pro forma financial statements for the issuer, and information on the experience of and any previous offences committed by members of the issuer's board of directors, as well as regarding the preparation and distribution of research reports by the underwriting

syndicate. Although certain aspects of the Going Public Principles have been debated, it is generally thought that its use could improve German capital markets practices and bring them in line with what are understood to be the best international practices.

The *ex ante* disclosure of corporate information is, of course, not only important for initial public offerings ("IPOs") and secondary offerings. *Ex ante* disclosure may also play a role in the much larger secondary market for securities, where a potential investor would not purchase shares from the company, but from a shareholder who desires to sell. The information for the primary market thus mixes with the information that is continuously disclosed to the secondary market. The nature of this information is addressed in detail in the following sections.

3. *Secondary Market Disclosure*

An investor who has already subscribed shares in the context of an IPO or a secondary offering, or purchased them in the secondary market (*shareholder*) will be interested in information *ex post* in order to make a decision whether to hold or sell the securities. I refer to this information as "ex post" or "hold/sell" information. Similarly, the *potential buyers* in the secondary market will require similar information in order to make their decision on whether to buy. I refer to this information, taken together with ex post or hold/sell information, as "secondary market information." Secondary market information consists of a number of elements (discussed in section (3), below), and follows general principles that are similar to those underlying *ex ante* information (see section (4), below).

(a) The Traditional Shareholder Information Model

Traditionally, a shareholder of a stock corporation (*Aktiengesellschaft*) obtains the bulk of his information regarding the company's financial condition and results of operation from the annual shareholders' meeting. For the following reasons, such information is inadequate for an investor in a publicly held corporation:

- a shareholders' meeting takes place, as a rule, only once annually;
- the information presented at the shareholders' meeting usually reaches investors too late;
- the unconsolidated financial statements (*Einzelabschluß*) that are presented at the shareholders' meeting are, at least when prepared pursuant to German law, not designed to present a true and fair view of the company, but are designed to protect the interests of creditors and to serve taxation purposes;

- management may only be required to provide additional information if an item or request regarding such information has been inserted in the meeting agenda (*see* § 131 *Aktiengesetz/Stock Corporation Act*);
- only shareholders, and not persons interested in investing through the secondary market, are admitted to the shareholders' meeting.

Because of these defects in the shareholders' meeting as a source of information, regulatory requirements and developments in information and communication technology have led to an increased flow of information apart from the shareholders' meeting. Such information consists of a number of elements (*see* section (b), below), and serves two functions: first, to enable shareholders to make a decision regarding their investment on a continuing basis, including when a material change occurs in the company's situation, and second, to promote the development of an efficient secondary market, i.e., to facilitate the decisions of investors interested in acquiring shares that are publicly traded on the secondary market.¹⁵

Thus, at least in the case of a publicly listed stock corporation, the shareholders' meeting has failed to perform one of its traditional tasks: to provide market-relevant company information to the capital markets.

(b) Information Disclosed

Secondary market disclosure consists of a number of types of information, and has developed to meet market needs over the years. This discussion will present only those types of information that are required to be disclosed by law. However, it should be noted that information that is freely disclosed to the capital market is taking on increasing importance. Such information has come to be disclosed in the context of investor relations and the pursuit of shareholder value, and includes voluntary interim reports¹⁶, shareholder (news)letters, meetings with analysts and institutional investors, and postings on the company's website.

(aa) Consolidated Financial Statements

The German system for preparing consolidated financial statements has a long history. Its original orientation was not capital market disclosure for purposes of investor protection.¹⁷ Today, consolidated financial statements (*Konzernabschlüsse*) and consolidated management reports (*Konzernlageberichte*) are the primary sources of company information on the capital markets. They have substantially replaced unconsolidated financial statements (*Einzelabschlüsse*), which are oriented toward other purposes. Pursuant to German law currently in force, which is based on the

Seventh EC Company Law Directive,¹⁸ the parent company of a corporate group must prepare consolidated financial statements if either the shareholders of the company itself or one of its subsidiaries is listed on a securities exchange. At present, a company may choose to prepare its financial statements pursuant to either German accounting principles¹⁹ or internationally recognized accounting principles (IAS or US GAAP). As is well known, the European Council has recently adopted a Regulation on accounting that would require all capital market oriented companies with registered offices within the European Union to prepare their consolidated financial statements pursuant to IAS beginning in 2005 (with transition periods).²⁰

(bb) Interim Reports

The purpose of preparing interim reports is to provide recipients with regular, current, and reliable information on the financial condition and results of operations of the company, as well as its current outlook for the fiscal year. In principle, an interim report is understood as an independent accounting instrument that is designed to both present the developments since the last, annual financial statements and enable forecasts regarding the results for the current, fiscal year. To this end, an interim report concentrates on activities, events and circumstances occurring within the interim period. Publicly listed companies that prepare their financial statements pursuant to IAS or GAAP must prepare interim reports for the first, three quarters of every fiscal year.

Under German law, the Exchange Act (*Börsengesetz*) requires the issuers of shares that are admitted to the official market (*amtlicher Markt*) to prepare at least one interim report during the fiscal year.²¹ In addition, the Frankfurt Stock Exchange has required the preparation of quarterly reports as a condition for inclusion in a market index (such as DAX, MDAX or SMAX) or in the *Neuer Markt* (which operated from 1997 through 2002). In the future the securities exchanges will be authorized to require the preparation of additional interim reports (quarterly reports) for admission to premium segments of the official market.²² The same applies to the second tier market (*geregelter Markt*).²³ In addition, these amendments of the Exchange Act by the Fourth Financial Markets Promotion Act will allow the securities exchanges to require a mandatory review of interim reports by independent auditors. To date, such reviews are performed solely on a voluntary basis.²⁴

The requirements regarding the preparation of interim reports as currently in force in Germany were originally based on the EC Periodic Reporting Directive (82/121/EEC), which has been replaced by Articles 70 to 77 and 102 to 107 of the EC Listing and Reporting Directive (2001/34/EC). The European Commission has launched a second round of open consultations for the purpose of updating the existing regulation of the information that publicly listed companies are required to disclose on a regular basis. Recommendations regarding the preparation of interim reports belong in this context.²⁵

(cc) Current Reports (*Ad Hoc - Publicity*)

Periodic reporting requirements are supplemented by a duty promptly to file and publish current reports regarding events that are capable of significantly influencing the exchange price of an issuer's securities.²⁶ Current reports serve the needs of shareholders and the secondary market equally.

The preparation of current reports in Germany may also be traced back to EC law requirements.²⁷ The European Commission's second round of consultations will cover specific questions in connection with current reports.²⁸

(dd) Disclosure of Shareholdings

The shareholdings disclosure requirement under German law²⁹ also arose through the implementation of EC law, the EC Transparency Directive.³⁰ Section 21 of the Securities Trading Act (*Wertpapierhandelsgesetz*) provides that any person who through acquisition, disposal, or in another manner reaches, exceeds or falls below one of the thresholds of 5 %, 10 %, 25 %, 50 % or 75 % of the voting rights of a listed company, must promptly provide written notice of such reaching, exceeding, or falling below the specified thresholds to the company and to the Federal Financial Services Supervisory Agency (*Bundesanstalt für Finanzdienstleistungsaufsicht*). The company must publish this notice. The European Commission is also considering amendments in this regard.³¹

(ee) Miscellaneous

There are other types of information that are of value not only for shareholders, but also for investors contemplating a share purchase, and the disclosure of which is currently mandated – albeit imperfectly – by German law. Improved disclosure should be considered for such information. This information includes transactions in the company's shares by members of the management board (*Vorstand*)³², the structure of performance-based incentives for management board members³³, and transactions between management board members and the company³⁴, as well as situations that generally present conflicts of interest affecting the company.³⁵ In its consultation paper, the European Commission lists the following additional items of information that an issuer with exchange-traded securities should promptly disclose to the capital market³⁶:

- any amendment to the instrument of incorporation or statutes. The issuer planning such an amendment shall communicate a draft thereof to the home Member State competent authority and to the regulated market to which the security is admitted without delay, but

at the latest on the date of calling the general meeting which is to vote thereupon, or is to be informed about;

- any amendment to the rules applicable to the appointment, removal and the powers of personnel in managerial or supervisory bodies, including those for issuing securities;
- any amendment to the rules applicable to the holders of special control rights, and representatives or proxies acting on behalf of such holders;
- any amendment to the rules empowering a person, or body, to issue securities on behalf of the issuer;
- any amendment to the rules applicable to the control system of any employee securities scheme, if its control is exercised on behalf of them, by another person;
- any amendment to the rules applicable to shares, and rights to acquire shares, of personnel in managerial or supervisory posts of the issuer;
- any changes in the rights attaching to the various classes of shares, including those related to convertible or exchangeable debentures, or debentures with warrants;
- any changes in the rights of holders of debt securities resulting in particular from a change in loan terms or in interest rates;
- new loan issues and in particular of any guarantee or security in respect thereof.

4. General Principles of Disclosure

There have been repeated attempts in economics literature to establish a body of "principles of orderly capital market information"³⁷, which would be designed to address information from both the primary and the secondary markets (*see* (2) and (3), above) in equal measure. This attempt is also occasionally referred to in texts on the regulatory aspects of information to be disclosed on the capital markets.

(a) Materiality

Information has a facilitating function. In the context of this part of the paper, information facilitates investment decisions, i.e., the decision to buy, hold or sell listed securities. Information is "material" if it is capable of causing a reasonable investor³⁸ to take a different decision than he would have made in the absence of the information. Both demonstrable facts and statements that are not capable of demonstration ("soft information"), such as management projections regarding business plans, can be material.³⁹ At least three policy considerations arise in connection with material information:

- all material information, as defined above, should be disclosed in its entirety to the capital markets;
- exceptions to this rule of disclosure should be strictly limited, such as for the protection of trade secrets;
- immaterial information should not be disclosed to the capital markets. Optimum disclosure, not maximum disclosure, is the goal. Publication of immaterial information is not only expensive and unnecessary, but can even be counterproductive if it works to distract interested persons from material information.

(b) Clear Disclosure

Article 22(1) of the EC Listing and Reporting Directive (2001/34/EC) requires that listing particulars present information in as easily analyzable and comprehensible a form as possible, and Article 5(2) of the proposed EC Prospectus Directive (COM (2001) 280 final) would reinforce this requirement ("The information . . . shall be presented in an easy analysable and comprehensible form"). This leads to the inference that a prospectus should refrain from using unnecessary financial and legal jargon.

A similar position has been promoted by the U.S. Securities and Exchange Commission ("SEC") through its "plain English rule" (*see* Rule 421(d) under the Securities Act of 1933, as amended),⁴⁰ which presents six, basic principles regarding the language used in prospectuses.⁴¹ The Frankfurt Stock Exchange's Code of Best Practices also contains recommendations for the content, language and structure of securities prospectuses in order to achieve a clear presentation of relevant information to investors.⁴²

Clear disclosure requirements can also demand that information that is not clear on its face be broken down into understandable elements, for example, to explain, rather than simply reiterate, data from the annual financial statements.

(c) Current Information

Current reports and reports regarding changes in shareholdings⁴³ must be made "promptly" (*unverzüglich*), which under German law means without culpable delay.⁴⁴ Distinct rules exist for the disclosure of financial information: pursuant to German law, consolidated financial statements must be submitted to the shareholders' meeting within eight months after the end of the fiscal year,⁴⁵ and be published within 12 months after the end of the fiscal year for which they are prepared.⁴⁶ The German Corporate Governance Code, on the other hand, recommends that the period for

publication be shorted to 90 days after the end of the fiscal year for which the financial statements are prepared, and for interim reports, it recommends a shorter term of 45 days.⁴⁷

(d) Standardization

One requirement of standardization is that all issuers must present the required information in the same format. Like the prospectus, the balance sheet and income statement must follow a standard format, which reduces the costs incurred by interested persons in obtaining company data.⁴⁸ Standardization also presents another characteristic. Because investors are interested in making comparisons between various companies, it could be advisable under certain circumstances to disclose a negative piece of information that would not reach the threshold of materiality if the company were viewed in isolation.

(e) Forward Looking Information and Cautionary Statements

As a general matter, information in the capital market is forward looking. It is necessary to put potential investors in a position to assess the results of the company's operations, including the company-specific risks involved, on the basis of the disclosed data. If the occurrence of specific events is expected, but they have not yet occurred, this must be clearly stated. Investors are also particularly interested in knowing how the management assesses the future earnings and risks of the company. The provisions of German law governing prospectuses require an issuer to provide information on the future prospects of the company, at least for the current fiscal year.⁴⁹ In the context of secondary market disclosure, provisions of law require the management board to include statements regarding the expected future development of the relevant corporate group in its consolidated financial statements and consolidated management report.⁵⁰ A decision of the German Federal Supreme Civil Court requires that management show restraint in making future projections in prospectuses and that they disclose those factors which could mitigate against the projected future developments.⁵¹ If we find this duty of restraint to be a concrete requirement, then the following may be said regarding forward looking statements:

- the assumptions on which the forward looking statements are based must be disclosed;
- the period of time to which the statements refer must be precisely stated;
- factors that could mitigate against the appearance of the projected developments must be disclosed; and
- cautionary language must make clear that the statements regard projections, not events that are likely to occur.⁵²

(f) *Equal Treatment of Investors*

Legally required corporate disclosure creates equal treatment of investors with regard to the information disseminated pursuant to law, provided that appropriate media of dissemination are used.⁵³ If certain groups of persons are privileged in the disclosure of information, other groups will be prejudiced, and these latter groups will either withdraw from the market or demand a compensating risk premium on those markets where such activity is allowed. Provisions on insider trading make it a criminal offense for members of the management board to communicate inside information to persons who enter into related securities transactions on the basis of such information.⁵⁴

Supplementing these legal prohibitions, the German Corporate Governance Code provides that: "The company's treatment of all shareholders in respect of information shall be equal. All new facts made known to financial analysts and similar addressees shall also be disclosed to the shareholders by the company without delay."⁵⁵

5. Other Facilitating Rights and Shareholder Information

Apart from their right to information relating to their hold/sell decision or, in other words, to the security's negotiability, shareholders have a complex bundle of other facilitating rights, such as the right to vote their shares. Shareholders do not have fixed claims against the firm, as do the firm's creditors and employees, but are rather residual claimants to the firm's income, and thus shareholders have appropriate incentives (collective choice problems aside) to make discretionary decisions.⁵⁶ In order to exercise their facilitating rights in an appropriate way, shareholders again need information. The information relating to the hold/sell decision, as discussed above, is not sufficient to this end. German law contains three principal concepts that are designed to provide shareholders with the information they need to exercise their ancillary rights.⁵⁷

- *First*, shareholders have broad, general rights to obtain information regarding the items on the shareholders' meeting agenda (§ 131 *Aktiengesetz*/Stock Corporation Act). If requested information is not provided, a court may order that the information be disclosed (§ 132 *Aktiengesetz*/Stock Corporation Act). In addition, a shareholders' resolution that is adopted on the basis of incomplete information may be challenged in court (§ 243 *Aktiengesetz*/Stock Corporation Act). However, in contrast to many other jurisdictions, shareholders in a German stock corporation have no general right to inspect the company's books.

- *Second*, if management plans to subject the company to significant structural changes of the type that require shareholder approval, German law requires that management submit a report to the shareholders in advance. Examples of transactions requiring such a report are a capital increase without pre-emptive rights (§ 186(3) *Aktiengesetz*/Stock Corporation Act), the conclusion of a contract forming a corporate group (*Konzernvertrag*) (§ 293a *Aktiengesetz*/Stock Corporation Act), a freeze-out (§ 327e *Aktiengesetz*/Stock Corporation Act) or a merger (§ 8 *Umwandlungsgesetz*/Transformation Act).
- *Third*, shareholders may demand that any type of information be disclosed – even if such information does not relate to the adoption of a shareholders' resolution – if the shareholders' meeting so resolves or if there is evidence of dishonesty or of a serious violation of the law or the articles of association (special audit rights, inquiry rights, *see* §§ 142 *et seq.* *Aktiengesetz*/Stock Corporation Act).

IV. Channels of Disclosure

Modern information technology permits market relevant data to be collected at a central location and disseminated on a real time basis. The German system of capital market information appears poised to make use of this modern technology. Previously, information provided by companies was collected in disparate locations, to a significant extent in paper form only, and although electronically collected data is now increasingly available, it still cannot be called up or searched from one central location.⁵⁸

1. The Commercial Register

General information regarding companies, including information regarding their registered offices, the members of their management boards, and their articles of association are recorded in the Commercial Register (*Handelsregister*) (*see* §§ 8 *et seq.* *Handelsgesetzbuch*/Commercial Code). Although the Commercial Register, which is administered by the local courts, could be kept on electronic medium, many have not yet converted to such medium. It is also in most cases not possible to access Commercial Register data through electronic medium.

2. The Official Gazette

The unconsolidated and consolidated financial statements of publicly listed companies are published in the Official Gazette (*Bundesanzeiger*) (*see* § 325 *Handelsgesetzbuch*/Commercial Code), as are the convening notices and agendas of the annual shareholders' meeting (§ 121(3)

Aktiengesetz/Stock Corporation Act). The law has traditionally required publication in print, but this has recently been changed, so that in the future, company notices will appear in an electronic version⁵⁹ of the *Bundesanzeiger*.⁶⁰ However, this change does not yet apply to the publication of annual financial statements.⁶¹

3. Current Reports (Ad hoc - Publicity) and Disclosure of Shareholdings

In Germany, the Federal Financial Services Supervisory Agency supervises compliance with the duty to provide current reports and disclosures of changes in shareholdings. This information can be obtained in electronic form at any time.⁶²

4. Prospectuses and Interim Reports

(a) Prospectuses

Securities prospectuses (*Verkaufsprospekte*), in the case of public offerings of securities, and listing particulars (*Börsenzulassungsperspekte*), in the case of admission of securities to exchange trading, must be published in exchange-designated newspapers (*Börsenpflichtblätter*) with trans-regional distribution,⁶³ and made available to the public either at the Federal Financial Services Supervisory Agency or a securities exchange.⁶⁴ It should be noted that Article 14 of the current proposal for an EC Prospectus Directive would allow an issuer or offeror to publish a prospectus in a number of ways: by inserting it in a qualifying newspaper, publishing it in brochure form and making it available free of charge, or posting it in electronic form on the website of the issuer and, if applicable, the underwriters, plus having it posted in electronic form on the website of the competent supervisory authority.⁶⁵

(b) Interim Reports

Interim reports, to the extent that they are required,⁶⁶ are to be published in a similar manner as prospectuses. They are inserted either in the Official Gazette (*Bundesanzeiger*) or exchange-designated newspapers, or published by the company itself in brochure form (with, as a rule, permission being given to use a website posting instead).⁶⁷

5. Plans for Reform

The overview presented above highlights the deficiencies of the forms and manner of disclosure currently used in Germany: a fragmented collection of records and an over-dependence on paper records. Many companies have reacted to these deficiencies by posting the information to be disclosed on their own websites in a timely manner. The German Corporate Governance Code

also recommends that companies undertake such action.⁶⁸ Supplemental posting of information on company websites is certainly a welcome improvement, but it is still insufficient because:

- the information is not subjected to regulatory supervision with respect to its content and timeliness;
- the information is not completely secured against alteration; and
- publication on a great number of websites, as opposed to central collection of data, increases the costs that investors incur in searching for and obtaining information.

Finally, it should be noted that a significant number of private investors do not have direct access to the internet, so that policymakers must consider whether – as in the past – certain fundamental information, such as convening notices and agendas for shareholders' meetings, should be provided to shareholders in paper form.

The Commission on Corporate Governance that the German government established in 2000 included detailed recommendations in its Final Report regarding advisable improvements in the form in which corporate disclosures in Germany are made to the capital markets.⁶⁹ It was recommended that a central internet portal, a "German Business Register", be established with links to individual data banks. All required disclosures to the capital markets should be collectively available through such a central portal. In addition, as mentioned above, certain basic information would still be made available in paper form. The German government has resolved to implement this recommendation in due time.

At the European level, there are plans to create a centralized European Company Register,⁷⁰ and to modernize corporate disclosure made to the capital markets gradually in several steps.⁷¹

V. Sanctions

A complete overview of sanctions would have to examine market sanctions (such as loss of reputation and impact on stock price), government imposed sanctions (such as fines and administrative sanctions) and other mechanisms (such as audits of consolidated financial statements by independent auditors,⁷² or judicial actions filed by investors under securities law), and ask whether the "principles of disclosure" presented in section III. 4, above, are sufficiently policed by the available sanctions. The discussion that follows restricts itself to a brief review of civil liability for the disclosure of false information to the capital markets under the law currently in force and a summary of certain plans for reforming this law.

With respect to liability in connection with false or misleading *primary market disclosure* (civil liability for securities prospectuses), the European Community has not provided rules in the two Directives applicable to this area.⁷³ The proposed Prospectus Directive limits itself to instructing the Member States to impose civil liability on the responsible persons.⁷⁴ German law contains provisions on civil liability, and these have been amended in recent years.⁷⁵ Further proposals for reform are currently being discussed.⁷⁶

With respect to false or misleading *secondary market disclosure*, however, liability exists under German law only if it can be proven that the defendant company damaged the plaintiff investor through a willful or morally culpable act or violated prohibitions of criminal law (e.g., criminal fraud). The German legislator has responded to criticism of this state of affairs and has proposed legislation to impose liability on issuers who make current reports that – through a willful act or gross negligence – contain false information or that are published in an untimely manner. However, this proposal does not contain provisions imposing personal liability on board members.

The Report of the Government's Commission on Corporate Governance, by contrast, recommends that board members generally be held liable to damaged investors if such board members intentionally or through gross negligence disclose false information to the capital markets; in the case of gross negligence, it is recommended that the liability be capped. The recommendation includes use of a general representative for the damaged investors, but not of a shareholders' derivative suit *à l'américaine*.⁷⁷ The report prepared for this year's national meeting of German lawyers supports both approaches, liability of both the company and its board members.⁷⁸ We can thus look forward to more legislative action in this area.

Endnotes

- ¹ BARCA & BECHT (eds.), *THE CONTROL OF CORPORATE EUROPE* (2001).
- ² COOTER & ULEN, *LAW AND ECONOMICS*, 38 *et seq.* (2nd ed. 1997); PINDYCK & RUBINFELD, *MICROECONOMICS*, 608 *et seq.* (1992); KAHN, *THE ECONOMICS OF REGULATION* (1993); FRITSCH, WEIN & EVERS, *MARKTVERSAGEN UND WIRTSCHAFTSPOLITIK*, 91 *et seq.* (2nd ed. 1996); with regard to disclosure, in particular, *see* FELDHOFF, *DIE REGULIERUNG DER RECHNUNGSLEGUNG* 9 *et seq.* (1992).
- ³ The first study in on this topic appearing in the German literature was by Hax, in: *FESTSCHRIFT FÜR BUSSE V.COLBE* 199 *et seq.* (1988); *see also* MEIER-SCHATZ, *WIRTSCHAFTSRECHT UND UNTERNEHMENSPUBLIZITÄT*, 167 *et seq.* (1989).
- ⁴ *See* KUHNER, *VERFÜGUNGSRECHTE AN UNTERNEHMENSINFORMATIONEN – DIE VERRECHTLICHUNG DES INFORMATIONSFLOSSES ZWISCHEN UNTERNEHMEN UND KAPITALMARKT IM BLICKPUNKT ÖKONOMISCHER ANALYSEN* 213 *et seq.* (1998).
- ⁵ *Id.* at 222 *et seq.*
- ⁶ Description and analysis of the German depositary voting system in Baums, *DIE AKTIENGESELLSCHAFT* 11 (1996); *see also* Baums, *Voting Rights and Practices in Germany*, in *SHAREHOLDER VOTING RIGHTS AND PRACTICES IN EUROPE AND THE UNITED STATES* 109, 125 *et seq.* with further references (Baums & Wymeersch eds., 1999). A form of proxy voting (*Verwaltungsstimmrecht*) was made available in Germany in 2001, but is restricted to cases in which the proxy named by management is given express and specific

instructions. In the future, German corporation law will make it possible for shareholders to cast votes electronically in webcast shareholder' meetings; see BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE 150 *et seq.* (Baums ed., 2001).

Article 21(1) of the Directive of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities (2001/34/EC) p. 1 O.J. July 6, 2001 (L 184) (hereinafter the "EC Listing and Reporting Directive"), expressly names both the investor (with what range of expertise?) and the investment adviser as the addressees of the prospectus. The German High Federal Court (*Bundesgerichtshof*) has simultaneously named the "average investor" as the relevant addressee while refusing to attribute to such average investor the ability to understand financial statements. Decision published in WERTPAPIERMITTEILUNGEN 901 at 904 (1992). This decision received sharp criticism by legal scholars, without, however, offering a convincing standard to guide decisions in this area (See, e.g., GROß, KAPITALMARKTRECHT §§ 45, 46 Exchange Act, Margin no. 25 (2nd ed. 2002); SCHWARK, BÖRSENGESETZ §§ 45, 46 Margin no.13 (2nd ed. 1994); see also Fleischer, Gutachten zum 64. Deutschen Juristentag, F. 21 ("differential disclosure") (2002).

Macey, "Efficient Capital Markets, Corporate Disclosure & Enron" (Working Paper, Cornell Law School 2002), with further references.

Id. at 24.

Generally regarding the theory of standards, and with further references, see Adams, *Normen, Standards, Rechte*, in ÖKONOMISCHE THEORIE DES RECHTS 25, at 40 *et seq.* (Adams ed., 2002).

See generally MERKT, UNTERNEHMENSPUBLIZITÄT 132 *et seq.* (2001).

Amended Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (COM (2002) 460 final) of August 9, 2001. For background information and assessment, see Ferrarini, *Securities Regulation on Pan-European Securities Markets*, in CAPITAL MARKETS IN THE AGE OF THE EURO 241 at 280 *et seq.* (Ferrarini *et al.* eds., 2002).

Deutsche Boerse AG, "Going Public-Grundsätze" as of July 15, 2002; available from the Frankfurt Stock Exchange at <http://deutsche-boerse.com/INTERNET/EXCHANGE/index.htm>. The Code has entered into force on September 1st, 2002.

For a critique of the law currently in force, see Baums & Hutter, "Die Information des Kapitalmarktes beim ersten Börsengang (IPO)," Johann Wolfgang Goethe-Universität, Institut für Bankrecht, Working Paper Nr. 93, available at <http://www.uni-frankfurt.de/fb01/baums/>; see also Fleischer, *supra* note 7, at F. 41 *et seq.*

For a discussion of the relationship between a liquid and efficient secondary market and a primary market, see SECURITIES REGULATION 22 (Jennings *et al.* eds, 8th ed. 1998).

For a discussion of legally required interim reports, see subsection (bb) of this section, *infra*.

See Barz, Comment on §§ 222 *et seq.*, in AKTIENGESETZ GROßKOMMENTAR Vol. 4 (3rd ed. 1975).

Seventh Council Directive of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts (83/349/EEC), p. 1 O.J. July 18, 1983 (L 193).

See §§ 290-315 *Handelsgesetzbuch*/Commercial Code and German Accounting Standards as adopted from time to time by the Deutsches Rechnungslegungs Standardisierungs Committee ("DRSC").

Regulation of the European Parliament and of the Council on the application of international accounting standards (2002/1606/EC), p. 1 O.J. September 11, 2002 (L 243).

"During each financial year, issuers of admitted shares shall regularly publish at least one interim report that, through disclosure of figures and explanations, provides a true and fair view of the issuer's financial position and general business developments during the period covered by the report; this shall also apply when substitute certificates rather than the shares they represent are admitted to the official market listing." § 39 *Börsengesetz*/Exchange Act, as amended by the *Viertes Finanzmarktförderungsgesetz*/Fourth Financial Market Promotion Law.

"For the protection of the public or for orderly exchange trading, the exchange rules may, for partial segments of the official market, provide that issuers whose shares or certificates representing shares are admitted shall have reporting duties that supplement the documents submission requirements generally applicable to undertakings." § 41 *Börsengesetz*/Exchange Act, amended version.

§ 53 *Börsengesetz*/Exchange Act, amended version.

- 24 "If the financial figures have been audited by an independent auditor, the auditor's certificate – including any additional observations, limitations, or denial of such certificate – shall be provided in its entirety." § 54(3) *Börsenzulassungsverordnung/Exchange Admission Regulation*.
- 25 See "Towards an EU regime on transparency obligations for issuers whose securities are admitted to trading on a regulated market second consultation by the services of the Internal Market Directorate-General of the European Commission", second consultation document, prepared by the Internal Market Directorate General's Division for Securities Markets and Investment Services Providers, available at: http://europa.eu.int/comm/internal_market/de/finances/mobil/transparency/index.htm
- 26 "An issuer of securities that are admitted to trading on a domestic exchange shall promptly publish any new, non-public information that arises within its sphere of activity if such information, by virtue of its effects on the assets and liabilities and financial position of the issuer or on the general course of its business, would be likely to have a significant effect on the exchange price of the admitted securities or, in the case of admitted debt securities, could impair the issuer's ability to meet its commitments." § 15(1) *Wertpapierhandelsgesetz/Securities Trading Act*.
- 27 Noteable examples are found in the provisions of the EC Directive on the Obligations of Listed Companies (79/279/EEC), which has been replaced by and incorporated into the EC Listing and Reporting Directive (2001/34/EC) and in European Council Directive of November 13, 1989 coordinating regulations on insider dealing (89/592/EEC) p. 30 O.J. November 18, 1989 (L 339). The latter Directive will soon be replaced by the proposed Directive of the European Parliament and of the Council on insider dealing and market manipulation (market abuse) (COM (2001) 281 final), or any amended version thereof.
- 28 See note 25, *supra*.
- 29 See §§ 21 *et seq.* *Wertpapierhandelsgesetz/Securities Trading Act*.
- 30 See Articles 85 to 97 of the EC Listing and Reporting Directive (2001/34/EC), which incorporate requirements to notify acquisitions and disposals of major equity holdings, as first embodied in the EC Transparency Directive of December 12, 1988 (88/67/627).
- 31 See note 25, *supra*.
- 32 With regard to the reporting of the shareholdings of board members, *see* Baums, Corporate Governance Report, *supra* note 6, at 274 *et seq.* (2001), and THE GERMAN CORPORATE GOVERNANCE CODE Nr. 6.6 (2002), available at www.corporate-governance-kodex.de; with regard to securities transactions of board members (purchases and sales of company shares or transactions in derivatives) *see* § 7.2. of the *Regelwerk Neuer Markt/Neuer Markt Listing Rules* and the Corporate Governance Code, *supra*, at no. 6.6.
- 33 See Baums, Corporate Governance Report, *supra* note 6, at 270 *et seq.*; Corporate Governance Code, *supra* note 32 at nos. 4.2.3, 4.2.4, 5.4.5; for a critical assessment of management compensation, *see* Adams, "Vorstandsvergütungen", Johann Wolfgang Goethe-Universität, Institut für Bankrecht, Working Paper Nr. 96, available at <http://www.uni-frankfurt.de/fb01/baums/>.
- 34 See Baums, Corporate Governance Report, *supra* note 6, at 270 *et seq.*; Corporate Governance Code, *supra* note 32 at, no. 4.3.4.
- 35 See Baums, Corporate Governance Report, *supra* note 6, at 107; Corporate Governance Code, *supra* note 32, at no. 5.5.
- 36 See note 25, *supra*.
- 37 Ballwieser, in ZEITSCHRIFT FÜR KAPITALMARKTORIENTIERTE RECHNUNGSLEGUNG 115 (2002), with further references. The following discussion draws on Ballwieser's principles.
- 38 With regard to this function of disclosed information, *see* section III.1 hereof, *supra*.
- 39 For further discussion, *see* Merkt, *supra* note 11, at 453 *et seq.*
- 40 17 CFR § 230.421.
- 41 17 CFR § 230.421(d) provides: "To enhance the readability of the prospectus, you must use plain English principles in the organization, language, and design of the front and back cover pages, the summary, and the risk factors section. . . . You must draft the language in these sections so that at a minimum it substantially complies with each of the following plain English writing principles: (i) Short sentences; (ii) Definite, concrete, everyday words; (iii) Active voice; (iv) Tabular presentation or bullet lists for complex material, whenever possible; (v) No legal jargon or highly technical business terms; and (vi) No multiple negatives." For a good discussion of the reasoning behind the SEC clear disclosure rules, *see* Proposed Plain English Rules, Securities Act Release No. 33-7380 (January 14, 1997), where it is stated: "One of the fundamental protections provided to investors by our

federal securities laws is full and fair disclosure, but investors must be able to understand these disclosures to benefit from them. Prospectuses often use a complex, legalistic language that is foreign to all but financial or legal experts". SEC documents are available at www.sec.gov.

42 No. 3.4.1 of the Code of Best Practices, *supra* note 13, provides (in unofficial translation): "The prospectus should be drafted in clear and understandable language. Use of technical language and technical terms should be avoided or explained in clear and understandable language. Sentences should be clear and short. Identical, literal repetitions of entire paragraphs should be avoided." In addition, the Code requires prospectus covers to be plain, without photographs or slogans, and state only the name and registered address of the issuer (Code, no. 3.1.1), to be printed in 12 point type, i.e., no "fine print" (Code, no. 3.2.1), and follow a specific model for its organization and content (Code no. 3.3).

43 *See supra* note 29 and accompanying text.

44 §§ 15, 21 *Wertpapierhandelsgesetz*/Securities Trading Act.

45 §§ 337, 175(1) *Aktiengesetz*/Stock Corporation Act.

46 § 325(3) *Handelsgesetzbuch*/Commercial Code.

47 Corporate Governance Code, *supra* note 32, at no. 7.1.2.

48 The EC Listing and Reporting Directive (2001/34/EC) provides three detailed schedules (Schedule A for stock, Schedule B for debt, and Schedule C for certificates representing shares) that must be followed in the drafting of listing particulars for the admission of securities to an official stock exchange in the European Union. The Amended Proposal for an EC Prospectus Directive (COM (2002) 460 final) contains Annexes that provide detailed schema to be followed in the drafting of prospectuses for public offerings of securities, and these schema are almost identical to those contained in the 1998 proposal of the International Organization of Securities Commissions (IOSCO), "International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers," available at <http://www.iosco.org/iosco.html>. Because the format that must be followed by all foreign issuers that offer securities into the United States, as adopted by the SEC in 2000, Form 20-F (*see* International Disclosure Standards, Securities Act Release No. 33-7745, available at <http://www.sec.gov/rules/final/34-41936.htm>), also follows the IOSCO disclosure standards, if the proposed EC Directive is enacted without major revision of this schema, a standardized format for securities prospectuses will be required by law in most of the world's major financial markets (Japan also participated in drafting the IOSCO standards). In the Explanatory Memorandum to the proposed Prospectus Directive, the European Commission observes: "The decision to base the system on the IOSCO Disclosure Standards also means that the European prospectus will be in line with internationally accepted best practice and should also be acceptable for public offers or admission to trading outside Europe, in IOSCO member jurisdictions. This will provide benefits to EU issuers, which will not be obliged to duplicate disclosure documents." (COM (2002) 460 final, at 14).

49 "The sales prospectus must contain general information on the trend of the issuer's business since the end of the financial year to which the last published annual accounts relate, as well as information on the issuer's prospects for at least the current financial year." § 11 *Verkaufsprospekt-Verordnung*/Sales Prospectus Regulation, and "The prospectus must contain general information on the trend of the issuer's business since the end of the financial year to which the last published annual accounts relate, and, in particular, on the most important tendencies regarding recent development in the manufacturing of products and the provision of services, turnover, inventory and orders, as well as the most recent tendencies regarding costs and profits. . . . The prospectus must provide information regarding the business prospects of the issuer, at least for the current financial year." § 29 *Börsen-Zulassungsverordnung*/Exchange Admission Regulation. *See also* no. 4.1.15 of the *Regelwerk Neuer Markt* /Neuer Markt Listing Rules.

50 "The consolidated management report (*Konzernlagebericht*) shall include information regarding the expected development of the group." § 315(2)(2) *Handelsgesetzbuch*/Commercial Code.

51 Decision of the *Bundesgerichtshof*, published in WERTPAPIERMITTEILUNGEN 862, at 865 (1982).

52 *See* Baums/Hutter, *supra* note 14, at p.20.

53 On the channels of disclosure, *see* Part IV hereof, *infra*.

54 *See* § 14 *Wertpapierhandelsgesetz*/Securities Trading Act.

55 Code, *supra* note 32, at no. 6.3.

56 For a detailed analysis of this problematic, *see* EASTERBROOK & FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 63, 67 *et seq.* (1991).

- 57 For an overview of German law in this area and a note on relevant judicial decisions, see Henze, *Pünktlich zur Hauptversammlungssaison: ein Rechtsprechungüberblick zur Informations- und Auskunftsrechten*, in BETRIEBS-BERATER 893 (2002).
- 58 For a comprehensive overview, see NOACK, UNTERNEHMENSPUBLIZITÄT. BEDEUTUNG UND MEDIEN DER OFFENLEGUNG VON UNTERNEHMENS DATEN (2002).
- 59 See www.bundesanzeiger.de.
- 60 See Article 1(1) of the Government Draft (*Regierungsentwurf*) of the "Law for the Continued Reform of Corporation Law, Accounting Law, and of Transparency and Publicity" (*Gesetzes zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität*), available at www.bmj.de under "Gesetzgebungsverfahren".
- 61 Legislation regarding the electronic dissemination of annual financial statements is slated for the next session of the *Bundestag*. See Baums, Corporate Governance Report, *supra* note 6, at 267 *et seq.*
- 62 Current reports (*Ad hoc-Meldungen*) are collected by a private company, the Deutsche Gesellschaft für Ad hoc-Publizität, and made available electronically at <http://www.dgap.de/>. The Federal Financial Services Supervisory Agency collects reports regarding changes in shareholdings and makes them available electronically at <http://www.bawe.de/database/stimmrechte.htm>.
- 63 "The board of admissions shall designate at least three domestic newspapers as publications for the making of required announcements to the public (exchange designated newspapers); at least two of such newspapers must be dailies with trans-regional distribution in Germany (trans-regional exchange designated newspapers). The designation may be for a limited time; the designation shall be published by an exchange announcement." § 30(4) *Börsengesetz*/Exchange Act, as amended.
- 64 § 9 *Verkaufsprospektgesetz*/Sales Prospectus Act, §§ 36(4), 72(2)(1) *Börsengesetz*/Exchange Act; see also § 62 *Börsenordnung Frankfurter Wertpapierbörse*/Rules of the Frankfurt Stock Exchange and No. 6.4. of the *Regelwerk Neuer Markt*/Neuer Markt Listing Rules.
- 65 In relevant part of Article 14, the proposed Directive provides: "(2) The prospectus shall be deemed available to the public when published either: a) by insertion in one or more newspapers circulated throughout the Member States in which the offer is made or the admission to trading is sought, or widely circulated therein, or b) in the form of a brochure to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered offices of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents, or c) in electronic form on the issuer's web-site and, if applicable, on the web-site of the financial intermediaries placing the securities. . . . (3) The competent authority shall publish on its web-site over a period of twelve months, at its choice, all the prospectuses approved or, at least the list of prospectuses approved . . . including, if applicable, a hyperlink to the prospectus published on the website of the issuer." (COM(2002) 460 final, Art. 14).
- 66 See section III.3.b.(bb), hereof, *supra*.
- 67 See § 61 *BörsenZulassungsVerordnung*/Exchange Admission Regulation; No. 7.1.7.(1) *Regelwerk Neuer Markt*/Neuer Markt Listing Rules.
- 68 "In order to provide shareholders and investors with an even flow of real-time information, companies should use an appropriate means of disseminating information, like the internet." Corporate Governance Code, *supra* note 32, at No. 6.4.
- 69 See Baums, Corporate Governance Report, *supra* note 6, at 265 *et seq.*
- 70 "Making information easily and readily accessible throughout the European Union . . . each competent authority should also allow the use of a language customary in the sphere of finance . . . it would offer the opportunity of a central access point for interested investors from abroad seeking to find/to track back information about issuers (but possibly also national investors)." Towards an EU regime on transparency obligations, *supra* note 25, at 9.
- 71 See generally Towards an EU regime on transparency obligations, *supra* note 25.
- 72 Moreover, one could even take the supervision of the "production" of accounting and auditing standards into account, see Ferrarini, *supra* note 12 at p. 278 *et seq.*
- 73 See the EC Listing and Reporting Directive (2001/34/EC), *supra* note 7, and the Council Directive of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (89/298/EEC) 8 O.J. (L 124) 5 May 1989.
- 74 See the amended proposal for an EC Prospectus Directive, *supra* note 12.

⁷⁵ "The purchaser of securities that have been admitted to exchange trading on the basis of a prospectus in which facts that are essential for the assessment of the securities are incorrect or incomplete may demand that (1) the persons who have assumed responsibility for the prospectus, and (2) the persons who have issued the prospectus, shall as joint and several obligors accept return of the securities against restitution of the purchase price, to the extent that it does not exceed the issue price of the securities, together with the customary costs connected with the purchase, provided that the purchase transactions were concluded within six months after publication of the prospectus and within six months after the securities' initial commencement of listing." § 43 *Börsengesetz*/Stock Exchange Act, as amended. "A claim pursuant to § 43 may not be made against a person who demonstrates that he or she did not know that the information in the prospectus was incorrect or incomplete and that such ignorance does not result from gross negligence." § 44 *Börsengesetz*/Stock Exchange Act, as amended. Other defenses, such as lack of causality and knowledge of purchaser, are also provided for in § 44. *See also* § 13 *Verkaufsprospektgesetz*/Sales Prospectus Act.

⁷⁶ *See* Fleischer, *supra* note 7, at F 55 *et seq.*

⁷⁷ Baums, Corporate Governance Report, *supra* note 6, at 195 *et seq.*

⁷⁸ *See* Fleischer, *supra* note 7, at F 95 *et seq.*

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