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The Progress of German Information Disclosure Requirements: A Comparative Law Perspective in Light of Recent Developments in European Capital Markets Law

Thomas M. Mollers J.

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Cover Page Footnote

International Law; Commercial Law; Law

The Progress of German Information Disclosure Requirements: A Comparative Law Perspective in Light of Recent Developments in European Capital Markets Law

Thomas M.J. Möllers[†]

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[†] Professor and Dr. of Law, University of Augsburg; Managing Director of the Institute for Legal Systems; Chair for Civil Law, European Law, International Private Law, and Comparative Law. A previous version of this argument had been published in *Zeitschrift für Bank-und Börsenrecht*, 14 ZBB 390 (2003).

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I. Introduction

German securities law, created by the enactment of the Wertpapierhandelsgesetz (WpHG or Securities Trading Act), is one of the most recent of a large number of recent European directives. This area of the law has been developing rapidly in response to the grievances that have arisen from the recent stock market boom. The first judgments have been delivered by the courts of first instance, although the majority of cases have been dismissed. The first successful penal¹ and civil² actions have been brought against noted companies such as Infomatec, EM.TV, Met@box, and most recently, Comroad. The German legislature has reacted by amending sections 37b and 37c of the WpHG. These changes were implemented by the Fourth Finanzmarktförderungsgesetz (FFG or Fourth Law for the Promotion of the Capital Market).³ The new amendments to German securities law introduce, for the first time, special liability

¹ See LG Munich I, 4 KIs 305 Js 52373/00 (2003) (deciding EM.TV's criminal conviction on the basis of section 400 of the AktG), *construed in* 56 NJW 2328 (2003); LG Munich I, 6 KIs 305 Js 34066/02 (2002) (deciding Comroad I).

² LG Augsburg, 3 O 4995/00 (2001), 46 WM 1944 (2001), 1 BKR 99 (2001), *construed in* Möllers & Leisch, 1 BKR 78 (2001) = 22 ZIP 1881 (2001) = 16 NJW-RR 1705 (2001) = Schäfer, WuB I G 8.01 = Schwark, 17 EWIR 1049 (2001) (discussing Infomatec II); LG Frankfurt on the Main, 3-7 O 43/02 (2003) (deciding Comroad IV); LG Frankfurt on the Main, 3-7 O 47/02 (2003) (deciding Comroad V); LG Ingolstadt, 5 O 2239/02 (2003) (deciding Comroad VI). For more comprehensive details with regard to this topic, see MÖLLERS & ROTTER, AD HOC-PUBLIZITÄT (2003).

³ 4th Finanzmarktförderungsgesetz (FFG) v. July 1, 2002 (BGBl. I. S.2010).

for defective or omitted *ad hoc* communications.

These amendments, however, are only an intermediate step⁴ – capital market law in Germany and the European Union is still developing. The first judgments addressing liability claims are about to be delivered by the Bundesgerichtshof (BGH), the highest German Federal Court for civil actions.⁵ For the first time, the BGH will give its opinion on whether boards of directors will be personally liable with regard to incorrect *ad hoc* communications.⁶ Thus far, the BGH has affirmed corporate liability in three judgments.⁷ In addition, the federal government plans to enhance liability and information duties by means of a ten-point roadmap.⁸

The German federal government has also enacted the Anlegerschutzverbesserungsgesetz (AnSVG or Act Improving Investor Protection),⁹ and has proposed an act addressing representative proceedings with regard to investors (Kapitalanleger-Musterverfahrensgesetz).¹⁰ Finally, the Ministry of Finance recently issued a draft for an act concerning capital market information liability (Kapitalmarktinformationshaftungsgesetz, or KapInHaG).¹¹

⁴ See, e.g., Dreyling, 42 Die Bank 16 (2002) (discussing the development that led up to the 4th FFG); Fleischer, 55 NJW 2977 (2002); Hutter & Leppert, 4 NZG 649 (2002); Möllers, in RWS-Forum: Bankrecht 2002, 271 (2002-2003); Möller, 46 WM 2405 (2001).

⁵ An appeal was allowed and filed against the decision of OLG Munich, 30 U 855/01 (2002), NJW 2003, 144 WM 2003, 70 ZIP. 2002, 1989, *construed in* Möllers & Leisch BKR 2002, 1096; Fuchs & Dühn, 2 BKR 1063 (2002) (Infomatec II). The lawsuit changed from the eleventh (file no. XI ZR 395/02) to the second senate (file no. II ZR 402/02).

⁶ BGH of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004) = 49 WM 1721 (2004) = 57 NJW 2971 (2004); BGH of July 19, 2004, II ZR 218/03, 25 ZIP 1599 (2004) = 57 NJW 2664 (2004); BGH of July 19, 2004, II ZR 217/02, 25 ZIP 1604 (2004), *reviewed in* Haas, LMK 181 (2004); Leisch, 25 ZIP 1573 (2004); Möllers, 60 JZ Vol. 2 (2005).

⁷ BGH of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004) = 49 WM 1721 (2004)=57 NJW 2971 (2004).

⁸ Der Finanzmarktförderungsplan 2006 (scheme paper proposed Feb. 2, 2003, by Federal Minister of Justice Zypries and Minister of Finance Eichel), *available at* <http://www.bmj.de>, *reviewed by* Seibert, 57 BB 693 (2003).

⁹ BT-Drs. 15/3493 of July 1, 2004, *at* <http://dip.bundestag.de/btd/15/034/1503493.pdf>.

¹⁰ *Id.*

¹¹ *See id.*

The European Union legislature is no less active, having mandated that the Market Abuse Directive 2003/6/EC,¹² issued April 12, 2003, be implemented into domestic law of member states no later than October 12, 2004. Amended proposals for both the Prospect Directive¹³ and the Transparency Directive of March 26, 2003¹⁴ have also been presented.

This paper seeks to provide an overview of the status of information duties and *ad hoc* publicity, as well as to point out the need for further legislative developments. Part II will address information duties, while Part III will address liability claims. Part IV provides a concluding summary of the contents of this Article.

II. Developments in Capital Markets Information Disclosure Requirements

A. German and European Law Requirements – Market Abuse Directive 2003/6/EC

1. *Ad hoc* Publicity

Ad hoc publicity is closely related to the insider law of section 14 of the WpHG. Inside facts, or facts that are not known to the public, can no longer be abused if they are revealed to the public pursuant to section 15 of the WpHG. Accordingly, *ad hoc* publicity is the flipside of insider law in that it can legitimize

¹² European Parliament and Council Directive 2003/6/EC of Jan. 1, 2003 on Insider Dealing and Market Manipulation (Market Abuse), 2003 O.J. (L 96), 16, [hereinafter Market Abuse Directive], available at http://www.europa.eu.int/eurlex/en/search/search_oj.html, construed in Jesper Lau Hansen, *The New Proposal for a European Union Directive on Market Abuse*, 23 U. PA. J. INT'L ECON. L. 241 (2002).

¹³ 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 (Prospect Directive) of Aug. 9, 2002, COM(02) 460, [hereinafter Prospect Directive], available at http://www.europa.eu.int/comm/secretariat_general/regdoc/recherche.cfm?CL=en.

¹⁴ Proposal for a Directive of the European Parliament and of the Council on the Harmonization of Transparency Requirements with Regard to Information about Issuers Whose Securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC (Transparency Directive) of Mar. 27, 2003, COM(03) 138 [hereinafter Transparency Directive], available at http://www.europa.eu.int/comm/secretariat_general/regdoc/recherche.cfm?CL=en.

insider information for use.¹⁵

a) Qualifications of Ad hoc Publicity

Article 6, paragraph 1 of European Union Market Abuse Directive 2003/6/EC perpetuates the rationale of WpHG by requiring member states to “ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuer.”¹⁶ This provision addresses the term “inside information,” which is legally defined in Article 1, paragraph 1:

‘Inside information’ shall mean information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.¹⁷

The Market Abuse Directive aligns *ad hoc* publicity with insider law. Several constituent facts which previously had been independently defined for *ad hoc* publicity are not rendered obsolete,¹⁸ including the terms “information,” “new,” “occurrence in the area of operations of the issuer,” and “impact on the estate and financial situation or the general business operations.”¹⁹ While the term “fact” was used under previous law, Article 1, paragraph 1 of the Market Abuse Directive 2003/6/EC now replaces the term “fact” with the term “precise information.” Article 2 of the European Securities Commission’s (ESC) proposal

¹⁵ 2d FFG, Begr. RegE, BT-Drs. 12/6679, at 35, 48, (previously Hopt & Will, *Europäisches Insiderrecht* (1973)); Hopt, *WM-Festgabe Hellner* pp. 29, 31 (1994); *Bankrechtstag 1995*, 3, 21 (1996); Kümpel, in *WpHG*, § 15 n.6 (2d ed. 1999).

¹⁶ Market Abuse Directive, *supra* note 12, art. 6, para. 1.

¹⁷ *Id.* art. 1, para. 1.

¹⁸ Article 20 of the Market Abuse Directive provides for the avoidance of double regulation of the publication duties by abolishing the duty of *ad hoc* publicity now stipulated in Article 68, paragraph 1 Directive 2001/34/EC (of the European Parliament and of the Council of May 28, 2001, on the Admission of Securities to Official Stock Exchange Listing and on Information to be Published on those Securities – *Capital Market Publicity Directive* 2001/34/EC = OJ L 184, 1, amended in O.J. (L 217), 18) [hereinafter *Capital Market Publicity Directive*].

¹⁹ Market Abuse Directive, *supra* note 12.

defines "precise information" as:

[A]ny information consisting of a matter or an event which is true or could reasonably be expected to become true in the future, when this information is specific enough to allow a conclusion to be drawn about its possible impact on prices of financial instruments or related derivate financial instruments.²⁰

Under the Market Abuse Directive, past events must be made revisable, and forward looking statements must be sufficiently likely. Thus, certain prognoses are likely to fall within the scope of the term "precise information," if they are sufficiently likely to come true.²¹ By the same token, plans, schemes, and strategies must be revealed to the public, regardless of whether they have previously been disclosed in a perceivable way.

Section 15, paragraph 1 of the WpHG stipulates that the event must have occurred within the purview of the issuer's operations. Thus, the duty to reveal information to the public is extended only to the extent that the new definition demands that the information relates "directly or indirectly" to the issuer. Information that relates to the issuer of financial instruments or to a financial instrument indirectly is referred to by the proposal as information that is apt to influence the development and formation of prices on a regulated market (such as a terrorist attack).²² Furthermore, listed subsidiaries will have to reveal events in the area of operations of the non-listed parent company, provided that the information affects the subsidiary directly and so long as there is potential to affect the subsidiary's market price. In addition, establishing causation between the possible effects and the effects on the market price is no longer necessary, because the amendments dropped the requirement of a showing of an "impact on the estate and financial situation or the general business operations." Therefore, changes in dividend payments and buy-

²⁰ European Parliament and Council Directive 2003/124/EC of 24 December 2003 on Implementing Directive 2003/6/EC of the European Parliament and of the Council as Regards the Definition and Public Disclosure of Inside Information and the Definition of Market Manipulation, 2003 O.J. (L 339) 70 [hereinafter *Definitions and Public Disclosure Directive*], available at http://www.europa.eu.int/eur-lex/en/search/search_oj.html, construed in Grimme & von Buttlar, 48 WM 901, 906 (2003).

²¹ This includes public forecasts of the company's developments by the board of directors.

²² 11th Reason, Parliament Draft, 13 ZBB 144, 150 (2002).

back programs, as well as changes of the listings, must now be revealed. The impact that the said changes to the provision will bring about has yet to be examined comprehensively. Nevertheless, as this Article argues, a massive broadening of the scope of the required duty of *ad hoc* publicity is needed.

Additionally, the structure of the exception to this law has been revised. Prior to the Market Abuse Directive, it was up to the supervisory body to decide whether an issuer was exempt from the duty of *ad hoc* publicity. Now, pursuant to Article 6, paragraph 2 of the Market Abuse Directive 2003/6/EC, the issuer may defer the publication of inside information at his sole discretion, if the publicity impairs his legitimate interests.²³ This change to the exception rule is now in line with the legal positions held of the United States, France, and Switzerland.²⁴ The same change of paradigm is also seen in European anti-trust law. Under Articles 81, 82, and 83 of the EC Executive Regulation No. 1/2003, the previous prohibition with the possibility of exemptions was transformed into a legal exception.²⁵ Ostensibly, this decreases the workload of the supervisory body. But, it will significantly increase the liability risk for companies if the *ad hoc* communication is omitted, since the company has the burden of determining for itself whether it is eligible for exemption.

b) Procedure for Publication

The procedure for publication in Germany is a three-stage process.²⁶ First, the *ad hoc* communication is disclosed to the

²³ Furthermore, this omission must not be apt to mislead the public and the issuer has to be capable of safeguarding the confidentiality of the information. See Market Abuse Directive, *supra* note 12.

²⁴ See Company Manual of the New York Stock Exchange (NYSE), § 202.06(A), at <http://www.nyse.com>; Law No. 98-07 of Mar. 2, 1999, J.O. Mar. 2, 1999, art. 4, available at <http://www.cob.fr>; Art. 72 Kotierungsreglement, at <http://www.swx.com>; see also FÜRHOFF, KAPITALMARKTRECHTLICHE AD HOC-PUBLIZITÄT ZUR VERMEIDUNG VON INSIDERKRIMINALITÄT 143 (2000); Köndgen, in Festschrift Druey, 791, 792 (2002).

²⁵ Council Regulation (EC) No. 1/2003 of 16.12.2002, on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2002 O.J. (L 1), 1, available at <http://europa.eu.int/smartapi/cgi>.

²⁶ Geibel in, WPHG, BÖRSG, VERKAUFSPROSPEKTG, § 15, 121 (1999). For the channels of disclosure for other company-related information, see Baums & Theodor, *Changing Patterns of Corporate Disclosure in Continental Europe: the Example of*

Bundesanstalt für Finanzdienstleistungsaufsicht, (BAFin or Federal Supervisory Body for Financial Services) and to the management of the stock exchanges.²⁷ Next, the actual publication takes place.²⁸ Finally, the wording of the published *ad hoc* communication is conveyed to the managements of the stock exchanges and to the BAFin.²⁹

Section 15, paragraph 3, subsection 1 of the WpHG obliges the issuer to undertake publication in at least one national newspaper authorized by the stock exchanges in Germany or in an electronic information system³⁰ in German. The communication may be simultaneously published in English. The electronic information system should be directed at institutional professional market participants³¹ rather than the general public. One such available electronic system is operated by Deutsche Gesellschaft für *Ad hoc*-Publizität mbH (DGAP).³² The DGAP immediately uploads the communications onto the Internet, but the DGAP does not publish the communications on teletext. However, there are numerous competing service providers that publish *ad hoc* communications.³³ Moreover, *ad hoc* communications can be found in the teletext systems of the German public television stations ARD and ZDF.³⁴ Technical problems, however, became evident during a recent inquiry.³⁵ None of the service providers

Germany (2002), ECGI Law Working Paper No. 04/2002, 15, available at http://papers.ssrn.com/paper.taf?abstract_id=345020.

²⁷ WpHG, § 15, para. 2.

²⁸ *Id.* § 15, para. 3.

²⁹ *Id.* § 15, para. 4.

³⁰ Kreditwesengesetz (KWG), § 53, para. 1.

³¹ 2d FFG, Resolution Reference and Report of the Financial Committee, BT-Drs. 12/7918, 101.

³² In the summer of 1996, Reuter Direct, the Vereinigten Wirtschaftsdienste GmbH (VWD), as well as the Deutsche Börse AG merged to found this service. See DGAP, available at <http://www.dgap.de> (last visited Oct. 25, 2004); Kümpel, *supra* note 15, n. 156, 159(b); Geibel, *supra* note 26, n. 140.

³³ See, e.g., N-TV, <http://www.n-tv.de> (last visited Oct. 25, 2004); <http://www.euroadhoc.com> (last visited Oct. 25, 2004); VWD, <http://www.vwd.de> (last visited Oct. 25, 2004).

³⁴ See Möllers/Ganten, 27 ZGR 773, 799 (1998) (discussing the teletexts of e.g. ARD and ZDF p. 718).

³⁵ Regarding an inquiry of Monday, Aug. 11, 2003.

had available *all ad hoc* communications,³⁶ and numerous providers only offered obsolete communications on their pages.³⁷ This finding is particularly problematic, as company information should be disclosed to the public without delay. Germany has since made most of the necessary revisions in order to conform with the publication procedure under European law.

The European Community Listing Directive 79/279/ECC³⁸ requires the publication of *ad hoc* communications in a national newspaper or an equivalent means acknowledged by a competent body. The *public* is intended to refer to the “general public.”³⁹ Article 6, paragraph 1, subsection 2 of the Abuse Directive 2003/6/EC also stipulates that inside information subject to publication must be published on the Internet site of the issuer.⁴⁰

In Great Britain,⁴¹ the issuer must immediately publish “announcements of price-sensitive information” through a special agency, The Regulatory Information Service.⁴² In contrast to German law, no so-called “sphere of publicity” (*Bereichsöffentlichkeit*) is to be established thereby; in fact, the precept of equal treatment of all investors applies.⁴³ Swiss law

³⁶ DGAP did not publish the *ad hoc*-communication of uzin Utz AG of Aug. 11, 2003, on their website. N-TV, <http://www.n-tv.de> (last visited Oct. 25, 2004).

³⁷ No *ad hoc* communications of Aug. 11, 2003 could be found. Hugin, <http://www.huginonline.de> (last visited Oct. 25, 2004); VWD, <http://www.vwd.de> (last visited Oct. 25, 2004); teletexts of ARD and ZDF p. 718.

³⁸ Council Directive of Mar. 5, 1979 coordinating the conditions for the admission of securities to official stock exchange (79/279/ECC) – *Stock Exchange Admissions Directive 79/279/ECC* = O.J. (L 66) 21.

³⁹ The Capital Market Publicity Directive, *supra* note 18, adopted this meaning of the term “public” from Articles 68 and 102, paragraph 1 of the Stock Exchange Admissions Directive, *supra* note 38.

⁴⁰ Incidentally, the obligation to publish the *ad hoc* communication in a national newspaper or comparable medium remains, as the Market Abuse Directive did not repeal Article 102 of the Capital Market Publicity Directive.

⁴¹ More comprehensive comparative law aspects addresses to *ad hoc* publicity can be found in MÖLLERS & ROTTER, *supra* note 2, §§ 5-6 (2003).

⁴² *Ad hoc* communications are listed in Schedule 12 of the Listing Rules, at <http://www.fsa.gov.uk/pubs/ukla/schedule12-3.pdf> (last visited Oct. 25, 2004); *see also* Joyce et al., *Practising Law Institute 2001*, No. BO-0162 (2001) (detailing an older scheme of *ad hoc* publicity duties).

⁴³ *See* Williams, *FSA’s Disclosure Regime for Listed Companies*, at <http://www.fsa.gov.uk/pubs/speeches/sp.90.html> (last visited Oct. 25, 2004). But the fact that small investors receive the information on the Internet with a twenty minute

also expressly provides that the equal treatment of market participants be observed as far as possible when publishing *ad hoc* communications.⁴⁴ Likewise, Austrian law provides for the publishing of *ad hoc* communications through electronic information systems; there is no limitation to professional investors.⁴⁵ In Italy, *ad hoc* communications are sent to two news agencies,⁴⁶ again without a limitation on the sphere of publicity.

In the United States, all reports filed on the EDGAR system (Electronic Data Gathering, Analysis, and Retrieval) have to be submitted to the Securities and Exchange Commission (SEC).⁴⁷ EDGAR reports are accessible to the general public through the Internet and can also be retrieved on the SEC homepage.⁴⁸ In France, the Commission des Opérations de Bourse (COB)⁴⁹ demands the equal treatment of investors⁵⁰ with regard to the promulgation of the information; there is no limitation on the

delay has been criticized. See HANNIGAN, INSIDER DEALING 194 (2d ed. 1994); WALDHAUSEN, DIE AD HOC-PUBLIZITÄTSPFLICHTIGE TATSACHE 98 (2002).

⁴⁴ Kotierungsreglement, art. 72 (4), *supra* note 24.

⁴⁵ BörseG, § 82 (8), at <http://www.fma.gofat> (last visited Oct. 25, 2004).

⁴⁶ Art. 66 para. 1 lit. b) Reg. *Ad hoc*-publicity is found in Art. 114 – 116, 118 Testo Unico (T.U.); see SANGIOVANNI, DIE AD HOC-PUBLIZITÄT IM DEUTSCHEN UND ITALIENISCHEN RECHT 173 (2003).

⁴⁷ The issuer of securities subject to registration is obliged to publish reports as demanded by the regulations issued by the Securities and Exchange Commission (SEC). Securities Exchange Act of 1934, 15 U.S.C. 78 (2003). The SEC issued Rule 13a-11, on the basis of this authorization, which prescribed a current publication duty using the form 8-K vorschrieb (“current reports”). See THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION 420 (2002). The Sarbanes-Oxley Act now introduces a general duty of *ad hoc*-publicity by Section 13 (l) of the SEA that reads:

Real Time Issuer Disclosures – Each issuer reporting under section 13(a) or 15(d) shall disclose to the public on a rapid and current basis such additional information concerning material changes in the financial condition or operations of the issuer, in plain English, which may include trend and qualitative information and graphic presentations, as the Commission determines, by rule, is necessary or useful for the protection of investors and in the public interest.

Sarbanes-Oxley Act, 15 U.S.C. § 409 (2003).

⁴⁸ U.S. SEC. & EXCH. COMM’N, at <http://www.sec.gov/info/edgar.html> (last visited Oct. 25, 2004).

⁴⁹ COB and Conseil des marchés financiers (CMF) merged to become L’Autorité des marchés financiers Loi de sécurités financière du 1^{er} août 2003.

⁵⁰ Paris 10 septembre 1996, RJDA 12/96, n 1487 (regarding the violation of the principle of equal treatment).

sphere of publicity. Moreover, the issuer must submit all information subject to publication to the COB before, or simultaneously with, the publication as pursuant to Règlement no. 98-07.⁵¹ In order to create comprehensive and simultaneous information for all investors, these *ad hoc* communications are published on the Internet using the SOPHIE database (Site Ouvert des Publications Historiques des Entreprises).⁵²

One area where German securities law has yet to functionally comply with European law is the present limitation of *ad hoc* publicity to professional investors only. This so-called “sphere of publicity” infringes upon the principle of equal treatment of investors and does not adequately and equitably disseminate information to all investors in the general public.⁵³ The Commission concurs with this opinion.⁵⁴ Thus, it is surprising that the legislature, amending section 10, paragraph 3, number 2 of the Wertpapierübernahmegesetz (WpÜG or Securities Take-over Act) on January 1, 2002, again only referred to the sphere of publicity with regards to the publication of a take-over, while the WpÜG in contrast stresses the principle of equal treatment in section 3, paragraph 1.⁵⁵ Legal scholars have been trying to qualify this problem. Most scholars contend that the incorrect implementation of the directive has been rendered obsolete by its actual development; the quick publication of facts on the Internet has resulted in adequate notice to the general public.⁵⁶ Yet, this

⁵¹ Law No. 98-07 of Mar. 2, 1999, J.O. Mar. 2, 1999, art. 8 (stating that a public disclosure document “is to be forwarded to the COB not later than the time of publication”), available at <http://www.cob.fr> (last visited Oct. 25, 2004).

⁵² AMF, at <http://www.cob.fr/frset.asp?rbrq=sophie> (last visited Oct. 25, 2004).

⁵³ HIRTE, BANKRECHTSTAG 1995, 47, 66, 67; Möllers, 26 ZGR 334, 359 (1997); Möllers & Leisch, 1 BKR 78, 80 (2001); Möllers, in Horn & Krämer eds., *RWS-Forum. Bankrecht 2002*, 217 (2003); BLIESENER, AUFSICHTSRECHTLICHE VERHALTENSPLICHTEN BEIM WERTPAPIERHANDEL 231 (1998); GRUNDMANN, EUROPÄISCHES SCHULDVERTRAGSRECHT 4.21, n.33 (1999); GEHRT, DIE NEUE AD HOC-PUBLIZITÄT NACH § 15 WPHG 201 (1997); VON KLITZING, DIE AD HOC-PUBLIZITÄT 53 (1999).

⁵⁴ According to the Commission’s opinion, the information is to be disclosed *simultaneously and actually* to the investors if selective disclosure of information during the regular business occurs. The reasons for the EC-Commission’s proposal is found in the Directive on Insider Dealings and Market Manipulation, Parliamentary Draft, 13 ZBB 144, 152 (2002).

⁵⁵ WpÜG, § 3, para. 1.

⁵⁶ See Kümpel, *supra* note 15; Geibel *supra* note 26; Fürhoff & Wölck, 42 WM 449,

opinion contains two misconceptions. First, pointing to the act of publishing is not helpful unless all *ad hoc* communication can be found there. Second, the prevailing case law of the European Court of Justice (ECJ) indicates that even if the actual method of publication in a member state is in accordance with the directive, implementation is still rendered insufficient if the language of the actual law of the member state does not suggest such an interpretation.

For reasons of legal certainty, citizens of European Union member states may demand that European law be incorporated into the codification of domestic law. The initial version of section 15, paragraph 3, number 2 of the WpHG was inconsistent with European Law. *De lege ferenda*, only electronic information systems are to be employed to disseminate information, and the limitation of diffusion to only financial institutes and other professional investors is to be deleted. In response to this inconsistency, the German legislature has since reacted by removing the limitation to the sphere of publicity. A regulation (yet to be enacted) will define manner, scope, and form of required publication.⁵⁷ It remains to be seen whether the necessary legal conditions to ensure investor equality can finally be achieved with the enactment of this regulation.

2. Directors' Dealing

Directors' dealing can now be found in Article 6, paragraph 4 of the Market Abuse Directive 2003/6/EC.⁵⁸ With the newly created section 15a of the WpHG, the German legislature now requires that board members, members of supervisory bodies, and their immediate relatives to inform the issuer and the BAFin as soon as possible after they acquire or sell shares of their own company.⁵⁹ Knowledge of such transactions can be of great

451 (1997); Grimme & von Buttlar, 48 WM 901, 907 (2003) (playing down the problem of the incorrect implementation of the directive); Hirte, *in* KK zum WpÜG, § 10 n. 67 (2003).

⁵⁷ WpHG, § 15(7); BT-Drs. 15/3493 of July 1, 2004, *supra* note 9, at S: 1, 21.

⁵⁸ Market Abuse Directive, *supra* note 12, art. 6, para. 4.

⁵⁹ WpHG, § 15a. See also the circular of the BAFin of June 27, 2002 as to the duties of disclosure and publication pursuant to § 15a of the WpHG, at 4 NZG 711 (2002), available at <http://www.bafin.de>; Schneider, 56 BB 1817 (2002); Schneider, 46 AG 473 (2002).

importance for the market, as it provides indications of management's assessment of the company's future business outlook.⁶⁰ Furthermore, the semblance of a covert abuse of a knowledge margin is eliminated.⁶¹ The provision mirrors section 16 of the Securities Exchange Act (SEA), which governs U.S. directors and their self-interested dealings.

Despite the efforts of the legislature,⁶² however, the provision's wording does not correspond to the language of the European directive. The possibility of easy evasion and the avoidance of sanctions has been criticized under the current German law.⁶³ The Market Abuse Directive 2003/6/EC is not confined to immediate relatives, but refers to persons closely associated with them. Nor is there a € 25,000 notification threshold at the European level. The German legislature reacted with the enactment of the Anlegerschutzverbesserungsgesetz, and thereby lowered the notification threshold to € 5,000.⁶⁴

3. *Analysts' Duties*

According to Article 6, paragraph 5 of the Market Abuse Directive, member states have to make sure that information spread publicly by analysts is "fairly presented."⁶⁵ Any conflicts of interests also must be revealed.⁶⁶ Section 34b, paragraph 1, subsection 1 of the WpHG, introduced by the Fourth FFG, stipulates that security analyses are to be undertaken with the "necessary experience, diligence, and consciousness."⁶⁷ This general clause (which could hitherto also be found in section 31, paragraph 1 of the WpHG) is broader, and therefore less precise,

⁶⁰ See Insiderdaten, <http://www.insiderdaten.de> (last visited Oct. 25, 2004).

⁶¹ 4th FFG, Reasons Government Draft, BT-Drs. 14/8017, 88.

⁶² See Möllers, 57 JZ 121, 128 (2002); 45 WM 2284, 2293 (2000).

⁶³ Posegga, 2 BKR 687, 698 (2002) (appropriately criticizes the fact that an investor would have to search countless websites due to the lack of a central information platform). Publication on the DGAP-website is voluntary. DGAP, <http://www.dgap.de> (last visited Oct. 25, 2004); see also Hutter & Leppert, 4 NZG 649, 656 (2002); Schuster, 167 ZHR 193, 206 (2003).

⁶⁴ WpHG, § 15a, para. 1(2); BT-Drs. 15/3493 of July 1, 2004, *supra* note 9, at S:1, 21.

⁶⁵ Market Abuse Directive, *supra* note 12, art.6, para.5.

⁶⁶ *Id.*

⁶⁷ WpHG, § 34b, para. 1(1).

than the wording of the European provision. Nor does the German BAFin bulletin indicate what is to be considered a "fair presentation" of securities.⁶⁸ A specification should be made immediately, as such duty did not exist until now, and needs to be clarified. Also, further incompatibility with European law should be prevented.⁶⁹ The German legislature has responded, in a limited way, by stating that analyses are to be created and presented in a manner which demands the disclosure of conflicts of interests.⁷⁰

B. Procedural Reporting Requirements - The Proposal for a Transparency Directive of March 26, 2003

A proposal for a new Transparency Directive, introduced on March 26, 2003, by the EC Commission, is designed to achieve both community-wide uniform transparency and create a level of information that will protect investors, and promote market efficiency.⁷¹

1. Improvements in Annual Reporting Requirements

At the European level, the European Community has adopted a proposal⁷² to introduce the International Accounting Standards (IAS) to member states.⁷³ In comparison to German accounting

⁶⁸ The BAFin bulletin's construction of several terms in § 34 b of the WpHG of Mar. 7, 2003, does not go into para. 1, § 1.

⁶⁹ As to the problem of implementing European directives by means of general clauses see W.H. Roth, *Generalklauseln im Europäischen Recht*, in: FS DROBNIG, 135 (1998) in FS 50 Jahre BGH 847, 871. As to the insufficient implementation of the Standard Business conditions Directive 93/13/EEC by § 9 AGBG with respect to the prior law, see Staudinger, 44 WM 1546, 1552 (1999); Leible, 12 EuZW 438, 439 (2001); MÖLLERS, *ROLE OF LAW IN EUROPEAN INTEGRATION* 20 (2003).

⁷⁰ WpHG, § 34b, para. 1; BT-Drs. 15/3493 of July 1, 1994, *supra* note 9, at S: 1, 21.

⁷¹ Transparency Directive, *supra* note 14, at 3.

⁷² The International Accounting Standards Committee (IASC) asked to amend the 4th and 7th Company Law EC-Directives. See Claussen, 73 AG 278, 279 (1993); Havermann, in FS Moxter 656, 668 (1994). As to the restriction of balance rights, see BUSSE VON COLBE, *MANAGEMENTKONTROLLE DURCH RECHNUNGSLEGUNGSPFLICHTEN, VORTRAG ZUR VERLEIHUNG DER EHRENDOKTORWÜRDE DER UNIVERSITÄT AUGSBURG* 17, 28 (1994).

⁷³ The International Accounting Standards have been frequently revised by the International Accounting Standard Board (IASB), which is organized under private law.

standards, there are far fewer options. The recently amended IAS-regulation (EC) No. 1606/2002 replaces the fourth and seventh company law directives of the IAS by 2005; the principles of maintenance of capital are thereby vastly restrained.⁷⁴ The draft of the Transparency Directive states that, for the annual accounts and the semi-annual reports, the guidelines of the IAS are to be observed according to Regulation No. 1606/2002/EC.⁷⁵ According to Article 4, number 2, the annual financial reports must consist of the audited annual financials, management reports, and a declaration by a competent body that the information contained in the annual reports corresponds to the facts and that the reports are free from material omissions. This declaration is similar to the recently adopted Sarbanes-Oxley-Act⁷⁶ in that the declaration requires the board of directors to attest to the accuracy of the annual reports.

2. *Semi-Annual Reporting Requirements*

Article 5 of the Transparency Directive draft creates an issuer's duty to publish a semi-annual report, governed by the IAS. This semi-annual report must contain abbreviated financials, an update of the previous management report contained in the annual report, and the declaration by a competent body as to the accuracy of the facts contained within the semi-annual report.⁷⁷

3. *Quarterly Reporting Requirements*

The proposal that companies disclose particular financial information for the first and third quarter was recently introduced in Europe.⁷⁸ The fact that eight member states⁷⁹ have already

See International Accounting Standards Board, at <http://www.iasb.org.uk> (last visited Oct. 20, 2004).

⁷⁴ Commission Regulation 1606/2002/EC of 19 July 2002 Concerning the Application of International Accounting Standards, 2002 O.J. (L 243) 1. *Contra* Schön, *Editorial*, 166 ZHR 1 (2002); *WPg-Sonderheft 2001*, 74; Niehues, *WPg*, 1209 (2001); Ruhnke et al., 2 *StuB* 876 (2000).

⁷⁵ See Transparency Directive, *supra* note 14, arts. 4-5.

⁷⁶ See Sarbanes-Oxley Act, 15 U.S.C. § 409 (2003); Lanfermann & Maul, 54 DB 1725 (2002); Lanfermann & Maul, 55 DB 349 (2003).

⁷⁷ See Transparency Directive, *supra* note 14, art. 5.

⁷⁸ *Id.* art. 6. The government commission Corporate Governance (Baums-Commission) asks that all listed companies in terms of § 3 para. 2 AktG, whose

introduced such duties for all or particular regulated markets supports harmonization of the duty to report quarterly. In Germany, for example, several private law regulations provide for a duty to report quarterly that exceeds the legal duty to report annually.⁸⁰ Furthermore, introducing a community-wide uniform quarterly information duty will move towards harmonization with the U.S. provisions, which have required quarterly reporting since 1946.⁸¹

Yet, the introduction of a duty to produce a quarterly report is not without criticism.⁸² For example, Porsche AG left M-DAX because of high costs and the influence of seasonally specific influences on the data provided by the reports. By discriminating between Prime Standard and General Standard, the latter not providing for quarterly reports, it is up to the companies to decide which information duties and costs they deem appropriate. As the discrimination of the two market segments is quite straightforward, the investor would be sufficiently informed about the different levels of information available through either segment.⁸³

The European Commission has partially addressed these concerns by significantly reducing the extent of the publication duty. In contrast to the interim report duty, the quarterly reports do not have to be based on the IAS principles, instead, a scheduled listing of net yields and operating profit after tax is sufficient. In addition, information about the projected development of the issuer is voluntary.

securities are dealt with on a regulated market (§ 2 Abs. 5 WpHG), obligatorily publish quarter reports for the first three quarters of a financial year, Baums (ed.), *Bericht der Regierungskommission "Corporate Governance"* of July 10, 2001, BT-Drs. 14/7515, n. 270.

⁷⁹ These are Austria, Belgium, Spain, France, Finland, Greece, Italy, and Portugal.

⁸⁰ This applies to the (DAX-30 und M-DAX), Tec-DAX, SMAX and presents rules of the New Market. See § 2 digit 7.1 Regelwerk Neuer Markt. Hanft & Kretschmer, 45 AG 84 (2001); Baums, *Changing Patterns of Corporate Disclosure in Continental Europe: The Example of Germany*, Law Working Paper No.4, 7 (2002), available at http://papers.ssrn.com/paper.taf?abstract_id=345020 (last visited Oct. 20, 2004).

⁸¹ See Transparency Directive, *supra* note 14; see also Merkt & Göthel, 49 RIW 23 (2003).

⁸² See, e.g., SÜDDEUTSCHE ZEITUNG, Mar. 25, 2003, at 20.

⁸³ See also Merkt *Gutachten G für den 64. DJT*, 100 (2002).

4. *Disclosure Requirements for Changes in Important Shareholdings*

Sections 21 – 26 of the WpHG now require noted companies to disclose changes in important shareholdings,⁸⁴ thereby preventing the abuse of inside information.⁸⁵ Disclosure duties occur when certain shareholding thresholds are exceeded (i.e. 5%, 10%, 25%, 50%, 75%).⁸⁶ Pursuant to section 21, paragraph 1 of the WpHG, both the seller and the purchaser must inform the company and the BAFin of the transaction.⁸⁷ Moreover, the listed company, whose shares are traded, must publish this information in a national newspaper authorized by the stock exchanges.⁸⁸

At the EC level, the proposed Transparency Directive includes additional shareholding thresholds of 15%, 20%, and 30%. This is in response to several member states having introduced new thresholds along with the fact that only three member states have reached the transparency standards established by the EC.⁸⁹ Furthermore, the time limits within which the information has to be forwarded have been shortened under the Transparency Directive.

5. *Procedural Publication Requirements*

With respect to *ad hoc* publicity, member states can determine the publication modalities on a national level, pursuant to the still-valid provision of Article 102, paragraph 1 of the Capital Market Publicity Directive 2001/34/EC. This has led to an enormous variation of information channels so that, in several member states, information about the same issuer is not available from a particular source. This is in stark contrast with the EDGAR system used in the United States and the SOPHIE database introduced by the French COB supervisory agency, both of which provide easy and central access to all issuer information.⁹⁰ While

⁸⁴ WpHG, §§ 21-26.

⁸⁵ 2d FFG (concerning WpHG, § 21).

⁸⁶ *Id.*

⁸⁷ WpHG, § 21, para. 1.

⁸⁸ WpHG, § 25, para. 1.

⁸⁹ *Id.*

⁹⁰ *See supra* Part II.A.1.

the Market Abuse Directive only obliges the issuer to publish *ad hoc* communications, Article 18 of the proposed Transparency Directive goes a step further by requiring the respective supervisory bodies to create guidelines making all information relevant to the investors (as derived from the Prospect, Market Abuse, and Transparency Directives) accessible on an electronic platform. The long-term goal is to consolidate and enlarge these electronic platforms to create a community-wide platform for all European Capital Markets investors' information. So far, the BAFin does not offer a German system compatible with such a platform.⁹¹ By implementing a uniform platform, problems arising from information deficiencies would likely be remedied.⁹²

III. Failure to Disclose and False Disclosure - Private Law Liability Claims

A. European Law

1. Effective Sanctions

Often, European directives concerning capital markets law make no mention of sanctions.⁹³ In the cases where sanctions are referred to, it is only said that they are to be "appropriate"⁹⁴ and "sufficient to promote compliance"⁹⁵ with the respective provisions.⁹⁶ Article 14, paragraph 1 of the Market Abuse Directive now provides a more precise framework, obliging the

⁹¹ The information concerning the links to the *ad hoc* communications is incomplete as well. It lacks information on <http://www.n-tv.de> (last visited Oct. 20, 2004) and <http://www.vwd.de> (last visited Oct. 20, 2004), respectively.

⁹² See *supra* Part II.A.1.

⁹³ See, e.g., Stock Exchange Admissions Directive 79/279/EEC of Mar. 16, 1979, O.J. (L 66) 21; Stock Exchange Admissions Prospectus Directive 80/390/EEC of Mar. 17, 1980, O.J. (L 100) 1; Interim Reports Directive 82/121/EEC of Feb. 15, 1982, O.J. (L 48) 26; Art. 7-18 et se Issue Prospectus Directive 89/298/EEC of Apr. 17, 1989, O.J. (L 124) 8.

⁹⁴ See, e.g., art. 15 Shareholding Transparency Directive 88/627/EEC of December 17, 1988, O.J. (L 348) 62; Capital Market Publicity Directive, *supra* note 18, art. 97.

⁹⁵ Capital Market Publicity Directive, *supra* note 18, art. 97.

⁹⁶ Art. 13 Insider Directive 89/592/ECC of Nov. 13, 1989, O.J. (L 224) 30; Art. 16 of the Proposal of the European Parliament and of the Council concerning Take-over Bids [hereinafter Proposal for a Take-over Directive] of Oct. 2, 2002, EUR. PARL. DOC. (COM 534).

member states to impose administrative sanctions which are effective, proportionate, and dissuasive. But, the directive abandons private law sanctions as the EC lacks the necessary enforcement power.⁹⁷

2. *Private Law Liability*

By introducing the Product Liability Directive 85/374/ECC, the EC asserted its legislative power by introducing private law liability claims some twenty years ago.⁹⁸ Therefore, the argument that private law sanctions have been abandoned due to the EC's lack of legislative competence is not convincing.⁹⁹ The argument has been rendered even more unworkable due to the fact that the EC has proposed private law liability for false or misleading prospectuses.¹⁰⁰ Private law liability is even more comprehensively dealt with in the Transparency Directive. According to the Transparency Directive, member states must introduce a private law establishing personal liability if they fail to comply with their duties to publish annual, semi-annual, and quarterly reports.¹⁰¹ With respect to major shareholding transparency, the Transparency Directive proposal leaves it up to

⁹⁷ Market Abuse Directive, *supra* note 12, art. 14.

⁹⁸ See Product Liability Directive 85/374/EEC of July 25, 1985, O.J. (L 210) 29. To establish equal competition conditions and customers' protection member states resort to their own laws, regulations and administrative provisions concerning liability for defective products.

⁹⁹ Möllers, 14 ZBB 390, 396 – 397 (2003); see also Büche, *Die Neuregelung der Pflicht zur Ad hoc-Publizität im Zuge der Vollendung des Binnenmarktes für Finanzdienstleistungen*, Diss. Augsburg at 222 (2004).

¹⁰⁰ Capital Market Publicity Directive, *supra* note 18, art. 6, para. 2, states that: "Member States shall ensure that their laws, regulation and administrative provisions on civil liability applies to those persons responsible for the information given in a prospectus." *Id.* Crüwell, 47 AG 243, 252 (2003) (contending that this is a success of German efforts).

¹⁰¹ See Transparency Directive, *supra* note 14, art. 7

1. Member States shall ensure that responsibility for the information to be drawn up and to be made public in accordance with Articles 4, 5 and 6 lies with the issuer or its administrative, management or supervisory bodies. 2. Member States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information disclosed to the public in accordance with Articles 4, 5 and 6.

the member states to decide whether to introduce administrative or private law sanctions.¹⁰² In addition, private law liability for defective *ad hoc* communications is expected to be introduced in the recently amended Market Abuse Directive because the proposal for a Transparency Directive proposal does not expressly address *ad hoc* publicity.¹⁰³

B. Foundations of Liability

1. The Legal Nature of Capital Market Information

Due to the limited number of European company defaults, the foundations of liability for defective capital market information are poorly secured and, in some cases, highly controversial. In addition, there is some dispute as to whether liability should be grounded in tort or contract law.

a) Stock Exchange Prospectuses and Take-Over Bids

The question of whether claims based on violations of capital market information duties are based on tort law or whether they constitute a breach of contract has not yet been examined comprehensively. The precept that strict liability, according to contractual principle, requires a contractual obligation was eroded early on in German law by the recognition of *culpa in contrahendo*.¹⁰⁴ Later, this newly introduced liability in quasi-contractual relations was gradually expanded by recognizing contracts with protective effects toward third persons (Vertrag mit Schutzwirkung zugunsten Dritter), solicitor liability (Sachwalterhaftung), and general private-law prospectus liability. These were eventually codified in section 311, paragraphs 2 and 3 of the BGB.

The legal situation remains unclear with respect to stock exchange liability. Arguments have been made that liability is based on both tort and contract law.¹⁰⁵ The legal situation is more

¹⁰² See *id.* art. 24, para. 1.

¹⁰³ See *id.* no. 5.3.4.

¹⁰⁴ Cf. RG of Apr. 26, 1912, 11 JW 743 Nr. 5 (1912).

¹⁰⁵ If one accepts the tort law approach, then there is a discrepancy to the jurisprudence of the BGH as to the general private law prospectus liability. According to the BGH, it is derived from a liability for general reliance, therefore it is regarded as an

clear regarding liability for defective bidding documents pursuant to section 12 of the WpÜG. Contractual obligations arise from the publication of the bidder's offer; these obligations include information duties for those responsible for the bid. For example, the duty to inform exhaustively and correctly pursuant to section 11, paragraph 1, subsection 3 of the WpÜG. Therefore, this is unambiguously a case of liability for a violation of pre-contractual duties. Nevertheless, the damages provision of section 12 of the WpÜG does not require proof of personal reliance on the part of the injured party¹⁰⁶ because such reliance regularly does not exist. Instead, the legislature deems it sufficient that the bidding documents typically promote reliance.

b) Ad hoc Communications and Periodical Communications

The rationale for general contractual reliance does not fit smoothly with *ad hoc* communications, because securities law is primarily directed towards the sale and acquisition of securities. Accordingly, one cannot ignore the fact that information duties pursuant to section 15 of the WpHG may be of a different nature than those imposed under securities disclosure requirements. As the obligatory prospectus is associated with a placement of securities, it follows that, at least in part, this prospectus also functions to boost sales of securities. This association does not exist with the recently introduced liability for defective *ad hoc* communications pursuant to sections 37b and 37c of the WpHG. The circle of persons entitled to bring a claim is restricted to those who actually enter into a security transaction with the shares at issue. This limitation on potential claimants would not be logical

enhancement of *culpa in contrahendo*. See BGH of Apr. 24, 1978, 71 BGHZ 284, 287 (1978); BGH of Nov. 16, 1978, 72 BGHZ 382, 387 (1978); BGH of May 22, 1980, 77 BGHZ 172, 175 (1980); BGH of Oct. 6, 1980, 79 BGHZ 337, 341 (1980); ASSMANN & SCHÜTZE, HANDBUCH DES KAPITALANLAGERECHTS § 7 n. 20 (2d ed. 1997); SCHÄFER, WPHG, BÖRSG, VERKPROSPG §§ 45, 46 (BörsG previous version n. 23) (1997); GERKE & STEINER, HANDWÖRTERBUCH DES BANK- UND FINANZWESENS 1736 (3d ed. 2001); GROß, KAPITALMARKTRECHT §§ 45, 46 (BörsG n. 4) (2d ed. 2002); EBENROTH ET AL., HGB, BankR IX, n. 170 (2001); SCHWARK, BÖRSG, §§ 45, 46 n. 2 (2d ed. 1994); VORTMANN, PROSPEKTHAFTUNG UND ANLAGEBERATUNG § 1 n. 72 (2002). Admittedly, it is of little practical importance to discuss the legal nature of liability. See SCHWARK, *supra* §§ 45, 46 n.4.

¹⁰⁶ See KÖLNER KOMMENTAR Z. WPÜG, § 12 n. 4 (2002).

unless liability is based on the existence of a quasi-contractual relationship, such as the one that exists between the parties to a securities instrument. An argument against qualifying sections 37 and 37c of the WpHG as provisions belonging to the quasi-contractual sphere is the fact that the legislature of the second FFG sought to construct section 15 of the WpHG as a purely public law provision.¹⁰⁷

The approach taken in proceeding from one valuation of similarity to a further valuation of similarity, and thereby positing a quasi-contractual liability for *ad hoc* communications, contradicts the strict distinction between tort and contractual liability in German law. It should, therefore, be rejected.¹⁰⁸ Sections 37b and 37c of the WpHG are thus tort provisions.¹⁰⁹

2. A Comparative Look at Liability

A comparative law analysis supports the above position that sections 37b and 37c of the WpHG are tort provisions. In England, the common law torts of deceit and negligence are discussed with respect to damages related to the publication of defective *ad hoc* communications.¹¹⁰ In France, according to numerous proceedings, the general tort clause of section 1382 of the Civil Code was held applicable to violations of *ad hoc* duties.¹¹¹ Similarly, in Italy and Switzerland, the general tort

¹⁰⁷ See Resolution Recommendation and Report of the Financial Committee of June 15, 1994, BT-Drs. 12/7918, 102 [hereinafter Resolution Recommendation].

¹⁰⁸ See Barnert, 47 WM 1473, 1483 (2002); Maier-Reimer & Webering, 47 WM 1857, 1863 (2002).

¹⁰⁹ See KÖNDGEN, *supra* note 24, at 805 (concurring as to Swiss law and depicting *ad hoc* publicity as a "capital market-related duty"). *But see* KALSS, ANLEGERINTERESSEN 325 (2001); 48 ÖBA 641, 655 (2000) (dissenting as to Austrian law).

¹¹⁰ See ALCOCK, THE FINANCIAL SERVICES AND MARKETS ACT 2000 212 (2000); WILLIAM G. HORTON & GERHARD WEGEN, LITIGATION ISSUES IN THE DISTRIBUTION OF SECURITIES: AN INTERNATIONAL PERSPECTIVE 288 (1997); THORNE & PRENTICE, BUTTERWORTHS COMPANY LAW GUIDE 325 (4th ed. 2002); BLAIR, BLACKSTONE'S GUIDE TO THE FINANCIAL SERVICES & MARKETS ACT OF 2000 149 (2001).

¹¹¹ See CA Paris 15 Jan. 1992, file no. Pal. 23 Apr. 1992, 293, note Marchi; Cass. crim. 15 Mar. 1993, Bull. crim. n° 113, s. 280; Bull. Joly Bourse 1993, 365, note Jeantin; CA Paris 18 Dec. 1995, Banque et droit n° 48, July-Aug. 1996, 35, chron. Peltier/de Vauplane; CA Paris 30 Apr. 1997, Reof sc. crim. janvier-mars 1999, 129, note Riffault; T. corr. Paris, 17 Dec. 1997, Bull. Joly Bourse 1998, 121, note Lesguillier; T. corr. Paris, 27 février 1998, RTD com. July-Sept. 1998, 640, note Rontchevsky; CA Paris, 8 Oct.

provisions of Article 2043 of the *codice civile*¹¹² and Article 41 of the OR,¹¹³ or liability for reliance,¹¹⁴ respectively, are held applicable. In Austria, tort claims are allowed for violations of a protective law pursuant to section 1311 of the AGBG in connection with section 82, paragraph 6 of the BörseG.¹¹⁵ In Greece, proceedings were based upon the protective law Article 34, paragraph 2 of the law 3632/1928 in connection with Article 914 of the AK (Civil Code).¹¹⁶ Finally, in the United States, private rights of action are permitted under Rule 10b-5 of the Securities and Exchange Act so long as there is evidence of misrepresentation and manipulation of share prices.¹¹⁷

1999 RD bancaire et financier janvier-février 2000, 34. Cass. crim. 15 May 1997, D. affaires 1997, 924. See also Fleischer/Jänig, 48 RIW 729 et seq. (2002).

¹¹² See Sfameni, Commento all'art. 116, in: Marchetti & Bianchi (a cura diti), *La disciplina delle società quotate nel testo unico della finanza*, D.lgs. Feb. 24, 1999, 509 n. 58. Art. 2043 cc, available at <http://www.studiocelestano.it/codici/cc>.

¹¹³ See HSU, *AD HOC-PUBLIZITÄT* 271 (2000).

¹¹⁴ See FESTSCHRIFT CHAPIUS 143 (1998); Köndgen, *supra* note 24, at 802. These appropriately stress that the foundations of liability are only discussed and that there is a factual lack of sanctions in Switzerland.

¹¹⁵ See HAUSMANINGER, *INSIDER TRADING* 408 (1997).

¹¹⁶ LG Athen 10370/1997, ΕΕμπΔ 1998, S.296 = ΔΕΕ 1998, S.284.

¹¹⁷ Rule 10b-5 reads:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or any facility of any natural securities exchanges,

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

See HAZEN, *supra* note 47, at 569; STEINHÄUER, *INSIDERHANDELSVERBOT UND AD HOC PUBLIZITÄT* 149 (1999); RIMBECK, *RECHTSFOLGEN FEHLERHAFTER AD HOC-MITTEILUNGEN IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT* (2004). See *infra* notes 222 & 253 (noting jurisprudence).

C. Problems of Terminology

1. Defective *Ad hoc* Communications

a) The Recently Introduced Sections 37b and 37c of the WpHG

For the first time, by way of the fourth FFG of July 1, 2002, the German legislature created special liability provisions for omitted or defective *ad hoc* communications.¹¹⁸ In contrast, as shown above, there are no special provisions creating liability for defective *ad hoc* communications in other developed countries. Under German law, damages can be claimed under section 37c of the WpHG for defective *ad hoc* communications and under section 37b for omitted *ad hoc* communications. As with stock exchange prospectus liability (section 44 of the Börsengesetz, Stock Exchange Act), cases of false information are covered by section 37c of the WpHG.¹¹⁹

In France, all adjudicated cases that granted damages to the investors on the basis of incorrect *ad hoc* communications involved felony misinformation to the public.¹²⁰ Since both elements existed at the same time, the element “unlawful act” (“faute”) in Article 1382cc was also satisfied.¹²¹

b) General Tort Law

Sections 37b and 37c of the WpHG are directed only towards the company, and not towards the individual directors on the executive board. Therefore, in order to sue the individual

¹¹⁸ WpHG, §§ 37b-c.

¹¹⁹ In the past, *ad hoc* communication has often been abused by inserting advertising statements and euphemistic communications. The inadmissibility of such measures had already been determined by the Federal Supervisory Agency for Securities Transactions (BAWe). According to the amended version of section 15, para. 1, sec. 2 of the WpHG by the 4th FFG, the codes used in an *ad hoc* communication are to be conventional. Section 3 requires that other information which evidently does not fulfil the requirements of section 1 must not be published nor be placed in connection with information subject to publication. Section 15, para.1, sec. 4 of the WpHG also demands a correction of the defective *ad hoc* communication.

¹²⁰ Art. L 465-1 al. 3 C. monét. fin.

¹²¹ See T. corr. Paris, 27 février 1998, RTD com. juillet-septembre 1998, 640, note Rontchevsky.

directors, one will have to continue to resort to other bases of liability such as general tort law.¹²² In recent years, German courts have been looking to section 826 of the BGB to determine the basis for liability.¹²³ Defective *ad hoc* communications best fit into the classifications of deliberate incorrect information and careless misinformation to third parties.¹²⁴

As the BGH recently stated, an omission only violates morality if the demanded act constitutes a moral imperative, thereby “requir[ing] special circumstances that render the damaging action immoral according to general business conduct due to its purpose, the used means or with regard to the shown intentions.”¹²⁵ Thus, the disclosure requirements are stricter under section 37b of the WpHG than under the BGB. For example, it would constitute immoral conduct if a company’s board knew a relevant negative fact but failed to publish it in order to avoid any negative impact on the company’s share price.¹²⁶ Reciprocally, this also applies to cases in which a board does not publish a fact having potential positive influence on the share price, in order to sell their own shares cheaply. In these cases, insider information is used for the personal benefit of the board of directors¹²⁷ at the expense of, and

¹²² Prior to the introduction of the provision July 1, 2002, the injured could only invoke the general tort provisions. See Graf Lambsdorff, 18 Vur 207 (2003) n. 3000-3500 (noting the injured parties whose cases will still be decided on the basis of the former law).

¹²³ See *supra* notes 2 & 6.

¹²⁴ See Möllers & Leisch, 46 WM 1648 (2001); Krause, 31 ZGR 799, 820 (2002); concurring Rössner & Bolkert, 23 ZIP 1471, 1476 (2002), Abram, 14 ZBB 41, 48 (2003). In the *Infomatec* case, the OLG Munich expressly confirmed several actual and legal requirements and thereby widely concurred with the LG Augsburg. See OLG Munich of Oct. 1, 2002, 23 ZIP 1989 (2002) at I.1.b) – *Infomatec II*.

¹²⁵ BGH of July 10, 2001, 54 NJW 3702 (2001) (citing immoral damages and omission).

¹²⁶ See Handelsblatt of April 17, 2001 and SunburstKlage@Yahoo.de (showing the accusation against the persons in charge of Sunburst Merchandising AG). See Memorandum from the Public Prosecutor (Mar. 1, 2001), file no. 940 Js 9788/01 (showing the accusation against the persons in charge of Met@box AG). Due to inadmissible insider dealings, Augsburg public prosecutors brought an action against the board of CPU Softwarehouse AG.

¹²⁷ This also applies to stock option schemes for the benefit of the boards, which are linked to a particular boost of the share price. See, for example, the stock option scheme mentioned in OLG Stuttgart of June 13, 2001, 47 WM 1060 (2002). See BGH of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004); BGH of July 19, 2004, II ZR 218/03, 25

by deceiving, the investors.¹²⁸ Additionally, it is considered unethical for a person to intentionally influence investors in an unfair manner by publishing grossly incorrect *ad hoc* communications.¹²⁹

Legal scholars have argued that ignorance of the duty to disclose is both unethical and a basis for negligence, even though there is no knowledge of the facts.¹³⁰ Yet the BGH's comments¹³¹ point to the conclusion that it deems knowledge of the general duty of publication, with respect to the relevant facts, necessary.¹³² Furthermore, it has to be obvious that the facts need to be published. This is the case if the business is particularly risky.¹³³

It is still not clear under what conditions violations of duties under the securities law constitute a violation of the protective law in terms of section 823, paragraph 2 of Bürgerliches Gesetzbuch, (BGB or German Civil Code). A provision classified as a protective law must not only aim at protecting the general public, but also at protecting individual parties. According to the jurisprudence, it is sufficient if the legislature strove to protect individuals, even if protecting the general interest was clearly the primary goal.¹³⁴ Securities law primarily aims at providing information for transactions by mandating market transparency and equal treatment of investors as well as the overall protection

ZIP 1599 (2004); BGH of July 19, 2004, II ZR 217/02, 25 ZIP 1604 (2004); Möllers & Leisch, *supra* note 124, at 1652; Fuchs & Dühn, 2 BKR 799, 821 (2002).

¹²⁸ See Krause, 31 ZGR 799, 824 (2002).

¹²⁹ See BGH of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004); BGH of July 19, 2004, II ZR 218/03, 25 ZIP 1599 (2004); BGH of July 19, 2004, II ZR 217/02, 25 ZIP 1604 (2004); Möllers & Leisch, *supra* note 124; Fuchs & Dühn, *supra* note 127.

¹³⁰ See SOERGEL, BGB § 826 n. 62 (12th ed. 1998); MÜNCHKOMM, BGB § 826 n. 49 (3d ed. 1997) (citing action toward a contracting party). Even further, according to Mertens, simple negligence is to suffice in cases of a legal error about a legal duty of disclosure.

¹³¹ See BGH of July 7, 2001, 54 NJW 3702, 3702 (2001).

¹³² Cf. LG Hanau of Mar. 14, 1996, 41 WM 540, 1544 (1996). In the facts on which the reasoning is based, the bank refrained from informing a non-customer about suspicious facts regarding the business partner. The latter kept an account with the bank, through which the fraudulent businesses were executed.

¹³³ See *FS Ulmer*, 817, 820 (2003). Due to the business risk, the Bundesgerichtshof has developed high standards for duties of information with commodity future options and future options in general.

¹³⁴ See BGH, 40 BGHZ 306.

of market integrity.¹³⁵ Because freedom of decision and the estate of the investors are the main focus, the question as to whether securities law provisions are apt to be protective laws depends upon whether or not they are aimed at individual protections. Then the question is whether the respective provision can be considered a supplementation and aggregation of section 826 of the BGB, and if a damage claim fits into the general liability scheme. Section 15 of the WpHG, sections 263 and 264a of the Strafgesetzbuch (StGB or Penal Code), section 331 of the Handelsgesetzbuch (HGB or Commercial Code), section 400 of the Aktiengesetz (AktG or Stock Companies Act), former section 88 of the BörsG, as well as section 20a of the WpHG, in connection with sections 38 paragraph 1, number 4 and 39 paragraph 1, numbers 1 and 2 of the WpHG are being discussed as protective laws. Of these, the most relevant to the discussion of *ad hoc* publicity is the former section 88 of the BörsG and its successor provision, section 20a of the WpHG.

In perspective, in both the United States¹³⁶ and Austria, the protective law character of their comparable statutory provisions has been expressly affirmed.¹³⁷ The BGH has confirmed section 264a of the StGB and section 400 of the AktG as being protective laws, but has yet to classify section 88 of the BörsG as a protective law.¹³⁸

2. Damages

a) Liability for Registration Statements

As for liability for false or misleading registration statements, the German legislature clearly stated that the issuer has to take back the shares and reimburse the investor the initial price.¹³⁹

¹³⁵ Cf. FLEISCHER, GUTACHTEN F ZUM 64. DJT 25 (2002).

¹³⁶ An infringement can result in a claim for damages if the violated legal right at least partly serves individual protection and if the injured party belongs to the protected group. See *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 513 (E.D. Pa. 1946).

¹³⁷ See HAUSMANINGER, *supra* note 115.

¹³⁸ BGH of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004) = 49 WM 1721 (2004); BGH of July 19, 2004, II ZR 218/03, 25 ZIP 1599 (2004) = 57 NJW 2664 (2004); BGH of July 19, 2004, II ZR 217/02, 25 ZIP 1604 (2004) = 49 WM 1726 (2004) = 57 NJW 2668 (2004). Cf. Leisch, in *AD HOC-PUBLIZITÄT*, *supra* note 2, § 16 n.15.

¹³⁹ BörsG, § 44, para. 1, s. 1.

b) *Violations of Ad hoc Publicity*

A similar rule, however, cannot be found in the newly-introduced sections 37b and 37c of the WpHG. The answer to the inextricably linked questions, which damages must be compensated and which standard is to be applied in the causation analysis, depends on which interests sections 37b and 37c of the WpHG intend to protect.¹⁴⁰ Both the negative (rescission) and so-called alternative interests (out-of-pocket) have to be considered. In the cases regulated by statutes, the negative interest refers to the situation one would be in if the claimant had not relied on the validity of the contract or the authorization to represent the contractual partner.¹⁴¹ In this case, the contract would not have been closed and the performance of the contractual duties would not have taken place. As a consequence, the injured party would then have the right to demand that the contract be rescinded.

In Germany, this form of damages is called "natural restitution," according to section 249, paragraph 1 of the BGB, and its applicability does not depend on a suffered pecuniary loss.¹⁴² The possibility of natural restitution is unclear in the area of liability for incorrect securities information disclosure. Since the tortfeasor is not a contractual partner, it is argued by some that natural restitution is not possible. Otherwise, the tortfeasor would be forced to take over an investment which they never possessed.¹⁴³ This argument is based on the narrow conception of restitution in section 249, paragraph 1 of the BGB. First, the purpose of tort law is to put the injured party in the position that he would have occupied if the tortfeasor had not violated his duties. It cannot be argued that the tortfeasor must also be put in the situation that he would have been in had he not violated his duties.

¹⁴⁰ For the following in detail, see Möllers & Leisch, *supra* note 2, § 14 n. 77.

¹⁴¹ BGB §§ 122 & 179.

¹⁴² Möllers & Leisch, *supra* note 124, at 1655. See also FLEISCHER, INFORMATIONENASYMMETRIE IM VERTRAGSRECHT: EINE RECHTSVERGLEICHENDE UND INTERDISZIPLINÄRE ABHANDLUNG ZU REICHWEITE UND GRENZEN VERTRAGSSCHLUSSBEZOGENER AUFLÄRUNGSPFLICHTEN 440 (2001); 200 AcP 91 (2000); Roland Schwarze, VORVERTRAGLICHE VERSTÄNDIGUNGSPFLICHTEN 86 (2001); STEPHAN LORENZ & THOMAS RIEHM, LEHRBUCH ZUM NEUEN SCHULDRECHT 372 (2002); ANWKOM-BGB/KREBS, § 311 n. 27 (2002); Fleischer, 56 BB 1869, 1870 (2002); Cf. STEFAN GEIBEL, DER KAPITALANLEGGERSCHADEN 90 (2002).

¹⁴³ Geibel, *supra* note 142, at 110; Fuchs & Dühn, *supra* note 5, at 1068.

This is not the purpose of section 249, paragraph 1 of the BGB.

It is also argued that the decision for making an investment stems from the investor, and he must consequently bear the risk of not being able to make use of this investment. This is not very convincing, however, because the claim for the negative interest is based on the assumption that the injured party would not have invested had the information been correct. The risk of not being able to make use of the investment is the result of the violation of the duties of disclosure and must be borne by the tortfeasor.¹⁴⁴ It is therefore correct to adhere to the long-held jurisprudence of the BGH to allow natural restitution in these cases.¹⁴⁵ Regarding section 826 of the BGB, the BGH has recently subscribed to the legal scholars' view¹⁴⁶ that, with regard to incorrect *ad hoc* communications, the negative interest can be claimed.¹⁴⁷

The negative interest cannot be claimed if the plaintiff fails to establish causation between his purchase decision and the incorrect *ad hoc* communication. This typically requires some temporal relationship, such as a purchase occurring within nine months after the dissemination of the incorrect *ad hoc* communication.¹⁴⁸ Yet the BGH does not need to address a possible out-of-pocket loss if the plaintiff does not bring anything forward with respect to causation.

In cases where the reversal of the transaction is inappropriate, the courts grant monetary compensation. The amount of damages depends on how much the buyer, relying on the incorrect information, paid over the actual value of the stock.¹⁴⁹ The same is true if the buyer is able to prove that, with the correct information, he would have entered into the contract under different

¹⁴⁴ Franz Clemens Leisch, 58 JZ 945, 946 (2003).

¹⁴⁵ Cf. BGH of June 27, 1984, 37 NJW 2524 (1984); BGH of June 17, 1991, 36 WM 1543, 1545 (1991); BGH of Dec. 12, 1991, 45 NJW 1223 (1992); BGH of July 5, 1993, 46 NJW 2865 (1993); Cf. Möllers & Leisch, *supra* note 2, § 14 n.112. See Veil, 32 ZGR 365 (2003).

¹⁴⁶ Möllers & Leisch, *supra* note 124, at 1655.

¹⁴⁷ BGH of July 19, 2004, II ZR 402/02, ZIP 2004, 1593 = WM 2004, 1721; BGH of July 19, 2004, II ZR 218/03, ZIP 2004, 1599 = NJW 2004, 2664; BGH of July 19, 2004, II ZR 217/02, ZIP 2004, 1604.

¹⁴⁸ BGH of July 19, 2004, II ZR 218/03, ZIP 2004, 1599 = NJW 2004, 2664.

¹⁴⁹ Cf. BGH of May 25, 1977, 22 WM 999, 1001 (1977).

conditions.¹⁵⁰ But this is no longer the negative interest, because the buyer is not in a situation where he would have avoided entering into a contract. Rather, the injured party is put into the position he would have been in had he entered into a different contract. The paradigm for this is the abatement of the purchase price according to section 441 of the BGB in the case of defects in purchased goods. Since this form of damages protects the interest in a contract that has not actually been entered into, it could be called alternative interest.¹⁵¹ For sections 37b and 37c of the WpHG, the alternative interest consists of either the amount the investor overpaid for the security, or the amount he has sold it for at less than fair value as a result of the faulty information. The important peculiarity for the causal link is the fact that the price is not negotiated but rather a result of the mechanism of the capital markets.

Which damages have to be compensated is a topic of heated debate in the literature. At the moment, three distinct views can be discerned. One view holds that sections 37b and 37c of the WpHG grant the investor the right to be put in the position he would have occupied had he not entered into the securities transaction (negative interest – damages resulting from entering into the contract).¹⁵² A second view contends that sections 37b and 37c of the WpHG rule out the negative interest, so that only the alternative interest can be claimed.¹⁵³ Finally, some argue that sections 37b and 37c of the WpHG institute a priority of the alternative interest.¹⁵⁴

¹⁵⁰ Cf. BGH of June 24, 1998, 51 NJW 2900 (1998); S. Lorenz, 52 NJW 1001 (1999).

¹⁵¹ Cf. GEIBEL, *supra* note 142, at 28, 129, 203 (describing this interest as “the positive interest in a hypothetically more advantageous contract”).

¹⁵² Alternatively, the investor is able to demand the amount that he has paid too much for the security (i.e., alternative interest – damage resulting from paying an incorrect price), cf. Rössner & Bolkart, *supra* note 124, at 1475.

¹⁵³ Maier-Reimer & Webering, *supra* note 108, at 1860. For a more cautious account, see Hutter & Leppert, *supra* note 63, at 655.

¹⁵⁴ In exceptional cases, restitution can still be granted. See Fuchs & Dühn, *supra* note 5, at 1068; Baums, 167 ZHR 139, 185 (2003). A final opinion seeks to deny natural restitution, but it defines the damage resulting from an incorrect price in a way that is neither the alternative nor the negative interest. See S. Reichert & Weller, 34 ZRP 49, 55 (2002). For a more cautious account, see Grobmann & Nikoleyczik, 54 DB 2031, 2035 (2002) and GEHRT, DIE NEUE AD HOC-PUBLIZITÄT NACH § 15 WpHG 205 (1997).

An analysis of the wording and the legal history of sections 37b and 37c of the WpHG, as well as the systematic arguments seconded by the protective aim of section 15 WpHG, indicate a straightforward solution. The investor's rational decision and his assets are protected. Therefore, sections 37b and 37c of the WpHG principally grant the negative interest, so that the damages resulting from entering into the contract have to be compensated.¹⁵⁵ Nevertheless, these provisions are also subject to a claim for damages resulting from an incorrect price, the alternative interest. The calculation of the alternative interest is a highly contentious issue. One view seeks to compare the market price of the share on the day when the *ad hoc* statement should have been publicized with the market price on the day when the facts actually became known.¹⁵⁶ Another view holds that the actual price paid has to be compared with the real price of the security on the very same day.¹⁵⁷ The second method of calculating the damages is the only one contemplated by section 249, paragraph 1 of the BGB. The problem then arises as to which point in time is relevant — the time when the damage was caused or the time when the damage is being compensated?

In general, the claimant may choose between the damage resulting from entering into the contract and the damage resulting from an incorrect price. This choice between remedies is in line with other jurisdictions. For example, the United States allows for these two methods of calculating the damages (rescission¹⁵⁸ and the out-of-pocket loss).¹⁵⁹ Out-of-pocket loss is defined as the difference between the actual price and the hypothetical price had

¹⁵⁵ For detailed discussion, see Thomas Möllers & Franz Leisch, 2 BKR 1071 (2002).

¹⁵⁶ Reichert & Weller, *supra* note 154.

¹⁵⁷ Fleischer, 56 BB 1869, 1872 (2002); Maier-Reimer & Webering, *supra* note 108, at 1861.

¹⁵⁸ *Randall v. Loftsgaarden*, 478 U.S. 647, 662 (1986); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 554 (5th Cir. 1981); *Glick v. Campagna*, 613 F.2d 31, 36 (3d Cir. 1979); *Baumel v. Rosen*, 412 F.2d 571, 574 (4th Cir. 1969).

¹⁵⁹ JAMES D. COX ET AL., SECURITIES REGULATION 791 (2001); *Glick*, 613 F.2d at 31; *Reves v. Ernst & Young*, 937 F. Supp. 834, 836 (W.D. Ark. 1996); *Western Federal Corp. v. Davis*, 553 F. Supp. 818 (D. Ariz. 1982). For a comprehensive analyses of U.S. case law on the topic, see RIMBECK, RECHTSFOLGEN FEHLERHAFTER AD HOC-MITTEILUNGEN IM DEUTSCHEN UND US-AMERIKANISCHEN RECHT (2004); see also *supra* note 117 and the sources cited therein.

the incorrect *ad hoc* communication not been made.¹⁶⁰

The French *Cour de Cassation*, in its jurisdiction, favors the damage resulting from an incorrect price.¹⁶¹ To address the problem of market risks,¹⁶² there are several instruments that allow for consideration of an individual case and its facts. The wording of sections 37b and 37c of the WpHG already includes the necessary requirements to counteract this risk effectively. Apart from the restriction on those who are able to sue, the test of causation is of particular importance, depending on which damages are claimed.

In cases of incorrect information regarding securities, a claim based on section 826 of the BGB requires the claimant to have suffered pecuniary loss,¹⁶³ but the claim nevertheless covers the negative interest. Again, the claimant may choose between the negative and the alternative interest.

¹⁶⁰ As for the approach in American law, see *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 155 (1972); *In re Executive Telecard Sec. Litig.*, 979 F. Supp. 1021, 1025 (2d Cir. 1997); *Mayer v. Mylod*, 988 F.2d 635 (6th Cir. 1993); *Fry v. UAL Corp.*, 136 F.R.D. 626 (7th Cir. 1991); *Backman v. Polaroid Corp.*, 893 F.2d 1405 (1st Cir. 1990); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1344 (9th Cir. 1976); *Harris v. American Inv. Co.*, 523 F.2d 220 (8th Cir. 1975); *Blackie v. Barrack*, 524 F.2d 891 (9th Cir. 1975); Ronald B. Lee, *The Measure of Damages Under Section 10(b) and Rule 10b-5* 46 MD. L. REV. 1266 (1987); Robert B. Thompson, "Simplicity and Certainty" in *the Measure of Recovery Under Rule 10b-5*, 51 BUS. LAW. 1177 (1996); See HAZEN, *supra* note 47, at 420.

¹⁶¹ In a judgment of April 30, 1997, it granted damages to investors that had bought their shares prior to the publication of the incorrect statements and had decided to keep these shares because of these incorrect statements. The *Cour d'appel* measured the damages as the difference between the price of the shares at the time of the first incorrect statement on June 29, 1989 and the price of the shares when the insolvency proceedings were started on June 25, 1990. CA Paris 30 Avril 1997, Rev. sc. crim. janvier-mars 1999, 129, comment by Riffault. These rulings yielded assent in the literature, have become the dominant opinion, and have been upheld by the Tribunal correctionnel de Paris, T. corr. Paris, 17 décembre 1997, Bull. Joly Bourse 1998, 121, comment by Lesguillier; T. corr. Paris, 27 février 1998, RTD com. juillet-septembre 1998, 640, comment by Rontchevsky.

¹⁶² Cf. Fleischer, *supra* note 157, at 1871. It remains to be seen whether new norms will be abused as way to get rid of an annoying contract. But the courts' decisions on the old law make this highly improbable.

¹⁶³ Möllers & Leisch, *Ad hoc-Publizität*, *supra* note 2, at 36.

3. Causation

a) *Liability for Registration Statements and Take-over Bids*

The burden of proof has been shifted to favor the claimant in cases of liability for registration statements pursuant to section 45, paragraph 2, number 1 of the BörsG.¹⁶⁴ For a possible liability claim, the plaintiff does not have to prove that the incorrect information caused him to purchase the securities; rather causation is presumed.¹⁶⁵ The burden of proof is also shifted for incorrect statements in take-over bids according to section 12, paragraph 3, number 1 of the WpÜG. As for liability claims, the claimant does not have to prove that he actually relied on the incorrect statements when he accepted the bid.¹⁶⁶

b) *Liability for Ad hoc Statements*

In general tort law and under sections 37b and 37c of the WpHG, the legislature did not introduce a shift of the burden of proof in favor of the claimant. Whether the purchaser made his decision as a result of an incorrect fact or the omission of a fact is a question of causation and must principally be stated and proven by the claimant.¹⁶⁷ The subjective nature of this required element of the claim can be difficult to prove.¹⁶⁸ For a claim based on

¹⁶⁴ 3d FFG, Official Legislative Documents, BT-Drucks. 13/8933, 76 = BR-Drucks. 605/97, 76.

¹⁶⁵ Prior to the shifting of the burden of proof in the course of the 3d FFG, the courts had already reached a similar result by using the institute of the "Anlagestimmung": The published prospectus creates a certain "Anlagestimmung" (a general attitude towards a certain security) that allows an assumption that the incorrect prospectus was the reason for the investor to buy the shares. S. RG of Oct. 11, 1912, 80 RGZ 196, 204; BGH of July 12, 1982, 27 WM 867 (1982); BGH of July 14, 1998, 19 ZIP 1528, 1531 (1998), *cf.* EWIR 835 (1998) (Koller); OLG Düsseldorf of April 5, 1984, 29 WM 586, 596 (1984); OLG Frankfurt of March 27, 1996, 17 ZIP1037, 1038 (1996); BGH of July 14, 1998, 139 BGHZ 225, 233; ASSMANN & SCHÜTZE, *supra* note 105, § 7, n.213; Hamann, *in* WERTPAPIERHANDELSGESETZ, BÖRSENGESETZ, VERKAUFSPROSPEKTGESETZ ex-§§ 45, 46 BörsG n.65 (Frank Schäfer et al. ed., 1999).

¹⁶⁶ For more detail, see Möllers, KK-WpÜG, § 12 n. 109 (2003).

¹⁶⁷ *Cf.* BGH, 36 WM 1543, 1545 (1991); BGH, 13 ZIP 1561, 1562 (1992); BGH, 14 ZIP 1467, 1470 (1993).

¹⁶⁸ In the *Infomatec* case, the claimant was able to convince the court that he had bought the shares because of the incorrect information, thus the causation for the

section 826 of the BGB, the literature has proposed resorting to the institution of “Anlagestimmung” (a general attitude towards a security created by a publication).¹⁶⁹ Section 45, paragraph 2, number 4 of the BörsG supports the conclusion that the legislature consider both *ad hoc* statements and registration statements, and the company’s report as equal in their influence on the investor. Those responsible for registration statements escape liability if the incorrect information is corrected in an *ad hoc* statement according to section 15 of the WpHG. The possibility of adjusting errors in the registration statements with an *ad hoc* statement would be inexplicable if the legislature had assumed that an *ad hoc* statement was not apt to influence the general attitude towards a security.¹⁷⁰ The investor does not have to know the precise nature of the incorrect information. The reasoning that the incorrect information changes the price of a security and causes the investor to buy or sell his securities is sufficient.¹⁷¹

In other legal systems, courts have dispensed with the direct causation requirement. The French courts have lowered the requirements for the test of causation and they have awarded damages to investors after they bought shares because of incorrect *ad hoc* statements.¹⁷² In the United States the fraud-on-the-market theory is applied. This theory lays down the rebuttable presumption that, in an open and developed capital market, the price of a security is determined by the essential available information concerning the company and the development of the business. Incorrect publications, therefore, deceive the investor

transaction was proved. Cf. LG Augsburg, 46 WM 1944 (2001); OLG München, 23 ZIP 1989 (2002).

¹⁶⁹ See Möllers & Leisch, *supra* note 124; see also Rössner & Bolkart, 23 ZIP 1471, 1476 (2002); Abram, 14 ZBB 41, 50 (2003); FLEISCHER, *supra* note 135, at 102; Fleischer & Kals, 46 AG 329, 333 (2002); LG Frankfurt on the Main, No. 3-7 0 43/02 (Apr. 28, 2003); LG Frankfurt on the Main No. 3-7 0 47/02 (Apr. 28, 2003). *But see* OLG München, 23 ZIP 1727, 1728 (2002), (reasoning that not every *ad hoc* statement is able to create a “Anlagestimmung”); Rieckers, 56 BB 1213, 1219 (2002).

¹⁷⁰ See Möllers & Leisch, *supra* note 124, at 1658 (2001); Rössner & Bolkart, 23 ZIP 1471, 1476 (2002).

¹⁷¹ Baums, 167 ZHR 139, 181 (2003), (giving further references to information efficiency of capital markets); RICHARD A. BREALEY & STEWART C. MYERS, *PRINCIPLES OF CORPORATE FINANCE* 364 (7th ed. 2003).

¹⁷² T. corr. Paris, 27 février 1998, RTD com. juillet-septembre 1998, 640, note Rontchevsky.

even if they did not actually rely on the incorrect information. The causation requirement for the investor's decision is the same as in cases where the investor actually relied on the incorrect publication.¹⁷³

An attempt was made recently to transfer the concept of "Anlagestimmung" (changes in market mood resulting from the release of new information) to the newly-introduced sections 37b and 37c of the WpHG and enhance it to shift the burden of proof.¹⁷⁴ This would mean that the claimant buying the securities, within a certain period after the wrongful publication, would not have to prove that they had purchased the securities because of the incorrect information.¹⁷⁵ But this framework was rendered unworkable for several reasons.

First, one has to recognize that the concept of "Anlagestimmung" cannot be transferred to section 37b of the WpHG, since the omission of obligatory information is not apt to influence the general attitude.¹⁷⁶ Second, it cannot be applied to

¹⁷³ *Basic v. Levinson*, 485 U.S. 224, 243-245 (1988) states:

The modern securities markets, literally involving millions of shares changing hands daily, differ from the face-to-face transactions contemplated by early fraud cases and our understanding of Rule 10b-5's reliance requirement must encompass these differences . . . The courts below accepted a presumption, created by the fraud-on-the-market theory and subject to rebuttal by petitioners, that persons who had traded Basic shares had done so in reliance on the integrity of the price set by the market, but because of petitioners' material misrepresentation that price had been fraudulently depressed. Requiring a plaintiff to show a speculative state of facts, i.e., how he would have acted if omitted material information had been disclosed or if misrepresentation had not been made would place an unnecessarily unrealistic evidentiary burden on the Rule 10b-5 plaintiff who has traded on an impersonal market. Arising out of considerations of fairness, public policy and probability, as well as judicial economy, presumptions are also useful devices for allocating the burdens of proof between parties.

Id. (citations omitted).

¹⁷⁴ Rössner & Bolkart, 23 ZIP 1471, 1476 (2002).

¹⁷⁵ *Cf.* Möllers & Leisch, *supra* note 2.

¹⁷⁶ This should not be confused with the cases dealt with in § 44 of the BörsG where registration statements omit material facts. Those responsible for the registration statements create an incorrect overall impression of their company when they omit certain facts. The issuer who keeps silent violating section 15 of the WpHG does not create any impression though he would have to do so. For the difference between the deception by doing something and the deception by omitting to do something, see FLEISCHER, *INFORMATIONASYMMETRIE IM VERTRAGSRECHT* 245 (2001).

section 37c, paragraph 1, number 2 of the WpHG since this provision sanctions the publication of incorrect negative facts. Only section 37c, paragraph 1, number 1 of the WpHG remains. This provision is most closely related to section 44 of the BörsG as it also sanctions deception by publication of incorrect positive facts. The fact that the legislature used section 44 of the BörsG as a blueprint¹⁷⁷ when creating sections 37b and 37c of the WpHG works against a shifting of the burden of proof.¹⁷⁸ If the legislature wished to introduce a shifting of the burden of proof for cases falling within the scope of section 37c, paragraph 1, number 1 of the WpHG, it could have included this in the wording (as in section 45, paragraph 2, number 1 of the BörsG). Yet this was not the case. One can, of course, still revert to the concept of "Anlagestimmung," which does not lead to a shifting of the burden of proof, but rather a relaxation of the burden. First, the issuer is allowed to prove that his publication did not influence the general attitude towards his securities. Secondly, the issuer is not forced to fully prove a different causality but is only obliged to state and prove that another reasonable chain of causality is conceivable.¹⁷⁹ Neither the wording nor the official legislative documents indicate that the legislature wanted to rule out this cautious modification of the burden of proof.¹⁸⁰

The opponents to transferring the concept of the "Anlagestimmung," argue that *ad hoc* statements, unlike registration statements, are not meant to boost the sale of shares.¹⁸¹ Experiences in recent years, most notably the legislature's strengthening of liability under section 15, paragraph 1, subsection 2 of the WpHG, contradict these arguments.¹⁸²

¹⁷⁷ 4th FFG, Official Legislative Documents, BT-Drs. 14/8017 94 to WpHG sec. 37b.

¹⁷⁸ See Rössner & Bolkart, 23 ZIP 1471, 1476 (2002).

¹⁷⁹ BGH, 43 WM 1528, 1531 (1998) – Elsfl ether Werft; OLG Düsseldorf, 29 WM 586, 596 (1984) – Beton- und Monierbau; OLG Frankfurt, 39 WM 291, 298 (1994) – Bond; Schwark, *BörsG*, §§ 45, 46 n.34 (2d ed. 1994); Hauptmann, Vortmann, *Prospekthaftung und Anlageberatung*, § 3 n.122 (2000).

¹⁸⁰ FLEISCHER, *supra* note 135, at 102 (allowing restitution in very few cases); *cf.* 56 BB 1869, 1873 (2002).

¹⁸¹ Veil, 32 ZGR 365, 383 (2003).

¹⁸² For the abuse of *ad hoc* statements as a marketing instrument, see Braun, *in* MÖLLERS & ROTTER, *supra* note 2, § 8 n.117 (2003).

Of course, the function of the concept of “Anlagestimmung” must be observed. It attempts to prevent giving an unjustified advantage to the wrongdoer, and does not attempt to shift the investor’s performance risk to the issuer. If the claimant’s burden of proof is reduced, the issuer must be granted the right to reduce the damages by stating that another chain of causation has led to the loss.¹⁸³

Cases in which the investor would not have sold securities had the information been correct must be treated differently, however.¹⁸⁴ It is futile for the investor to prove that without the wrongdoing he would have held the securities until the last day of the trial; thus, this presumption does not exist. While the rational investor is normally influenced by the information concerning the company when deciding which security to buy, the motives for selling a security can vary.¹⁸⁵ The official legislative documents for section 37c, paragraph 1, number 2 of the WpHG state: “It is crucial in the case where the securities were sold ‘too cheaply’ and that this has led to a loss.”¹⁸⁶ This clearly shows that, with respect to the selling of securities, the authors of the act have only thought of reimbursing the damages resulting from an incorrect price.¹⁸⁷ Additional damages are not addressed directly.

Causation is easily proven if the investor only wants to claim the damages resulting from an incorrect price. To prove causation, one must simply establish that “but for” the incorrect information, the price for the security would have been higher. Since the investor only claims that he would have bought the security at a lower price or would have sold the security for a higher price, his knowledge of the incorrect information is immaterial. The knowledge of these facts is already included in the price of the

¹⁸³ Cf. Fleischer & Kalss, 46 AG 329, 333 (2002). The idea that the burden of proof can be eased in these cases has to be examined more thoroughly.

¹⁸⁴ Möllers & Leisch, *supra* note 2, § 14, n.114 (2003).

¹⁸⁵ The decision may depend on the realization of a previously set gain or on reaching a predetermined maximum loss. Very often the decision to sell can simply be motivated by the fact that the investor needs his funds elsewhere.

¹⁸⁶ 4th FFG, Official Legislative Documents, BT-Drs. 14/8017, 94.

¹⁸⁷ For practical purposes, it is not important whether one restricts damages to overpayment, or whether one excludes the negative interest when one tries to verify the causation.

security.¹⁸⁸ Therefore, in cases in which a security was purchased, the investor has to establish that the price paid would have been different if the information had been published.¹⁸⁹ The question of how low the price would have been maintained on the market is no longer a question of causation and is, therefore, not governed by section 286 of the Zivilprozeßordnung (ZPO or Civil Procedure Code), but by section 287 of the ZPO.¹⁹⁰

In most recent decisions concerning section 826 of the BGB, the BGH rejected a general shifting of the burden of proof pursuant to section 45, paragraph 2, number 1 of the BörsG as well as general facilitations on the basis of *prima facie* evidence. Yet in particular cases, the development of proper "Anlagestimmung" was held possible.¹⁹¹

In case decided by the BGH, the plaintiff was able to establish that the incorrect *ad hoc* communication was critical in his decision to buy the shares.¹⁹² In another case, because the stock purchase took place more than nine months after the *ad hoc* communication, the plaintiff was unable to establish the necessary causal connection here.¹⁹³

4. Fault

a) Degree of Fault: Intent and Gross Negligence as the Degree of Fault for Liability for Incorrect Information on Capital Markets

In regulating the violation of capital market rules, the legislature introduced guidance on the required degree of fault. Notably, if incorrect registration statements are filed, liability is

¹⁸⁸ Cf. Maier-Reimer & Webering, *supra* note 108, at 1860.

¹⁸⁹ Maier-Reimer & Webering, *supra* note 108; WpHG, § 37b, para. 1, no. 1.

¹⁹⁰ Cf. Möllers & Leisch, *supra* note 124, at 1656, 1660; Fleischer, *supra* note 157, at 1874.

¹⁹¹ BGH, II ZR 402/02, 25 ZIP 1593 (2004); BGH, II ZR 218/03, 25 ZIP 1599 (2004); BGH, II ZR 217/02, 25 ZIP 1604 (2004). See Rössner & Bolkart, 23 ZIP 1471, 1476 (2002); Möllers & Leisch, *supra* note 2, § 15, n.65.

¹⁹² BGH, II ZR 402/02, 25 ZIP 1593 (2004).

¹⁹³ BGH, II ZR 218/03, 25 ZIP 1599 (2004), *remanded to* BGH, II ZR 217/02, ZIP 2004, 1604.

restricted to intent and gross negligence.¹⁹⁴ The degrees of fault also apply to incorrect take-over bids according to section 12, paragraph 2 of the WpÜG and liability claims based on incorrect *ad hoc* statements according to sections 37b and 37c of the WpHG.

Originally, the injured party had to prove the fault of those responsible for producing the registration statements. Most scholars deem this proof practically impossible to obtain and have therefore opted for an analogy to old sections 282 and 285 of the BGB.¹⁹⁵ The legislature shared their view in the third FFG. As the facts lie exclusively within the defendant's knowledge, it would be impossible for the claimant to prove fault in practice.¹⁹⁶ Therefore, the burden of proof was shifted in favor of the claimant, creating the presumption of fault. In the special laws dealing with incorrect capital market information, a common standard for fault and the burden of proof is implemented.

Although this degree of fault applies to many of the liability provisions in securities law, it is not undisputed. Some favor a restriction to intentional transgressions, since otherwise the risk of personal liability would result in artistic formulations which diametrically oppose quick and accurate *ad hoc* statements. Furthermore, engaging in the exchange of shares is an inherently risky business.¹⁹⁷ On the other hand, one could include all forms of negligence,¹⁹⁸ because they are included in the general civil law liability for misstatements.¹⁹⁹

Taking everything into consideration, many arguments support maintaining the current middle-of-the-road position, imposing liability only for intentional misrepresentation and gross

¹⁹⁴ BörsG, § 45, para. 1, 55 BörsG & § 13 Verkaufsprospektgesetz, VerkProspG (Law on the Prospectus for Securities Offered for Sale).

¹⁹⁵ See CANARIS, BANKVERTRAGSRECHT n.2281 (2d ed. 1981); Assmann, 28 WM 138, 141 (1983); HAMANN, in SCHÄFER (ed.), WpHG, BörsG, VerkProspG, §§ 45, 46 BörsG (1999).

¹⁹⁶ 3rd FFG, Official Legislative Documents, BT-Drs. 13/8933, to § 46 BörsG; see also 4th FFG, Official Legislative Documents, BT-Drs. 14/8017, 93 to § 37b WpHG.

¹⁹⁷ Thümmel, 53 DB 2331, 2333 (2001); LG München I, 46 WM 1948 (2001).

¹⁹⁸ See Köngden, *supra* note 24, at 791, 807.

¹⁹⁹ For an example of an argument against including gross negligence for specialized liability claims in general, see GRUNDMANN, BANKRECHTSHANDBUCH § 112 n.56 (2d ed. 2001).

negligence. On the one hand, a restriction to intentional misrepresentation is not convincing. In the past, *ad hoc* statements have been recklessly formulated and abused as another form of advertising. Objectively, *ad hoc* statements are very often the sole basis for an investor's decision. That is reason enough for ensuring that the investor specifically, and the capital market in general, can rely on the correctness of this information.²⁰⁰ Imposing liability for gross negligence is also not unreasonable for those who have to obey the duties of disclosure, since gross negligence represents a much higher standard than regular negligence under section 276, paragraph 1 of the BGB.²⁰¹ The director or executive is able to avoid committing gross negligence by procuring professional assistance²⁰² or by insuring himself against the risk.²⁰³ If the imposition of sanctions is not to be rendered an empty threat, gross negligence must result in liability. Great Britain²⁰⁴ and the United States²⁰⁵ both recognize liability in cases of gross negligence and recklessness.

On the other hand, liability for all forms of negligence goes too far. Köndgen most recently argued for extending liability to all forms of negligence.²⁰⁶ Restricting liability to gross negligence can only be justified, economically and legally, if the norms of conduct are imprecise, making it difficult to realize one's duties or to properly evaluate one's conduct. This is principally true for *ad hoc* statements, however, the legislature has already accounted for these problems in the wording of the norm.²⁰⁷ In addition, supervising authorities are more precisely establishing the duty to publish *ad hoc* statements, making a further restriction to gross negligence unnecessary. Moreover, the gap between negligence

²⁰⁰ 2d FFG, *supra* note 15, Official Legislative Documents, BT-Dr. 12/6679, at 33.

²⁰¹ BGHZ, NJW, 47 (1994), 2093-2094.

²⁰² See Thomas M.J. Möllers, FRANKFURTER ALLEGMAINE ZEITUNG, Sept. 29, 2001, at 23.

²⁰³ KÖNDGEN, THEORIE DER PROSPEKTHAFTUNG 54 (1984); Reichert & Weller, *supra* note 154, at 56.

²⁰⁴ See § 397 FSAMA 2000; Derry v. Peek, 14 App. Cas. 337 (H.L. 1889) (dealing with the "tort of deceit").

²⁰⁵ Cf. *infra* note 222.

²⁰⁶ Köngden, *supra* note 24, at 791, 807.

²⁰⁷ *Ad hoc* publicity requires a significant relevance for the price of the shares.

and gross negligence is too wide. Finally, it is difficult to explain why the German legislature initially requires gross negligence, just to shift the burden of proof to the disadvantage of the Director or Executive.

Köndgen is correct when he states that this back and forth between gross negligence and shifting burden of proof is surprising. Restricting fault to gross negligence may be justified under the theory that capital market liability awards damages for disappointed general confidence,²⁰⁸ although, according to general civil law principles, personal contact alone creates information and counselling duties. Dispensing with the requirement of reliance on personal contact is balanced by the restriction to intentional misrepresentation and gross negligence. In that way, those having to publish *ad hoc* statements are not overly privileged in relation to the general prerequisites for liability in German law which require intentional behavior in order to recover for pecuniary losses.²⁰⁹ Liability for gross negligence complies with the results of the courts in their rulings regarding section 826 of the BGB.²¹⁰ The wide gap between negligence and gross negligence, mentioned by Köndgen, is reduced when gross negligence is assumed.

b) Intention to Harm in section 826 of the BGB

Liability for negligent behavior is an exception to the German tort law principle that liability for harming other people's assets outside a contract requires intent.²¹¹

The requirement of intent to harm another person in section 826 of the BGB requires that the tortfeasor be aware of the harm done and that he desires, or at least assents, to the harm. Therefore, conditional intent is sufficient.²¹² The intent of the tortfeasor must be responsible for all resulting damages. It is

²⁰⁸ Cf. MÖLLERS & ROTTER, *supra* note 2, § 16 n.7; see also *supra* Part III.A.2.

²⁰⁹ Normally, penal laws regulating crimes against other people's assets regularly demand more than normal negligence.

²¹⁰ See *infra* Part III.C.

²¹¹ Oechsler, *in* Staudinger, § 826, Nr. 12 et seq. BGB (13th ed. 1998).

²¹² The tortfeasor acts with conditional intent if he is seriously aware of the fact that his acts might violate a duty and he accepts this. BGHZ of June 14, 2000, 53 NJW 2896, 2897 (2000); Thomas, *in* Palandt, BGB, § 826 n.9 (62d ed. 2003).

enough if the intent roughly covers the way and the direction of the consequences. A precise knowledge of the extent of the harm, the causation, and the persons damaged is not necessary.²¹³ Awareness of the immorality is not part of the elements of the norm, otherwise especially ruthless and reckless behavior would be rewarded. Subjectively, it is only necessary that the tortfeasor be aware of the facts that render the act immoral.²¹⁴

According to German courts, ruthless behavior creates a presumption of intent to harm another person. This presumption is clear when the tortfeasor intentionally turns a blind eye to facts that constitute immorality.²¹⁵ Some, however, argue that to assume intent is absurd, as the company is only interested in higher prices for its shares and not in harming investors.²¹⁶ An assumption of intent would also contradict the principle in German tort law that the harming of one's own assets is compensated only in exceptional cases.²¹⁷ Arguably, those spreading incorrect financial data about their company are interested in high prices for their securities. Critics of presumed intent ignore the fact that dissemination of false information is simply harming the investor. This understanding was recognized by the legislature of the fourth FFG in the new section 37c of the WpHG stating that the investor buys his share "at too high a price in cases of incorrect positive *ad*

²¹³ BGH of Mar. 8, 1951, 4 NJW 596, 597 (1951), with comments Coing; BGH of June 26, 1989, 108 BGHZ 134, 143; BGHZ of Nov. 20, 1990, 44 NJW 634, 636 (1991), with further references; KARL LARENZ & CLAUS-WILHELM CANARIS, *SCHULDRECT*, BT, II at 454 (13th ed. 1994); Oechsler, *supra* note 211, at n.77; Schiemann, *in* Erman/Schiemann, *BGB*, § 826 n.15 (10th ed. 2000).

²¹⁴ *See* BGHZ 8 (1952), 83 (87); BGHZ of June 20, 1963, 16 NJW 1872, 1873 (1963); Oechsler, *supra* note 211, at Nr. 61 BGB; Hönn & Dönneweg, *in*: Soergel, sec. 826 Nr. 54 BGB (12th ed. 1998); Schiemann, *in* Erman, § 826, Nr. 11 BGB (10th ed. 2000); LARENZ & CANARIS, *supra* note 213, at 455.

²¹⁵ BGHZ 10 (1953), 228 (233); BGHZ of Jan. 6, 1970, 15 WM 1021, 1023 (1970); BGHZ of Mar. 5, 1975, 20 WM 559, 560 (1975); BGHZ of Sept. 24, 1991, 44 NJW 3288, 3289 (1991); BGHZ of Apr. 14, 1986, 31 WM 904, 906 (1986); BGHZ 129, 136 (176); Larenz & Canaris, *supra* note 195 at 454; Thomas, *in* Palandt, *supra* note 202, § 826 n.9 with further references; Schiemann, *in* Erman, § 826 n.14 BGB (10th ed. 2000); Staudinger, *in* Hk-BGB, § 826 n.9 (2d ed. 2002); BANKRECHTSHANDBUCH., *supra* note 199, at § 40 n.65; LG Augsburg of Sept. 24, 2001, 46 WM 1944, 1946 (2001) – Infomatec II; and Möllers & Leisch, 46 WM 1642, 1662 (2001).

²¹⁶ *See* Thümmel, *supra* note 197; Reichert & Weller, 35 ZRP 53, 59 (2002).

²¹⁷ *See* Reichert & Weller, *supra* note 216, at 59.

hoc statements.”²¹⁸ Publishing the *ad hoc* statement, the board of directors expresses that it considers the published facts to have an influence on the price of the shares. The board is aware that the positive “advertising” of *ad hoc* statements will raise the price of the share and that investors will consequently buy the shares for too high a price.²¹⁹ The BGH adopted this rationale without restrictions.²²⁰ Such a positive act is lacking with omissions of or in *ad hoc* statements. It is not possible to simply assume the intent to harm another person. But, if an omission is at issue, the intent to harm will be difficult to discern, since the board of directors is unlikely to make known an intention to harm another party.

In the special laws dealing with liability in capital market law, the legislature has also shifted the burden of proof for proving fault.²²¹ Arguably, the legislature’s reason for this shift was that otherwise the ability to prove fault is rendered practically impossible and that it concerns facts that lie exclusively within the knowledge of the tortfeasor. Intentional acts can be assumed if circumstantial evidence demonstrates the intent to harm. In the United States, Rule 10b-5 of the SEA requires scienter on the part of the tortfeasor.²²² As in German law, recklessness is sufficient, and it can be assumed if the defendant knows the risk or it is obvious that the purchaser or seller is deceived.²²³ U.S. courts have also found an act to be reckless if facts could have been easily published but were not.²²⁴ In *Greebel v. FTP Software*

²¹⁸ 4th FFG, Official Legislative Documents, BT-Drs. 14/8017, at 93; WpHG, § 37b. This was, in fact, true according to the facts in the judgment of the LG Augsburg.

²¹⁹ See Möllers & Leisch, 23 ZIP 1995, 1997 et seq. (2002); see also Fuchs & Dühn, 2 BKR 1063, 1068 (2002) (dissenting with the lower court OLG München of Oct. 1, 2002, 23 ZIP 1989, 1993 (2002)); see Part I.2.b) (3) – Infomatec II.

²²⁰ BGHZ of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004); BGHZ of July 19, 2004, II ZR 218/03, 25 ZIP 1599 (2004); BGHZ of July 19, 2004, II ZR 217/02, ZIP 2004, 1604).

²²¹ See *supra* Part III.3.d.

²²² For a U.S. federal court opinion regarding scienter, see Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976).

²²³ For U.S. federal court opinions regarding scienter, see AUSA Life Insurance Co. v. Ernst & Young, 206 F.3d 202 (2d Cir. 2000); Hollinger v. Titan Capital Corp., 914 F.2d 1564 (9th Cir. 1990).

²²⁴ Keirman v. Homeland, Inc., 611 F.2d 785 (9th Cir. 1980). To verify recklessness, certain facts may be used as evidence. For example, access to information that contradicts previously published information or the publication of such contradictory

Inc.,²²⁵ the First Circuit of the U.S. Court of Appeals listed circumstances that may lead to a presumption of an intentional act, including: insider trading, discrepancies between internal reports and publications, temporal proximity between an alleged incorrect publication or an omitted publication and a subsequent publication of contradicting information, bribery by a senior executive, fast settlement in similar lawsuits, and self-interested transactions such as payments or protection of one's job.²²⁶ There must also be a causal link between the tortfeasor's intention and the resulting loss.

Conditional intent can be assumed in disclosure or expertise cases if the tortfeasor, although unaware of providing incorrect information, is aware that the basis for the information is so insecure that the risk of incorrect information is particularly great. In this case, although not aware of the immorality itself (the incorrectness of his information), there is an awareness of the risk (insufficient method of verification) that creates the small possibility that the predicted facts will come true. Positive knowledge of the risk is thus sufficient to presume the existence of conditional intent, as clarified by a systematic comparison with section 142, paragraph 2 of the BGB. Cases in which the tortfeasor provides information with no knowledge at all as to whether his information is correct can be problematic. The

information serves a self-interest. See *Novak v. Kasaks*, 216 F.3d 300 (2nd Cir. 2000); *Greebel v. FTP Software, Inc.*, 194 F.3d 185 (1st Cir. 1999).

²²⁵ 194 F.3d 185 (1st Cir. 1999). The First Circuit makes clear the facts that imply scienter:

This court has considered many different types of evidence as relevant to show scienter. Examples include: insider trading (discussed below); divergence between internal reports and external statements on the same subject; closeness in time of an allegedly fraudulent statement or omission and the later disclosure of inconsistent information; evidence of bribery by a top company official; existence of an ancillary lawsuit charging fraud by a company and the company's quick settlement of that suit; disregard of the most current factual information before making statements; disclosure of accrual basis information in a way which could only be understood by a sophisticated person with a high degree of accounting skill; the personal interest of certain directors in not informing disinterested directors of impending sale of stock; and the self-interested motivation of defendants in the form of saving their salaries or jobs.

Id. (internal citation omitted). Cf. *COX ET AL.*, *supra* note 159, at 739.

²²⁶ For an example of reckless behavior on EM.TV's side, compare *Thomas Möllers*, 48 WM 2393 (2003).

tortfeasor does not know that his information is incorrect. But since the information is not unified, it is clear that there is a risk and high probability of incorrectness.

In the *Infomatec* cases, the BGH already considered the defendants' actions immoral: a grossly incorrect *ad hoc* communication fundamentally violates the minimum legal standards; moreover, the defendants were willing to use every means available to mislead prospective investors.²²⁷

D. Proposed Developments (de lege ferenda)

1. Director Liability

The fourth FFG only established the liability of the individual issuer and has abstained from introducing a special legal basis for a claim directly against the board of directors.²²⁸ Restricting claims to gross negligence prevents the unlimited liability of the director, and company executives. This has been criticized, because the other shareholders have to pay the damages indirectly and claims will very often go unfulfilled if the company goes bankrupt.²²⁹ The Baums-Commission explicitly opted for the introduction of claims against the board of directors.²³⁰ By the same token, both the legal literature²³¹ and the 64th DJT (Association of German Jurists),²³² call for establishing a claim against the board of directors. Finally, the government has put personal liability on the agenda in its ten-point action program.²³³

²²⁷ BGHZ of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004).

²²⁸ Thus only tort law claims or claims arising out of a pre-contractual relationship can apply. See WpHG, para. 37b-c.

²²⁹ Baums, 166 ZHR 375, 379 (2002).

²³⁰ Baums, *supra* note 78, BT-Drs. 14/7515, n.186 as sec. 77 para. 1; cf. Baums, *Changing Patterns of Corporate Disclosure in Continental Europe: the Example of Germany*, Law Working Paper No. 4, at 17 (2002), available at http://papers.ssrn.com/paper.taf?abstract_id=345020.

²³¹ Horn & Krämer, *supra* note 53, at 271; Fleischer, *supra* note 4, at 99; 55 NJW 2977, 2979 (2002); Spindler, 47 DStR 1576, 1580 (2002).

²³² Resolutions of the 64th DJT 2002 in Berlin, 55 NJW 3073, 3082 (2002).

²³³ See Press Release, Secretary of Justice Brigitte Zypries and Secretary of Finance Hans Eichel (February 25, 2003), available at <http://bmj.de> sowie <http://www.thomasmoellers.de/materialien>; see also FRANFURTER ALLEGMAINE ZEITUNG, Feb. 26, 2003, at 9; FRANKFURTER ALLEGMAINE ZEITUNG, Mar. 7, 2003, at 20.

Systematic and teleological arguments, in particular, suggest the need for the introduction of personal liability.²³⁴ Personal liability of the board of directors can already be found in general tort law.²³⁵ In addition, personal liability against those responsible for the registration statements has been established in the case of incorrect statements. The notion of prevention is of particular importance as directors and executives tend to deceive the general public in times of financial difficulty.

2. *General Liability Claim for False Information*

a) *Further Claims de lege lata*

There has been little discussion as to whether the violation of periodic disclosure duties and of the duty to disclose directors' dealings lead to liability. The discussions that have addressed the consequences, particularly for the claims of investors against the board of directors for violations of the Corporate Governance Code,²³⁶ have proven controversial. Some opt for granting claims;²³⁷ others deny liability for an incorrect prospectus as the compliance declaration cannot be compared with a prospectus.²³⁸ Furthermore, the highest German federal court, the Bundesgerichtshof, demands an "unregulated area" with respect to the application and development of the principles of general civil liability for incorrect statements.²³⁹ The introduction of the

²³⁴ Cf. Fleischer, *supra* note 135, at 102; *see also* 2 BKR 608, 612 (2003).

²³⁵ Section 823, para. 2 BGB; § 826 BGB.

²³⁶ AktG, § 161 states:

Declaration on the Corporate Governance Code: The executive board and supervisory board of exchange-listed companies shall declare once a year that the recommendations of the "Government Commission on the German Corporate Governance Code" published by the Federal Ministry of Justice in the official section of the electronic Federal Gazette have been and are being complied with or which of the Code's recommendations are not being applied. The declaration shall be made permanently accessible to stockholders.

Id. *See also supra* note 16 and the sources cited therein.

²³⁷ Köngden, *supra* note 24, at 463, 474; Ulmer, 166 ZHR 150, 169 (2002.); *see also* Hopt, in CORPORATE GOVERNANCE, 27, 55 (Peter Hommelhoff et al. eds., 2002).

²³⁸ *See* Seibert, 56 BB 581, 584 (2002); Ihrig & Wagner, 56 BB 789, 792 (2002); Borges, 32 ZGR 508, 531 (2003); Abram, 14 ZBB 41, 44 2003.

²³⁹ BGHZ 89, 337 (341).

Corporate Governance Code and the compliance declaration of section 161 of the AktG were not meant by the legislature to extend liability.²⁴⁰ Finally, one should not forget that the courts would either have to develop individual requirements for liability or adapt them to the existing system of liability,²⁴¹ actions which should be taken by the legislature. Therefore, creating liability through the development of the law would likely prove difficult. For example, the BGH has most recently refused to apply the principles of prospectus liability as a basis of liability for incorrect *ad hoc* communications.²⁴²

*b) On the Way to a General Liability Claim for
Incorrect Capital Market Information*

The Governmental Commission on Corporate Governance has called for the creation of a general liability claim for incorrect capital market information and has made proposals for a rewording of sections 79–83 of the BörsG (draft of the Commission report), section 400 of the AktG was used as a blueprint for this proposal. According to the draft proposal, the board of directors, not the company, is liable for incorrect publications if the courts find that such publication was intentional or reckless.²⁴³ The 64th DJT is more restrictive in its approach and has called for liability for incorrect obligatory publications.²⁴⁴ The

²⁴⁰ See Seibt, 46 AG 249, 256 (2002).

²⁴¹ According to the principles of general liability for incorrect information all forms of negligence are sufficient.

²⁴² BGHZ of July 19, 2004, II ZR 402/02, 25 ZIP 1593 (2004); BGHZ of July 19, 2004, II ZR 218/03, 25 ZIP 1599 (2004); BGHZ of July 19, 2004, II ZR 217/02, 25 ZIP 1604 (2004). For comments, see Leisch, 25 ZIP 1573 (2004).

²⁴³ AktG, § 79, para. 1 reads:

The members of the executive board and the supervisory board of exchange-listed companies shall be liable according to the subsequent provisions for intentional or grossly negligent misrepresentations of the company's condition including its relations to affiliated companies in presentations or overviews on the financial situation, in lectures or disclosures in the shareholders' meeting if such presentation is apt to influence the share price materially.

Report of the Commission, Corporate Governance, BT-Drs. 14/7515, n.186. The whole text is available at http://www.otto-schmidt.de/corporate_governance.html. For a "cautious agreement" with this contention, see Fleischer, *Gutachten F für den 64 DJT* 113 (2002).

²⁴⁴ Resolutions of the 64th DJT 2002 in Berlin, No. 1.9., 55 NJW 3073, 3082

government is also examining the introduction of personal liability for incorrect capital markets information.²⁴⁵ The Transparency Directive proposal of March 26, 2003²⁴⁶ states that a violation of the duty to correctly publish financial data annually, semi-annually, and quarterly must lead to personal civil liability. The demand of the High Level Group on European Company Law for collective liability of all members of the board of directors for the annual report and the annual Corporate Governance compliance declaration represents one step towards this goal of liability and accountability.²⁴⁷

Two arguments are often made in favor of the introduction of general liability for incorrect capital market information. First, the risk of circumvention has to be taken into consideration: if an issuer is not obliged to publish *ad hoc* statements, and publishes important facts in an *ad hoc* statement, it is possible to apply section 37c of the WpHG analogously.²⁴⁸ But such an analogy must fail if the information is then misrepresented at the shareholder's meeting or at a press conference and, under these circumstances, the investor is also to be protected.²⁴⁹ It is preferable to look at the cases where liability can arise by legal norms rather than the less predictable approach of relying on the courts to further develop the general civil law principles on incorrect statements.

But one has to be aware of the risk of over-regulation.²⁵⁰ When examining U.S. Rule 10b-5 of the SEA²⁵¹ in a comparative

(2002), according to the proposals of Fleischer, *supra* note 243, at 112.

²⁴⁵ Press Release, *supra* note 233.

²⁴⁶ Transparency Directive, *supra* note 14, art. 7; *see also supra* Part III.1.b).

²⁴⁷ Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward of May 21, 2003, COM (2003) 284 at 19; *cf.* Maul, 55 DB 27, 28 et seq. (2003). *See now* for a liability claim of the company against its directors, Art. 50b proposal for a directive amending the directive concerning the annual accounts of certain types of companies, COM (2004) 725 final.

²⁴⁸ *See* Möllers & Leisch, 5 NZG 112, 113 (2003).

²⁴⁹ Fleischer, *supra* note 243, at 112.

²⁵⁰ *See* Von Rosen, FRANKFURTER ALLEGMAINE ZEITUNG, Aug. 14, 2003, at 18 (showing the risk of overregulation and doubting a general liability claim); Mülbart, 54 JZ 826, 836 (2002); Veil, 32 ZGR 365, 400 (2003).

²⁵¹ HAZEN, *supra* note 47, at 569. *See also* Steinhauer, *Insiderhandelsverbot und Ad*

law perspective,²⁵² it is important to recognize the fact that the courts have liberally interpreted this anti-fraud rule as a general liability claim with its own unwritten requirements.²⁵³ The U.S. Supreme Court has considerably restricted the implicit liability claim. It has held that to be eligible for damages, the claimant must: (1) be either a buyer or seller of the securities;²⁵⁴ (2) prove an intentional act;²⁵⁵ and, (3) prove that the defendant acted with intent to deceive.²⁵⁶

There is a real risk that if the requirements for a general liability claim are vague the courts will refrain from applying them. This was the fate of former section 88 of the BörsG, which had not been applied by courts and public prosecutors. If every negligent statement in front of the press might result in enormous damage claims, the boards of directors would likely limit their current way of informing the public. Limitations of information would not help the efficiency of capital markets.

Given the possibly high number of claimants, it is important to include a rule that only a material misrepresentation will lead to liability, such as can be found in U.S. law.²⁵⁷ Although, it is true that the test of materiality is already relevant to the test of causation, overzealous claimants would be deterred from suing if the materiality of the misrepresentation would be one of the elements of the provision.²⁵⁸

hoc Publizität 149 (1999); Resolution Recommendation, *supra* note 107 (discussing Rule 10b-5).

²⁵² Fleischer, *supra* note 243, at 111.

²⁵³ See *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (1946) (the first case to make a decision in this direction); see also *MacLean v. Huddleston*, 459 U.S. 375 (1983); *Superintendent of Insurance of New York v. Bankers Life & Casualty Co. et al.* 404 U.S. 6 (1971); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (upholding the decision in *Kardon v. National Gypsum Co.*).

²⁵⁴ *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 730 (1975).

²⁵⁵ *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976).

²⁵⁶ *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

²⁵⁷ See *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (stating that materiality of a fact is given if there is sufficient probability that a rationale investor would consider this fact to be important); HAZEN, *supra* note 47, at 596.

²⁵⁸ Thomas M.J. Möllers, 14 ZBB 390, 407 (2003).

c) *Draft on an Act Concerning Capital Market Information Liability*
(*Kapitalmarktinformationshaftungsgesetzes*)

The Ministry of Finance most recently submitted a draft of the Act Concerning Capital Market Information Liability²⁵⁹ in which numerous suggestions were implemented. Though the draft has been stopped, it will most probably become law at some point in the future.

The newly amended section 37b of the WpHG extends the issuer's liability to members of a managing, administrative, or supervisory board. The issuer can now be held liable for public notifications or communications about business transactions that affect a large number of persons. Consequently, practically all information duties on the secondary market are included. Yet, liability for oral statements remains limited to those statements made at shareholders' meetings and information meetings arranged by the issuer such as analysts' meetings hosted by the company. Moreover, the notification or the concealed fact must be significant to the valuation of the shares. Finally, liability is limited to intent and gross negligence; in accordance with stock exchange prospectus law,²⁶⁰ the burden of proof is shifted with regard to default. Unlike previous provisions concerning liability for incorrect *ad hoc* communications, the recently amended provisions refrain from stipulating what constitutes proof of causation; namely, that the investor's decision was provoked by the incorrect communication. As in the domain of stock exchange prospectus liability, it is sufficient that the investor bought or sold at a price influenced by the incorrect information; as for causation, the "Anlagestimmung" created by the incorrect information suffices. Nevertheless, the assumption that the investor purchased on the basis of the incorrect information is only valid for six months.

The amendment of section 37b of the WpHG results in a noticeable expansion of liability as board members can now be held liable for grossly incorrect *ad hoc* communications. Liability

²⁵⁹ See Thomas M.J. Möllers, Juristische Fakultät, available at <http://www.thomas-moellers.de/materialien> (last visited Dec. 20, 2004).

²⁶⁰ BörsG, § 45.

does not depend on whether the purchase or sale of the share was caused by the incorrect communication. The legislature now follows the road paved by legal scholars.²⁶¹

The draft act also introduces a maximum limit on liability with respect to managing and supervisory boards; liability remains unlimited with respect to the company itself. The maximum limit of liability only applies in cases of gross negligence. Director and officer insurance must provide an adequate deductible in order to ensure that the prevention intended by the law is not undermined. The draft act proposes a maximum limit of liability of four times the individual's yearly remuneration per violation. If the entire loss exceeds this limit, the draft provides for pro-rata compensation.²⁶²

d) *Comparison with United States law*

The United States Congress introduced a limitation on liability²⁶³ in the Reform Act of 1995.²⁶⁴ Under this act, damages shall not exceed the difference between the purchase price of a security and its mean trading price during the ninety days following a corrective disclosure. The reason for the ninety-day rule was to accommodate the fact that the price over-reacts if incorrect information is corrected and therefore self-corrects to the true price.²⁶⁵ The ninety-day rule has been criticized as being too long, since the market reacts quickly to the relevant information.²⁶⁶

²⁶¹ Möllers & Leisch, WM 46 WM 1648, 1652 (2001); Fleischer & Kals, 57 AG 329, 333 (2002); see also *supra* III.4.2)b).

²⁶² For more details see Möllers, *Die Infomatec-Entscheidungen des BGH – Marksteine auf dem Weg zu einer Haftung für Kapitalmarktinformationen*, 60 JZ Vol. 2 (2005).

²⁶³ Subsequently, lawsuits have frequently been filed if the share price changed after a press release was submitted by the issuer. See Thomas W. Antonucci, *The Private Securities Litigation Reform Act and the States: Who Will Decide the Future of Securities Litigation?*, 46 EMORY L.J. 1237 (1997); see also Michael Y. Scudder, *The Implications of Market-Based Damages Caps in Securities Class Actions*, 92 NW. U. L. REV. 435 (1997) (illustrating the misuses and discussing the implications for securities class action litigation).

²⁶⁴ 15 U.S.C. § 78u – 4 (e) (2000).

²⁶⁵ See Baruch Lev & Meiring de Villiers, *Stock Price Crashes and 10b-5 Damages: A Legal, Economic, and Policy Analysis*, 47 STAN. L. REV. 7, 9 – 11 (1994).

²⁶⁶ See Jonathan C. Dickey & Marcia Kramer Mayer, *Effect on Rule 10b-5 Damages of the 1995 Private Securities Litigation Reform Act: A Forward-Looking*

Furthermore, the limitation on liability has been considered unfair in situations in which the issuer has acted in a fraudulent manner.²⁶⁷ Section 21 D(e) does not address cases in which an incorrect *ad hoc* communication has been corrected after six months.²⁶⁸ Finally, it remains unclear whether the issuer is entitled to bring forward the fact that the general market risk shall be excluded from the loss adjustment.²⁶⁹ Market risks have no relation to the influence of the incorrect communication or the price when a correction is made.²⁷⁰ By means of section 21 D (e) of the SEA, only claims made pursuant to Rule 10b-5 of the SEA are limited. Therefore, claims made on the basis of common law and state law can still be aimed at rescission.²⁷¹

Interestingly, in Germany, this provision supports an argument for the *expansion* of liability rather than a limitation. In principle, the German legislature is only willing to award the difference between prices to the plaintiff. Therefore, it does not relate to the difference between the actual price and a hypothetical price had the incorrect communication not been made.²⁷² The investor is entitled to claim the difference between his purchase or sales price and the average stock exchange or market price within thirty days after the disclosure of the false statement or concealed information. Moreover, personal liability is limited to € 4 Million.

Nevertheless, it remains unclear whether both parties are entitled to establish that the real loss was higher or lower. The explanatory statement submitted with the draft act currently permits this, yet, there is no indication for this in the wording of the draft act itself. It remains to be seen whether this will be clarified in the final version of the law.

Assessment, 51 BUS. LAW. 1203, 1212 (1996); see also Scudder, *supra* note 263, at 460.

²⁶⁷ See John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 335, 366-67 (1996); see also ROBERT B. THOMPSON, "SIMPLICITY AND CERTAINTY" IN THE MEASURE OF RECOVERY UNDER RULE 10B-5 1177, 1199-1200 (1996).

²⁶⁸ See Scudder, *supra* note 263, at 463-64.

²⁶⁹ See *id.* See also Bradford Cornell & R. Gregory Morgan, *Using Finance Theory to Measure Damages in Fraud on the Market Cases*, 37 UCLA L. REV. 883, 897-911 (1990).

²⁷⁰ See Antonucci, *supra* note 263, at 1252-53.

²⁷¹ *Id.* at 1272; see also Sternman & Gray, 958 PLI/CORP 757, 806 (1996).

²⁷² See *supra* note 144 and accompanying text.

In general, the amended version of the act specifies the scope of liability more accurately than the previous law. Thus, as a basic principle, it is no longer possible to recover the sales revenue and return the shares (out-of-pocket). This is understandable, as the claimant is not obliged to establish that the purchase of the shares was caused by the incorrect information. The claimant must bear the market risk. Because the legislature assumes that individuals bought on the basis of false information, it can also be expected that they may sell the shares when the information is corrected. In that case, the issuer is not responsible for a loss caused by the investor holding onto the shares. The legislature thereby creates a joint responsibility that is dogmatically not to be considered with respect to contributory negligence but with respect to the loss.

Reciprocally, the plaintiff can still claim rescission if he has any special relation²⁷³ to the issuer. As in the United States,²⁷⁴ it still remains possible to claim the full amount of the capital investment as loss on the basis of section 826 of the BGB and section 45 of the BörsG.

Indeed, the issuer is, as a general principle, only obliged to reimburse the difference between prices when there is a loss. Moreover, the issuer can establish that there was less of a loss by claiming that the lower price of the share was not caused by the incorrect information but by other market risks. Here, it would have been helpful if the legislature had included a definition of out-of-pocket loss as a first step.²⁷⁵ But, because the legislature assumes causation in the purchase decision, it could be argued that this higher market risk has to be borne by the issuer, and thus the argument for causation by other market risks cannot be brought forward as a defense. The issuer, however, carries the burden of proof for the lower loss.²⁷⁶ Therefore, issuers have to provide comprehensive scientific reports.

Section 37b of the WpHG avoids the weaknesses of section 21 (D)(e) of the SEA. Unlike United States law, section 37b of the

²⁷³ See, e.g., *Huddleston v. Herman & MacLean*, 640 F.2d 534, 554 (5th Cir. 1981) (discussing how rescission involves the fiduciary duty of the issuer).

²⁷⁴ See *supra* note 142 and accompanying text.

²⁷⁵ See *supra* note 144 and accompanying text.

²⁷⁶ See THOMPSON, *supra* note 267, at 1200-02 (concurring with respect to U.S. law).

WpHG provides a period of thirty days within which the correction will be considered. Notwithstanding the fact that the amended version of section 37b of the WpHG allows for more damages than just out-of-pocket losses, if the act is unethical, section 826 of the BGB is still applicable. A limitation to the out-of-pocket loss is thereby avoided.²⁷⁷ Moreover, the issuer is entitled to bring forward evidence that a lower loss has occurred. Thus, the rationale that the assumption of causation is limited to six months appears consequential. The introduction of this new provision takes a giant step towards permitting civil liability for instances of dissemination of false information on the capital market.

3. *Federal Agency for Financial Services Supervision – Duty of Publication*

In Germany, most investors' lawsuits have failed since often the claimants have not been able to establish the requisite elements of causation or intent. In the *Telecom* case, the limitation of claims was a major problem; the preliminary proceedings by the public prosecutor were not followed up very eagerly.²⁷⁸ Until now, investors could not count on support by the public prosecutor or the BaFin (Federal Agency for Financial Services Supervision). In fact, section 8 of the WpHG imposes an obligation of secrecy on the employees of the BaFin. In the work of the BaFin, it is common practice to keep the names of the companies violating the duties under the WpHG secret. The BaFin's practice of refusing to publish, even publicly tried sanction decisions results in the BaFin protecting these companies. This protects the tortfeasors and makes it harder for the investors to claim their damages. The protection of the tortfeasors cannot be the goal of a public agency whose main purpose is the supervision of *ad hoc* statements to prevent the formation of incorrect prices on the basis of incorrect information.

²⁷⁷ *Id.* See also Fleischer, 57 BB 1869, 1872 – 1873 (2002) (showing how the alternative approaches discussed by Thompson are adapted to German law).

²⁷⁸ It is in dispute whether the registration statements were incorrect when the Telecom AG increased its share capital in June 2000 because possibly the assets in real estate were evaluated improperly. The limitation of the claims after three years which has passed in summer 2003 has been too short to verify the individual prerequisites for a claim. The public prosecutor in Bonn is still investigating.

In France the COB (now the L'Autorité des Marchés Financiers) is allowed to publish its sanctions in the media form of their choice.²⁷⁹ This possibility is of great importance, as it makes the names of the tortfeasors publicly known. If a fine is imposed, the addressee has to bear the costs. Article 14, paragraph 4 of the Market Abuse Directive 6/2003/EC imposes the duty on the member states to enable supervisory agencies to publish their measures and sanctions; section 8 of the WpHG will therefore have to be amended.²⁸⁰

Fortunately, this was amended by the introduction of the Anlegerschutzverbesserungsgesetz.²⁸¹ A newly amended section 40b of the WpHG now provides that the BaFin can publish unchallengeable measures on its website if violations of the WpHG occur. Yet publication is only permissible if it is necessary to remedy deficiencies and only if no unreasonable loss is at stake for the persons involved or the financial markets. Consequently, it is feared that the BaFin will reluctantly exercise its powers in the face of these limitations.

4. Representative Proceedings

Finally, the federal government plans to introduce an act concerning representative proceeding with regard to investors (Kapitalanleger-Musterverfahrensgesetz or KapMuG). As a result, the high risks and costs of litigation arising from the complex hearings of evidence and the complex capital market questions involved are to be reduced. The Oberlandesgericht (Higher Regional Court) *ex officio* appoints a plaintiff to represent similarly situated plaintiffs. All other plaintiffs receive third party summons to attend the proceedings and are thereby enabled to participate in the representative proceeding. Unlike U.S. class action claims, the right to be heard is secured for all plaintiffs in this proceeding.²⁸²

The draft of the act concerning representative proceedings with regard to investors has been criticized by legal scholars who argue

²⁷⁹ Art. – 621-15 C. monét. Fin.

²⁸⁰ Möllers, 14 ZBB 390, 408 (2003).

²⁸¹ BT-Drs. 15/3493 of July 1, 2004, *supra* note 9.

²⁸² See Press Release, Secretary of Justice Brigitte Zypries, available at <http://www.bmj.de> (last visited Oct. 20, 2004).

that a claim by one investor does not suspend the period of limitation for the other investors that do not participate in the lawsuit. These investors are still forced to file a lawsuit in order to suspend the period of limitation.²⁸³

IV. Summary

This Article supports the assertion that capital market law in Germany and other European member states still has to be developed. This includes not only the development of the duty to disclose for *ad hoc* and periodical statements, but also the development of effective civil law and supervisory sanctions. Germany, the European Union's largest market, leads other member states in the development of liability laws designed to strengthen confidence in the capital market. The new draft of a general liability provision section 37b of WpHG is strongly correlative to United States law, particularly the fraud-on-the-market theory. The shorter correction period and the rules of evidence in the new draft exceed U.S. requirements. If the drafts of a Transparency Directive and Prospect Directive are passed, then there will be, along with the Market Abuse Directive, three directives that align the requirements and the consequences of the capital market information duties to a previously unknown extent. This would be an important step forward in the protection of the investors and the capital markets in general.

²⁸³ See Braun & Rotter, 4 BKR 296, 297 (2004).