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# Investor Protection in the System of Capital Markets Law: Legal Foundations and Outlook

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# Investor Protection in the System of Capital Markets Law: Legal Foundations and Outlook

## **Cover Page Footnote**

International Law; Commercial Law; Law

# Investor Protection in the System of Capital Markets Law: Legal Foundations and Outlook

*Thomas M.J. Möllers†*

I.	Introduction .....	58
II.	Market Participants.....	60
	1. Private and Professional Investors.....	60
	2. Larger and Smaller Listed Companies.....	61
	3. Financial Intermediaries.....	62
III.	Financial Products and Information from Listed Companies .....	63
	1. Complex Financial Products – Prohibition, Approval and Transparency.....	63
	2. Information on Listed Companies and Information Floods.....	67
	a. Information Floods .....	67
	b. Bounded Rationality – Summary .....	67
IV.	Financial Services of Financial Intermediaries .....	69
	1. Selected Abuses of Financial Intermediaries.....	69
	a. Rating Agencies.....	69
	b. Financial Analysts and Journalists .....	69
	c. Investment Services Providers.....	70
	2. Fiduciary Duties of Finance Intermediaries and Other Market Participants .....	73
V.	Supervision and Enforcement.....	75
	1. Public Supervision .....	75
	a. Efficiency at the European Level .....	75
	b. Efficiency at the National Level.....	76
	2. Civil Law Sanctions.....	76
	a. Inadequate State of the Law .....	76

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b. Introduction of Further Reaching Causes of Action.....	77
VI. Legislation and Legal Methodology in Capital Market Law .....	78
1. The <i>Lamfalussy</i> Process, Full Harmonization and Further Gaps.....	78
2. Legal Methodology in the Application of Law.....	81
a. Capital Markets Law as an Interdisciplinary Field.....	81
b. Legal Development through Regulators and Private Parties.....	82
c. Capital Markets Law as European Law and a Research Area for Studies in Comparative Law .....	83
d. Capital Markets and Capital Markets Law – the Interdisciplinary Character of Capital Markets Law .....	84

## I. Introduction

It is no coincidence that the capital markets law we know today owes much of its existence to a financial crisis. Black Friday, October 24, 1929, prompted President Roosevelt to lay the foundations of United States capital markets law with the Securities Act of 1933 (SA) and the Securities Exchange Act of 1934 (SEA).<sup>1</sup> Important features of these two statutes were then adopted in the rest of the world.<sup>2</sup> They were adopted, for example, in Europe in the 1970s. Moreover, United States law is not known for its systematic structure; rather, statutes are often developed as *ad hoc* reactions to crises. However, it is distinguished by a number of features, for example the fact that legislative competence for capital markets law rests with the federal government, while that for corporations law rests with the states.

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<sup>1</sup> Besides the introduction of the *Securities Act of 1933* (SA) and the *Securities Exchange Act 1934* (SEA) by President Roosevelt, the *Sarbanes-Oxley Act* [SOX] also constitutes such a statute. On financial crises, see generally JAMES D. COX ET AL., *SECURITIES REGULATION* 3-7 (6th ed. 2006); CARMEN M. REINHART & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (1st ed. 2009); on the SOX, see generally Thomas M. J. Möllers, *Creating Standards in a Global Financial Market – The Sarbanes-Oxley Act and other Activities: What Europeans and Americans could and should learn from each other*, 4 EUR. CO. & FIN. L. REV. 173 (2007).

<sup>2</sup> See Möllers, *supra* note 1.

Another peculiarity, generous in comparison to Europe, is the general approach of leaving problems for the market to solve, as the market is perceived to have regulatory solutions more readily available than the legislature.

The Member States of the European Union are home to a corporations law that is relatively mature,<sup>3</sup> but a capital markets law that is in relative infancy at only 20 years old.<sup>4</sup> As a result of this, capital markets law is only taught at some European universities. Nonetheless, thousands of statutory provisions have arisen, so that it is already difficult to maintain an overview of them.<sup>5</sup>

The current financial crisis has made clear the “fragility” of the financial markets in recent times. In the forum of the G20, efforts have been made to find the weak points and to react to them.<sup>6</sup> The

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<sup>3</sup> On the history of German corporations law, *see generally* WERNER SCHUBERT & PETER HOMMELHOFF, HUNDERT JAHRE MODERNES AKTIENRECHT: EINE SAMMLUNG VON TEXTEN UND QUELLEN ZUR AKTIENRECHTSREFORM 1884 MIT 2 EINFÜHRUNGEN (De Gruyter Recht, 1985) and WERNER SCHUBERT & PETER HOMMELHOFF (EDS.), DIE AKTIENRECHTSREFORM AM ENDE DER WEIMARER REPUBLIK (De Gruyter Recht, 1987).

<sup>4</sup> *See, e.g.*, Klaus Hopt, *Europäisches Kapitalmarktrecht – Rückblick und Ausblick*, in SYSTEMBILDUNG UND SYSTEMLÜCKEN IN KERNGEBIETEN DES EUROPÄISCHEN PRIVATRECHTS 307, 307-11 (Stefan Grundmann ed., 1999); On the development of the much older stock exchange law, *see generally* Hanno Merkt, *Zur Entwicklung des deutschen Börsenrechts von den Anfängern bis zum zweiten Finanzmarktförderungsgesetz*, in BÖRSENREFORM: EINE ÖKONOMISCHE, RECHTSVERGLEICHENDE UND RECHTSPOLITISCHE UNTERSUCHUNG 17 (Klaus Hopt et al. eds., 1997).

<sup>5</sup> *See Datenbank zum deutschen und europäischen Wirtschaftsrecht*, THOMAS M.J. MÖLLERS, <http://www.thomas-moellers.de> (last visited Nov. 5, 2010). On the three-tier organization at the national and European level, *see* Thomas M.J. Möllers, “Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht/Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards,” [2008] ZEuP 480; Thomas M.J. Möllers, *Vollharmonisierung im Kapitalmarktrecht – Zur Regelungskompetenz nationaler Gerichte und Parlamente*, in *Vollharmonisierung im Privatrecht* 247, 253 (Beate Gsell & Carsten Herresthal eds., 2010) [hereinafter Möllers, *Vollharmonisierung im Kapitalmarktrecht*].

<sup>6</sup> *See, e.g.*, G-20, *London Summit, Progress report on the actions of the Washington action plan* (Apr. 2, 2009), [http://g20.org/Documents/FINAL\\_Annex\\_on\\_Action\\_Plan.pdf](http://g20.org/Documents/FINAL_Annex_on_Action_Plan.pdf) [hereinafter G-20, *London Summit*]; G-20, *Pittsburgh Summit, Progress report on the actions to promote financial regulatory reform* (Sept. 25, 2009), <http://www.pittsburghsummit.gov/documents/organization/129866.pdf> [hereinafter G-

novel feature of this process is that those involved possess the serious intention of creating uniform regulations at the international level. The following article seeks to sketch out some current flaws in capital markets law, in order to identify areas that need future action. To this end it might help to structure capital markets law more clearly than in the past. A distinction is sought to be made in this discussion between (I) market participants, (II) the financial products and information on listed companies, and (III) the relevant financial services of financial intermediaries. The final discussion will then deal with (IV) implementation and enforcement measures and (V) the legal methodology of capital markets law. In the process, the positive developments in capital markets law will be discussed, but above all gaps in investor protection will be addressed. Individual problems will be left for a deeper analysis in the future.

## II. Market Participants

### 1. *Private and Professional Investors*

In banking and capital markets law, listed companies stand before a market that consists of both retail and professional investors. A third group, so-called “financial intermediaries,” gathers information about these companies and evaluates it. The *Markets in Financial Instruments Directive* (MiFID) has made a distinction between professional and private investors. A different standard is set for these two groups, and numerous duties of disclosure are reduced for the former.<sup>7</sup> This is a convincing approach, as the alternative would give rise to transaction costs by imposing information paternalistically on informed investors.<sup>8</sup> However, the financial crisis demonstrates that even the (purportedly) professional *Landesbanken*<sup>9</sup> were not professional

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20, *Pittsburgh Summit*]; G-20, *St. Andrews Summit, Progress report on the economic actions of London, Washington, and Pittsburgh* (Nov. 7, 2009),

[http://g20.org/Documents/20091107\\_progress\\_report\\_standrews.pdf](http://g20.org/Documents/20091107_progress_report_standrews.pdf) [hereinafter G-20, *St. Andrews Summit*].

<sup>7</sup> See Art. 4(1), no. 11, in comparison with Annex II of the MiFID, transposed in §31(9) and §31a(2) WpHG.

<sup>8</sup> See FRANZ CLEMENS LEISCH, *INFORMATIONSPFLICHTEN NACH § 31 WpHG* 163 (C.H. Beck 2004).

<sup>9</sup> Landesbanken is a group of state owned banks unique to Germany. They are

enough to accurately calculate the risks inherent in financial products.<sup>10</sup> Numerous municipal treasuries are complaining about insufficient disclosure.<sup>11</sup> Since they are professional investors, many of the duties imposed under Section 31 of the *Securities Trading Act* (WpHG) do not apply.<sup>12</sup>

## 2. Larger and Smaller Listed Companies

European capital markets law is also full of gaps. Many disclosure obligations only apply to the regulated market, not to the curb market [*Freiverkehr*], such as the Entry Standard on the Frankfurt Stock Exchange or the over-the-counter markets of the other regional stock exchanges.<sup>13</sup> The size of the listed companies correlates clearly with the different “market segments” of the exchange, such as the DAX, MDAX, SDAX and the Prime Standard of the Frankfurt Stock Exchange.<sup>14</sup> The three large exchanges in Europe all solicit small companies. The curb market has the advantage for small companies that it is not subject to strict

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regionally organized and their business is predominantly wholesale banking. They are also the head banking institution of the local and regional bases *Sparkassen* or saving banks. See Michael Gruson & Uwe H. Schneider, *The German Landesbanken*, 1995 COLUMB. BUS. L. REV. 337, 339-40 (1995).

<sup>10</sup> See G-20, *London Summit*, *supra* note 6; G-20, *Pittsburgh Summit*, *supra* note 6; G-20, *St. Andrews Summit*, *supra* note 6.

<sup>11</sup> Above all the Deutsche Bank is the subject of numerous claims. See, e.g., OLG Naumburg judgment of Mar. 24, 2005, 28 *Wertpapier-Mitteilungen* 1313; OLG Bamberg judgment of May 11, 2009, 23 *Wertpapier-Mitteilungen* 1082; OLG Celle judgment of Sept. 30, 2009, *Betriebsberater* 2265.

<sup>12</sup> See Bundesministerium für Justiz, *Begründung Regierungsentwurf zum Finanzmarktrichtlinie Umsetzungsgesetz*, BUNDESTAGSDRUCKSACHE 16/4028, at 66 (Sept. 27, 2006); Ingo Koller, *Commentary on §31a*, in WERTPAPIERHANDELSGESETZ KOMMENTAR ¶ 3 (Otto Schmidt, 2009); c.f. Hannes Bracht *Kommunen als geeignete Gegenparteien im Handel mit Derivaten nach dem Finanzmarktrichtlinie-Umsetzungsgesetz*, 30 WERTPAPIER-MITTEILUNGEN 1386, 1388 (2008).

<sup>13</sup> See RÜDIGER VON ROSEN, GATEWAY TO EUROLAND: THE GERMAN FINANCIAL MARKETPLACE—CENTRE OF EURO AREA CAPITAL MARKETS, 12 (2003), available at [http://www.dai.de/internet/dai/dai-2-0.nsf/0/A7AAF8D6D2950E04C125747C0055904E/\\$FILE/5D8F7F9838EA12CAC125747C0053B257.pdf?openelement&cb\\_content\\_name\\_utf=Gateway%20to%20Euroland.pdf](http://www.dai.de/internet/dai/dai-2-0.nsf/0/A7AAF8D6D2950E04C125747C0055904E/$FILE/5D8F7F9838EA12CAC125747C0053B257.pdf?openelement&cb_content_name_utf=Gateway%20to%20Euroland.pdf).

<sup>14</sup> See DIRK DOHSE & SVEN-CHRISTIAN STEUDE, CONCENTRATION, COAGGLOMERATION AND SPILLOVERS: THE GEOGRAPHY OF NEW MARKET FIRMS IN GERMANY 2 (43rd European Congress of the Regional Sci. Ass'n 2003), available at <http://www-sre.wu-wien.ac.at/ersa/ersaconfs/ersa03/cdrom/papers/230.pdf>.

reporting and disclosure requirements of the regulated market, and avoid the costs associated therewith. A number of disadvantages arise for smaller companies on the capital markets, which make the curb market segment more attractive. Smaller companies often cannot afford large investor relations departments to maintain the company website and provide financial analysts, funds and other investors with regular information. In addition, large investment services providers seldom produce financial analyses of small listed companies. Finally, the securities of these companies are traded far less relative to larger companies.

In turn, fewer turnovers of securities invite price manipulation.<sup>15</sup> Even with so-called “spam emails,” retail investor “ripoffs” are not seldom. “Wild West” manners still remain to a certain degree, which is hardly beneficial to capital markets as an institution. The potentially higher risk of insider trading and market manipulation of the values of smaller listed companies, caused by their lower level of market capitalization, has not yet provoked an adequate legal response. While it is traditionally the larger market segments that have been regulated and supervised, in the future a better supervision of the trading values of smaller listed companies by the exchanges and the Federal Supervisory Authority, the *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin), appears desirable.<sup>16</sup>

### 3. *Financial Intermediaries*

Investors depend on the expertise of financial intermediaries such as rating agencies, financial analysts and investment services providers, and rely on the information they produce. Duties of disclosure still constitute the main instrument of capital markets law.<sup>17</sup> In contrast to prohibitions, duties of disclosure have the

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<sup>15</sup> See Holger Fleischer, *Stock-Spams—Anlegerschutz und Marktmanipulation*, 3 ZBB 137 (2008).

<sup>16</sup> According to information from the responsible departments, the BaFin has been directing particular attention to these problems recently. This increased pressure appears to have been effective at reducing the number of relevant delicts. See also, Bundesanstalt für Finanzdienstleistungsaufsicht [hereinafter BaFin], *Jahresbericht 2008* at 156 (Bonn 2008). See also, KLAUS J. HOPT ET AL., *BÖRSENERFORM* 372 (1997).

<sup>17</sup> See Thomas M. J. Möllers, *The Progress of German Information Disclosure Requirements: A Comparative Law Perspective in Light of Recent Developments in European Capital Markets Law*, 30 N.C. J. INT'L L. & COM. REG. 279, 282-3 (2004).



advantage that the transactions concerned are allowed subject “only” to a duty to provide an explanation of the risks involved.<sup>18</sup> Surprisingly, conflicts of interest are not dealt with in the relevant textbooks as a general instrument of capital markets law.<sup>19</sup> This notwithstanding, the avoidance, or at least disclosure, of conflicts of interest is not just a duty of the banks towards their clients<sup>20</sup> organized within the framework of their compliance regime,<sup>21</sup> but also gives rise to duties incumbent on financial analysts,<sup>22</sup> rating agencies<sup>23</sup> and accountants.<sup>24</sup> It seems one could expand on this approach further – misleading disclaimers are to be forbidden.<sup>25</sup> Breaches of these rules ought to give rise to civil causes of action.

### III. Financial Products and Information from Listed Companies

#### 1. *Complex Financial Products – Prohibition, Approval and Transparency*

Banks, especially investment banks, are innovative. While shares, as a dominant form of security, and corporate bonds used to dominate the market, in recent years countless new financial products have appeared, not only to save taxes, but to generate new markets, new trade, and new profits. Common examples include put- and call-options, as well as derivatives, short sales,

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<sup>18</sup> *Id.*

<sup>19</sup> For examples of this not being addressed, *see, e.g.*, PETRA BUCK-HEEB, *KAPITALMARKTRECHT* (C.F. Müller, 2006); CARSTEN PETER CLAUSSEN, *BANK- UND BÖRSENRECHT* (C.H. Beck 2008); SIEGFRIED KÜMPEL & RÜDIGER VEIL, *WERTPAPIERHANDELSGESETZ* (Erich Schmidt, 2006).

<sup>20</sup> WpHG §31(2) No. 2.

<sup>21</sup> WpHG §33(1) No. 3.

<sup>22</sup> WpHG §34b(1) No. 2; *see also* Thomas M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts - Die Verwendung empirischer und ökonomischer Argumente zur Begründung zivil-, straf- und öffentlich-rechtlicher Sanktionen*, 208 AcP 1 (2008).

<sup>23</sup> *Article 5, Proposal for a Regulation of the European Parliament and of the Council on Credit Rating Agencies*, at 20 COM 704 (Nov. 11, 2008); *see also* Thomas M.J. Möllers, *Regulating Credit Rating Agencies: the new US and EU law – important steps or much ado about nothing?*, 4 CAP. MARKETS L.J. 477 (2009).

<sup>24</sup> Council Directive 2006/43 art. 22(22), 2006 O.J. (EC) (on the statutory audits of annual accounts and consolidated account).

<sup>25</sup> For such a disclaimer, *see* Thomas M.J. Möllers & Florian Holzner, *Die Offenlegungspflichten des Risikobegrenzungsgesetzes*, 11 NZG 166, 171 (2008).

including naked short sales, and structured products such as collateralized debt obligations (CDOs) and residential mortgage backed securities (RMBS). As a result of these developments, products are no longer fully understood by buyers, whether retail investors or professional investors.<sup>26</sup> As such, the benefits and risks of the financial product cannot be properly calculated.<sup>27</sup> Additionally, complex financial products such as the CDO have given rise to certain risks.<sup>28</sup> Residential mortgages were given to non-creditworthy clients, but the risks of these mortgages were not recorded on the books of the bank itself; rather they were transferred to third parties via the financial markets.<sup>29</sup> Lastly, market fluctuations were intensified by speculation on rising or falling prices by the means of certain financial products.<sup>30</sup> A well-known example is that of the Volkswagen shares, which in autumn of 2008 were driven up to €1,000 within a short time, but then fell back down to €200.<sup>31</sup>

In particular, two regulatory mechanisms of capital markets law may be triggered here. On one hand, it must be discussed which products should be prohibited or allowed in more limited quantity and only with the approval of a regulatory authority.<sup>32</sup> Certainly the industry's livelihood lies, in part, in its constant creation of new and "innovative" financial products. Opportunity and risk are by nature bound together. Investors should just "gamble" on the market on a large scale, however, only when they are prepared to lose their investment. For this reason, future

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<sup>26</sup> See Gretchen Morgenson, *Investors in mortgage-backed securities fail to react to market plunge*, N.Y. TIMES (Feb. 18, 2007), available at <http://www.nytimes.com/2007/02/18/business/worldbusiness/18iht-morgenson.4633573.html>.

<sup>27</sup> See *id.*

<sup>28</sup> See *id.*

<sup>29</sup> See *id.*

<sup>30</sup> See *id.*

<sup>31</sup> David Gaffen, *Volkswagen's Bizarre Trading Bug*, THE WALLSTREET JOURNAL (Oct. 7, 2008) <http://blogs.wsj.com/marketbeat/2008/10/07/volkswagens-bizarre-trading-bug/>.

<sup>32</sup> Similar discussions are found in competition law. See, e.g., Wolfgang Fikentscher, *Finanzkrise, Wettbewerb und Regulierung*, 9 GRURINT 615 (2009); Joseph Straus & Simon Klopschinski, *Der Schutz von Geschäftsmethoden und andere patentrechtliche Fragestellungen im Lichte der aktuellen Finanzmarktkrise*, in Festschrift für Peter Mes 327 (Gereon Rother et al. eds., 2009).

products should be prohibited which require no *capital investment* and which, because of *extreme leverage effects*, do more harm than good. WpHG Section 37g provides a good approach: under this section, the Federal Ministry of Finance can release regulations on the basis of which certain financial products can be prohibited. Unfortunately, use has not yet been made of this provision. Fortunately, however, short selling has been prohibited in the United States and by the BaFin in Germany, because this practice can cause the market to rise or fall without the actual investment of capital.<sup>33</sup> Additionally, CDOs should only be allowed in the future if the trading partner assumes some risk of his own. For retail investors, limitations are already in place, namely that discount broking is only permissible for non-complex financial instruments.<sup>34</sup> In a recently passed law, the German legislature prohibited naked short sales and certain trades with derivatives.<sup>35</sup> This approach is inappropriate because alternatives were not discussed sufficiently: the non-stock market trade could also be transferred to the stock market or to multilateral trading facilities (MTFs). Alternatively, “failures to deliver”<sup>36</sup> caused by naked short sales could be reduced by additional measures.<sup>37</sup>

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<sup>33</sup> On July 15, 2008, the SEC prohibited “naked short selling” of the securities of particular financial institutions. Naked short selling refers to the practice of selling securities without actually buying them before hand, or determining that they can be borrowed. The SEC believes that panic sales lead to falls in price to levels that are significantly lower than that to which a normal supply-demand relationship would lead. *Emergency Order Taking Temporary Action to Respond to Market Developments, Exchange Act*, Release No. 58,166, 73 Fed. Reg. 42,379, 42,380 (proposed July 21, 2008) (notice). The BaFin has also prohibited this practice on the basis of §4(1) WpHG, and the German Minister of Finance Wolfgang Schäuble intends to introduce similar prohibition on the Federal level. See BAFIN, ALLGEMEINVERFÜGUNG DER BAFIN VOM 21.09.2008 ZUM VERBOT VON LEERVERKÄUFEN (2008) (Ger.).

<sup>34</sup> WpHG § 31(7) (transposing Art. 19(6) of the MiFID).

<sup>35</sup> DEUTSCHER BUNDESTAG: DRUCKSACHE [hereinafter BT] 19/1952 (Ger.).

<sup>36</sup> Failures to deliver occur if an investor or its broker-dealer do not deliver sold shares within three days. Following new SEC rules, failures to deliver in all equity securities have decreased by approximately fifty-seven percent since the fall of 2008. See SEC Takes Steps to Curtail Abusive Short Sales and Increase Market Transparency, SEC Press Release No. 2009-172 (July 27, 2009).

<sup>37</sup> “Stellungnahme zum Regierungsentwurf für ein Gesetz zur Vorbeugung gegen missbräuchliche Wertpapier- und Derivategeschäfte.” Letter from Thomas M.J. Möllers, Dominique Christ & Andreas Harrer to Volker Wissing, Chairman of the Finance Committee, Deutschen Bundestags (June 15, 2010), available at <http://www.jura.uni-augsburg.de>.

Alongside these developments, more transparency must be created. Further-reaching reporting duties should definitely be introduced, as Section 31 of WpHG does not sufficiently express the dangers presented by financial futures trading.<sup>38</sup> Therefore, the abolition of Section 37 et seq. of WpHG, which warned about particularly dangerous futures trades until October 31, 2007, and 2002. Prior to 2002, WpHG even imposed writing requirements,<sup>39</sup> constituting a step backwards at the cost of investor protection. Retail investors should be able to get an overview of the risk they are entering into. A development to celebrate, on the other hand, is the recent decision of the Federal Court of Justice that granted an award of damages because the investor was not made aware of the risk of total loss of investment.<sup>40</sup>

A stronger classification of risks would also be helpful. Not every investor is aware of the danger of the Prime Standard. More transparency in complex products is definitely needed, especially for derivatives and certificates. A short information sheet that provides more than the price history of the product could be helpful.<sup>41</sup> A draft bill has meanwhile been introduced in this context.<sup>42</sup> Particular risk should be presented, not just in a

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<sup>38</sup> See WpHG § 31.

<sup>39</sup> On the legal history, see GERHARD ROTH, KÖLNER KOMMENTAR ZUM WPHG (Heribert Hirte & Thomas M.J. Möllers eds., Carl Heymanns 2007) (commentary on § 37d ¶ 19); WERTPAPIERHANDELSGESETZ (Andreas Fuchs ed., C.H. Beck 2009) (commentary on § 37e and § 37g ¶ 92).

<sup>40</sup> BGH judgment of 14 July 2009 – BFI Bank, WERTPAPIER-MITTEILUNGEN 1674 (2009) (Ger.).

<sup>41</sup> There is a similar product disclosure statement with insurance products. See, e.g., Verordnung über Informationspflichten bei Versicherungsverträgen [VVG-InfoV], Dec. 18, 2007, BGBL. I at 3006, § 4 (Ger.). See also BUNDESMINISTERIUMS FÜR ERNÄHRUNG, LANDWIRTSCHAFT UND VERBRAUCHERSCHUTZ [BMELV] [THE GERMAN MINISTRY OF NUTRITION, AGRICULTURE AND CONSUMER PROTECTION], ANFORDERUNGEN AN FINANZVERMITTLER – MEHR QUALITÄT, BESSERE ENTSCHEIDUNGEN 62 (2008) (Ger.); Volker Land & Andreas Kühne, *Anlegerschutz und Finanzkrise – noch mehr Regeln? – Zu den Gesetzesinitiativen des BMJ und des BMELV u.a. im Rahmen des Gesetzes zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung (SchVG)*, 28 WERTPAPIER-MITTEILUNGEN [WM] 1301, 1303 (2009) (Ger.) (skeptical of this “rather counterproductive” position).

<sup>42</sup> See *Diskussionsentwurf für ein Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*, BUNDESMINISTERIUM DER FINANZEN (May 3, 2010, 10:01AM),

standardized form sheet, but also in the written record of financial advice, to ensure that specific risks have been expressly named.

## 2. *Information on Listed Companies and Information Floods*

### a. *Information Floods*

Numerous reporting duties exist for listed companies.<sup>43</sup> In recent years, these duties of disclosure have been extended extensively: one remembers the introduction of quarterly, half-yearly and yearly financial records, *ad hoc* reporting, reporting of “directors” dealings,” transparency of financial interests, etc. However, it appears more and more that the limits of disclosure duties have been reached. They not only burden the company with high costs, but also lead to an insurmountable information overload<sup>44</sup> which operates, rather, to the disadvantage of investors.

### b. *Bounded Rationality — Summary*

The results of behavioral finance research can be applied here. They point to the limited understanding and information-processing capability of investors.<sup>45</sup> An approach to solving

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[http://www.bundesfinanzministerium.de/nm\\_1940/DE/BMF\\_\\_Startseite/Service/Downloads/Abt\\_VII/DiskE\\_Gesetz\\_Anlegerschutz\\_Verbesserung\\_20Funktionalit\\_C3\\_A4t\\_20Finanzm\\_C3\\_A4rkte,templateId=raw,property=publicationFile.pdf](http://www.bundesfinanzministerium.de/nm_1940/DE/BMF__Startseite/Service/Downloads/Abt_VII/DiskE_Gesetz_Anlegerschutz_Verbesserung_20Funktionalit_C3_A4t_20Finanzm_C3_A4rkte,templateId=raw,property=publicationFile.pdf).

<sup>43</sup> For a graphic overview, see THOMAS M.J. MÖLLERS, AD-HOC-PUBLIZITÄT § 2, ¶ 50 (Thomas M.J. Möllers & Klaus Rotter eds., C.H. Beck 2003).

<sup>44</sup> See generally GOODYEAR ROGER & REKHA AGARWALA-ROGERS, COMMUNICATION IN ORGANIZATIONS 90 (Free Press 1976); Jacob Jacoby et al., *Brand Choice Behavior as a Function of Information Load: Replicaion and Extension*, 1 J. OF CONSUMER RES. 33 (1974); Naresh K. Malhotra, *Information Load and Consumer Decision Making*, 8 J. OF CONSUMER RES. 419 (1982); Naresh K. Malhotra, *Reflections on the Information Overload Paradigm in Consumer Decision Making*, 10 J. OF CONSUMER RES. 436 (1984). On capital market law, see generally Paula J. Dalley, *The Use and Misuse of Disclosure as a Regulatory System*, 34 FLA. ST. U. L. REV. 1089 (2007); Donald C. Langevoort, *Investors, IPOs and the Internet*, 2 ENTREPRENEURIAL BUS. L. J. 767, 770 (2008); Troy A. Paredes, *Blinded by the Light: Information Overload and its Regulation*, 81 WASH. U. L. Q. 417 (2003); Susanna K. Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139 (2006).

<sup>45</sup> See generally HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 81 (Free Press, 1957); ANDREI SHLEIFER, INEFFICIENT MARKETS: AN INTRODUCTION TO BEHAVIOURAL FINANCE 10 (Oxford, Oxford University Press 2000); W. G. Chase & Herbert A. Simon, *Perception in Chess*, 4 COGNITIVE PSYCHOLOGY 55, 76 (1973); Christine Jolls, Cass R. Sunstein & Richard Thaler, *Theories and Tropes: A Behavioural Approach to Law and*

problems in the capital markets could be to avoid misleading or confusing information<sup>46</sup> and to reduce the overall quantity of information. This would require the abolition of the yearly document under Section 10 of WpPG, though this would save but negligible costs and an overview of the yearly financial information of the company seems sensible as an investor relations measure. Revision of the yearly and half-yearly balances is also needed. These balances are not even read, let alone understood, by retail investors.<sup>47</sup> What is required here is “translation” assistance, information that is simple and easy to understand. Currently, the legislature requires the production of a summary of prospectus information under Section 5(2) WpPG. This duty should be carried over to the secondary market. In the future, the yearly report is to be accompanied by a “short financial report,”<sup>48</sup> to enable the comprehension of this important corporate information by investors better than has hitherto been the case.<sup>49</sup>

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*Economics*, 50 STAN. L. REV. 1471 (1998); George A. Miller, *The Magical Number Seven, Plus or Minus Two*, 63 PSYCHOLOGY REVIEW 81 (1956); Andreas Oehler, *Behavioural Finance – Theoretische, empirische und experimentelle Befunde unter Markt-relevanz*, 48 BANK ARCHIV [BA] 978, 989 (2000) (Ger.); Robert J. Shiller, *From Efficient Markets to Behavioral Finance*, J. ECON. PERSP., Winter 2003, at 83; Herbert A. Simon, *A Behavioural Theory of Rational Choice*, 69 Q. J. OF ECON. 99 (1955) (foundational work); see also LARS KLÖHN, KAPITALMARKT, SPEKULATION UND BEHAVIOURAL FINANCE (Duncker Humboldt Verlag 2006); WOLFGANG SCHÖN & ROLF STÜRNER, FESTSCHRIFT FÜR CLAUS-WILHELM CANARIS (Andreas Heldrich, Jürgen Prölss & Ingo Koller eds., C.H. Beck 2007).

<sup>46</sup> On the misuse of *ad hoc* reporting in the year 2000 and the reaction of the legislature with the introduction of §15(2) WpHG, see BAFIN, EMITTENTENTLEITFADEN 59 (2005) (Ger.); see also WERTPAPIERHANDELSGESETZ (Otto Schmidt, 2009) (commentary on § 15, ¶ 199). See also WpHG § 31(2) (introduced for securities trading companies on the basis of Art. 19(2) MiFID).

<sup>47</sup> *Id.*

<sup>48</sup> WpHG-E §37v(2).

<sup>49</sup> In the United Kingdom, such financial reports have existed since 1995. See The National Archives, *The Companies (Summary Financial Statement) Regulations 1995* (Dec. 31, 1995), <http://www.legislation.gov.uk/uksi/1995/2092/contents/made>. This has been accepted on a voluntary basis by, for example, the BASF S.E. with the *BASF Compact*, available at

[http://berichte.basf.de/basfir/copsfiles/de/2008/kompakt/14586\\_BASF\\_Kompakt\\_2008.pdf](http://berichte.basf.de/basfir/copsfiles/de/2008/kompakt/14586_BASF_Kompakt_2008.pdf); cf. Thomas M.J. Möllers & Eva Kernchen, *Information Overload am Kapitalmarkt – Plädoyer zur Einführung eines Kurzfinanzberichts auf empirischer, psychologischer und rechtsvergleichender Basis*, 40 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] (forthcoming Feb. 2011) (Ger.).

Besides the base price information, securities service providers could provide clients with short “information sheets” in the course of investment advisory service that are more tailored to the clients’ needs.<sup>50</sup>

#### IV. Financial Services of Financial Intermediaries

##### 1. Selected Abuses of Financial Intermediaries

###### a. Rating Agencies

Even today material deficits exist in this area.<sup>51</sup> Rating agencies give ratings that are substantially too positive on structured financial products (collateralized debt obligations or CDOs) and operate with extensive conflicts of interests.<sup>52</sup> These arise primarily because the same agencies are involved first in structuring products and then rating them.<sup>53</sup>

###### b. Financial Analysts and Journalists

In contrast to the USA, retail investors in Germany do not generally have access to financial analyses. They turn to third parties, for example journalists, for analysis summaries. In terms of content, financial analyses must name the author and disclose any conflicts of interest. Journalists in Germany fall foul of this requirement on a regular basis at present.<sup>54</sup>

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<sup>50</sup> See Möllers, *Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht/Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards*, supra note 5.

<sup>51</sup> See Thomas M.J. Möllers, *Credit Rating Agencies under New US and EU Law – Important Steps or Much Ado about Nothing?*, 4 CAP. MARKETS L. J. 477 (2009).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Accord.* THOMAS M.J. MÖLLERS, *KÖLNER KOMMENTAR ZUM WPHG* (Carl Heymanns 2007) (commentary on §34b ¶ 234); Thomas M.J. Möllers, *Efficiency as a Standard in Capital Market Law – The Application of Empirical and Economic Arguments for the Justification of Civil Law, Criminal Law and Administrative Law Sanctions*, EUROPEAN BUS. L. REV. 243 (2009). Concurring, see INGO KOLLER, *WERTPAPIERHANDELSGESETZ* (Heinz-Dieter Assmann & Uwe Schneider eds., Cologne, Otto Schmidt 2009) (commentary on §34b ¶ 73); see also ULRICH GÖRES, *HANDBUCH KAPITALMARKTINFORMATION* (Mathias Habersack, Peter Mülbelt & Michael Schlitt eds., C.H. Beck 2009) (commentary on §24, ¶ 176).

*c. Investment Services Providers*

It is certainly positive for investors that, at the level of European law, investment advisers are obliged to make themselves familiar with the wishes and financial situation of the investor – the principle of “know your customer.” It is also positive for investors that advice is now to be documented in written form under Section 34(2a) clauses 3–5 of WpHG.<sup>55</sup>

It remains doubtful, however, whether the German legislature has competence at all to create a duty to keep records of this sort.<sup>56</sup> And there exist many unresolved questions: the banks and financial advisors are not allowed to carry out the transactions planned in the consultation until the client has received the written protocol. However, particularly for investment advice, time can be of the essence. The production and communication of written advice can, at times, simply be too slow; who then bears the risk of market conditions that change in the meantime? Beyond this, the reversal of the burden of proof against the banks in the case of an action to challenge the memorandum hides several material risks, which could manifest themselves as outright abuses. The client has one week in which to challenge the protocol after its receipt. As the bank bears the onus of proof, the client could easily impugn the advice given, should market prices happen to change in that supervening period. The bank would then have to discharge the onerous burden of proving that the written advice was neither incomplete nor incorrect. The client should also be given the opportunity to waive the need for a written protocol.<sup>57</sup> In

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<sup>55</sup> Comparable duties existed before under §6(1) II and §61(1) II VVG. However, these are substantially less extensive. See Michael Böhm, *Regierungsentwurf zur Verbesserung der Durchsetzbarkeit von Ansprüchen aus Falschberatung*, 6 ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [hereinafter BKR] 221, 224 (2009).

<sup>56</sup> See Thomas M.J. Möllers & Thomas Wenninger, *Stellungnahme im Rechtsausschuss als Gutachter des Deutschen Bundestages zum Regierungsentwurf eines Gesetzes zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung*, Apr. 29, 2009, available at [www.thomas-moellers.de](http://www.thomas-moellers.de) (Ger.); see also THOMAS M.J. MÖLLERS, VOLLHARMONISIERUNG IM PRIVATRECHT 247 (Beate Gsell & Carsten Herresthal eds., Mohr Siebeck 2009); Michael Böhm, *supra* note 55, at 228; Dieter Leuring & Dirk Zetsche, *Die Reform des Schuldverschreibungs- und Anlageberatungsrechts - (Mehr) Verbraucherschutz im Finanzmarktrecht?* NEUE JURISTISCHE WOCHENSCHRIFT 2856, 2859 (2009).

<sup>57</sup> Michael Böhm, *Regierungsentwurf zur Verbesserung der Durchsetzbarkeit von*



such cases, investor protection overshoots the mark and leads to a disproportionate disadvantage for the banks.

Beyond this, many banking and investment services providers are capable of optimization. It is a statutory requirement that information and advice be provided with the required level of expertise.<sup>58</sup> However, this has not been concretized further by statute, and often 16 to 30 year old bank employees give customers important advice – a task clearly beyond their capacity.<sup>59</sup> Meanwhile, the German legislature created a new proposal to ensure that the quality of the adviser is supervised.<sup>60</sup>

The MiFID concretizes financial services and creates a greater degree of legal certainty. At the expense of investor protection, and to this extent in a step backwards, it expressly allows “discount brokers” and standardized disclosure forms.<sup>61</sup> In practice, hybrids exist between asset management and investment advisory services. To this group belong the so-called “grey” asset management and secondary advice after an initial investment. It is unclear to what extent these sorts of dealings give rise to judicial control.<sup>62</sup>

Further, conflicts of interest exist because banks usually sell

*Ansprüchen aus Falschberatung*, 6 BKR 221, 222 (2009) (F.R.G.).

<sup>58</sup> See WpHG § 31(1), No. 1.

<sup>59</sup> See generally Dieter Leuring & Dirk Zetsche, *Die Reform des Schuldverschreibungs- und Anlageberatungsrechts - (Mehr) Verbraucherschutz im Finanzmarktrecht?*, 39 N.J.W. 2856, at 2861 (2009) (F.R.G.) (discussing how branch consultants are directed by business managers and have no access to finance experts).

<sup>60</sup> *Diskussionsentwurf für ein Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*, BUNDESMINISTERIUM DER FINANZEN (May 11, 2010),

[http://www.bundesfinanzministerium.de/nn\\_19408/DE/Wirtschaft\\_und\\_Verwaltung/Geld\\_und\\_Kredit/Aktuelle\\_Gesetze/DiskE\\_Anlegerschutzverbesserungsgesetz\\_2010.html](http://www.bundesfinanzministerium.de/nn_19408/DE/Wirtschaft_und_Verwaltung/Geld_und_Kredit/Aktuelle_Gesetze/DiskE_Anlegerschutzverbesserungsgesetz_2010.html).

<sup>61</sup> On this point, see THOMAS M.J. MÖLLERS, *KÖLNER KOMMENTAR ZUM WPHG*, commentary §31, ¶ 195 (1997); see also WERTPAPIERHANDELSGESETZ, commentary §§31-37(a), ¶ 70 (Andreas Fuchs ed., 2009).

<sup>62</sup> Thomas M.J. Möllers, *Vermögensbetreuungsvertrag, graue Vermögensverwaltung und Zweitberatung - Vertragstypen zwischen klassischer Anlageberatung und Vermögensverwaltung*, 3 WERTPAPIER-MITTEILUNGEN [WM] 93 (2008) (F.R.G.); see also VOLLHARMONISIERUNG IM PRIVATRECHT 247, 265 (Beate Gsell and Carsten Herresthal eds., 2009); WERTPAPIERHANDELSGESETZ, *supra* note 19, commentary §31, ¶ 245.

their own products. Reported judgments on kick-backs<sup>63</sup> only cover one aspect of this problem. Although the Federal Court of Justice postulates the avoidance of conflicts of interest as a general principle,<sup>64</sup> it has not found such a conflict in cases where a bank only recommends its in-house products.<sup>65</sup> This authority contradicts the “no conflicts” model, whereby financial services providers are bound to deal in the best interests of their clients.<sup>66</sup> The market for fee-based advice from disinterested advisors who can inform investors neutrally about a range of different investment forms is still remarkably small.<sup>67</sup> Insurance law provisions are more advanced in this regard — under Section 60(2) VVG, insurance brokers must disclose the limited selection of products they offer.<sup>68</sup> A similar obligation would not be an unreasonable imposition on banks.

Banks, as financial intermediaries, also owe a minimum degree of disclosure, which takes the form of standardized disclosure in brochures. It should be considered insufficient when no current

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<sup>63</sup> BUNDESGERICHTSHOF [hereinafter BGH], Dec. 19, 2000, 146 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [hereinafter BGHZ] 235 241 (Ger.); 170 BGHZ 226 (234) (regarding Kick Back II); BGH Jan. 20, 2009, 9 WERTPAPIERMITTEILUNGEN [WM] 405, 406, 2009 (Ger.) (regarding Kick Back III); 27 WM 1274 (Ger.) (regarding Kick Back IV); HIRTE & MÖLLERS, *supra* note 39, commentary §31, ¶ 144.

<sup>64</sup> See BGH, Jan. 20, 2009, *supra* note 64, at 406. Reference to HIRTE & MÖLLERS, *supra* note 39, commentary § 31, ¶ 23, does not apply with such generality. See Mathias Haas, Case Note on BGH judgment of 16 June 2009, (2009) LMK 277068.

<sup>65</sup> BGH Dec. 19, 2006, 11 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [hereinafter ZIP] 518 (520), 2007 (Ger.); Fuchs, *supra* note 39, commentary §31, ¶ 79; see also Frank A. Schäfer & Ulrike Schäfer, *Zur Frage der Aufklärungspflicht der anlageberatenden Bank im Zusammenhang mit der Zahlung von Rückvergütungen durch eine Kapitalanlagegesellschaft*, 4 BKR 163, 164 (2007) (Ger.).

<sup>66</sup> WpHG § 31; For a critical assessment, see Ingo Koller, *Zu den Grenzen des Anlegerschutzes bei Interessenkonflikten*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT [hereinafter ZBB] 197, 198 (2007); Ingo Koller in Heinz-Dieter Assmann, and Uwe Schneider (eds.), *Wertpapierhandelsgesetz* (Otto Schmidt, Cologne 2009) (commentary on §31, ¶ 134).

<sup>67</sup> See Marco Habschick, et al., *Anforderungen an Finanzvermittler – mehr Qualität, bessere Entscheidungen*, BUNDESMINISTERIUMS FÜR ERNÄHRUNG, LANDWIRTSCHAFT UND VERBRAUCHERSCHUTZ [BMELV], 152 (Sept. 2008) (Ger.), [http://www.bmelv.de/cae/servlet/contentblob/379922/publicationFile/42905/StudieFinanzvermittler.pdf;jsessionid=F237\\_0B2E1310E6FCFE482F73C38955C5](http://www.bmelv.de/cae/servlet/contentblob/379922/publicationFile/42905/StudieFinanzvermittler.pdf;jsessionid=F237_0B2E1310E6FCFE482F73C38955C5) (last visited Oct. 26, 2010).

<sup>68</sup> See Council Directive 2002/92, art. 12(1)(e)(ii) and (iii), 2003 O.J. (L 9) 9 (EC).

market price is provided in online brokering services. In such cases, the investor is often forced to estimate instead of being able to limit overly large spreads through the use of a stop-loss order.<sup>69</sup>

## 2. *Fiduciary Duties of Finance Intermediaries and Other Market Participants*

One thing that stands out is that the contractual duties of a financial intermediary only apply towards the company's principal, the customer, but not towards third parties. While damages claims against banks are not infrequent, a gap exists where liability to third parties may be justified, for example, where financial analysis and rating agencies give ratings or recommendations that are far too positive.

In corporate law, the managerial organs of the company owe a duty of loyalty to the company.<sup>70</sup> This fiduciary duty arises from the special power that company managers have over the capital of others.<sup>71</sup> This concept also applies directly to asset management<sup>72</sup> and to investment funds.<sup>73</sup> In general, bank business is characterized according to German civil law as *Auftragsrecht* or agency law, by which the bank deals in its own name for the benefit of the client-principal, and is bound to put its own interests behind those of the principal.<sup>74</sup> Whether this falls below the true fiduciary standard of duty, and to what extent, requires further dogmatic inquiry. Section 31(1) No. 1 of WpHG has also extended the principle of furthering another party's interest to relationships that are not really for the benefit of that other party for example, with the provision of credit.<sup>75</sup>

It is unclear whether the duties of financial intermediaries, who

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<sup>69</sup> See generally *Banking and Stock Glossary*, DEUTSCHE BANK (Nov. 9, 2010, 7:00 PM), [http://www.db.com/lexikon/lexikon\\_de/content/index\\_e\\_1178.htm](http://www.db.com/lexikon/lexikon_de/content/index_e_1178.htm) (defining a stop-loss order and briefly explaining its use in limiting investors' losses).

<sup>70</sup> See Thomas M.J. Möllers, *Treuepflichten und Interessenkonflikte bei Vorstands- und Aufsichtsratsmitgliedern*, in *HANDBUCH CORPORATE GOVERNANCE* 387 (2003).

<sup>71</sup> *Id.*

<sup>72</sup> For a detailed treatment, see ROLF SETHE, *ANLEGERSCHUTZ IM RECHT DER VERMÖGENSVERWALTUNG* 149, 618 (2005).

<sup>73</sup> *Investmentgesetz* §22; see also *Pfandbriefgesetz* §7.

<sup>74</sup> KLAUS J. HOPT & ADOLF BAUMBACH, *HANDELSGESETZBUCH*, §347, ¶ 30 (C.H. Beck 2008).

<sup>75</sup> HIRTE & MÖLLERS, *supra* note 39, commentary § 31, ¶ 87.

often stand between investors and listed companies, can be transferred in weaker form to the company itself. On its face, this approach is to be rejected, as listed companies do not usually act in the interest of others, that is, their investors. Fundamentally, contractual relationships are absent, so that only delictual liability comes into question.<sup>76</sup> It is conceivable that listed companies might be held subject to duties comparable to the professional liability<sup>77</sup> of accountants, tax advisors and lawyers, as on the capital market a certain trust is put in the expertise of professionals.<sup>78</sup> In the case of *ad hoc* reporting requirements, a particular duty is imposed on the management of a listed company because it bears a particular responsibility as “information monopolists.”<sup>79</sup> The information provided by the company influences the market price of its securities, but it also influences third party analyses. Do the number and nature of duties deemed to apply and the question of fault influence this role?<sup>80</sup> This reasoning can be extended to yearly and half-yearly financial reporting, because the information content in these reports is significantly higher than content derived from *ad hoc* reporting.<sup>81</sup>

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<sup>76</sup> For a survey of the argument, see HIRTE & MÖLLERS, *supra* note 39, commentary §§ 37b-37c, ¶ 18; see also SETHE, *supra* note 72, §§ 37b-37c, ¶ 18.

<sup>77</sup> See Klaus J. Hopt, *Nichtvertragliche Haftung ausserhalb von Schadens- und Bereicherungsausgleich*, 183 ARCHIV FÜR PRESSERECHT 578, 608 (1983) (Ger.). See ALEXANDER HELLGARDT, *KAPITALMARKTDELIKTSRECHT: HAFTUNG VON EMITTENTEN, BIETERN, ORGANWALTERN UND MARKTINTERMEDIÄREN- GRUNDLAGEN, SYSTEMATIK, EINZELFRAGEN* 218, 436 (2008) (arguing that, on the basis of a *sui generis* legal relationship, false information for self-enrichment or targeted exclusion of corporate governance mechanisms can crystallise into a capital markets law duty of loyalty). For a discussion of the *Informatec* decision, see, e.g., Thomas M.J. Möllers and Franz Clemens Leisch, *Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach § 826 BGB*, WM 1648, 1654 (2001); see also HIRTE & MÖLLERS, *supra* note 39, commentary §§ 37b-37c, ¶ 119; Möllers, *AD-HOC-PUBLIZITÄT*, *supra* note 43, §3 ¶¶ 32, 47; cf. Oliver Rieckers, *Haftung des Vorstands für fehlerhafte Ad-hoc-Meldungen de lege lata und de lege ferenda*, BETRIEBS-BERATER [1213 (2002) (Ger.); Rüdiger Krause, *Ad-hoc-Publizität und haftungsrechtlicher Anlegerschutz*, 6 ZGR 799, 823 (2002).

<sup>78</sup> See *id.*

<sup>79</sup> Möllers, *supra* note 37, at 282-83.

<sup>80</sup> On the misuse of this information instrument, see Fuchs, *supra* note 39, at commentary on §37b and §37c ¶ 34; Patrick C. Leyens, *Unabhängigkeit der Informationsintermediäre zwischen Vertrag und Markt*, in PERSPEKTIVEN DES WIRTSCHAFTSRECHTS 423 (Harald Baum et al. eds., 2008).

<sup>81</sup> The Federal Court of Justice emphasizes correctly that documents such as the

As such, this must apply *a fortiori* to the duties arising from regular reporting requirements. The introduction of a “balance-sheet oath” has made the significance of the yearly financial report to the investing public even clearer.<sup>82</sup>

The elements of the generally applicable insider trading and price manipulation provisions are completely vague. Does it increase the illegality of the action when professional market participants fulfill an element of proscribed conduct, for example price manipulation, or does it only have an influence on sentencing considerations? Put differently, is there a layman’s discount for insider traders?<sup>83</sup>

## V. Supervision and Enforcement

### 1. Public Supervision

#### a. Efficiency at the European Level

Finally, some mention ought to be made of supervision. Here, too, we allow ourselves inefficient structures, with twenty-seven national supervisory authorities in Europe. Many of these are far too small to be equal partners with global players on the financial markets such as the three largest credit rating agencies.<sup>84</sup> Meanwhile, attempts have been made to create new European supervision structures and to make European Law more efficient. In this context, it becomes relevant to consider which problems are to be solved on the international, European or national level.<sup>85</sup>

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yearly financial reports or the prospectus have a higher information value than *ad hoc* reporting. See BGH, July 19, 2005, 160 BGHZ 134, 138 (Ger.).

<sup>82</sup> WpHG §37v(2) No. 3, §37w(3) No. 3, §37y No. 1; HANDELSGESETZBUCH [hereinafter HGB], §264(2), sentence 3, §289(1), sentence 5. However, the sanctions imposed can now differ greatly from the criminal provisions of §331 No. 3a HGB to a lack of any sanction at all. See Fuchs, *supra* note 39 (Andreas Fuchs et al. eds.) (commentary on §37v - §37z ¶ 15); Peter O. Mülbart & Steffen Steup, *Das zweispurige Regime nach Inkrafttreten des TUG*, 20 NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [hereinafter NZG] 761, 769 (2007) (Ger.).

<sup>83</sup> If an investor organization makes a public statement, higher duties to conduct proper research exist to avoid the creation of rumors than when retail investors express a position on securities in an online forum.

<sup>84</sup> For a critical commentary, see Thomas M.J. Möllers, *Regulierung von Ratingagenturen*, 64 JURISTEN ZEITUNG 861, 869 (2009) (Ger.).

<sup>85</sup> Concerning the problems in dealing with derivatives, see *supra* note 34. European Member States such as France criticized Germany’s single-handed national approach.

### *b. Efficiency at the National Level*

Banking and capital markets law is a complex constellation of public law, criminal law and civil law structures. Cooperation between the BaFin and the public prosecutors is still hindered by the fact that the corporate departments of the latter possess insufficient staff and expertise. In the future, the capacity of the public prosecutors to sanction insider trading and market manipulation offences with criminal proceedings should be enhanced to reflect the importance of the stock exchange. Finally, the number of BaFin employees must be increased.<sup>86</sup>

## *2. Civil Law Sanctions*

### *a. Inadequate State of the Law*

Recent developments in European competition law make clear that besides public law, the civil law actions of private individuals are indispensable to sanctioning violations and ensuring an open market economy with free competition.<sup>87</sup> If one regards functioning capital markets as a legal value comparable to functional competition, it is one that requires enhanced protection under civil law in order to build the required confidence in the capital markets. What is certainly positive is the abolition of the special statute of limitations in Section 37a WpHG<sup>88</sup> and the

*Frankreich irritiert über deutschen Alleingang*, FRANKFURTER ALLGEMEINE ZEITUNG, May 19, 2010, available at

<http://www.faz.net/s/RubEC1ACFE1EE274C81BCD3621EF555C83C/Doc~E27EEBDF4D87C4880AE64DB93DA974EC5~ATpl~Ecommon~Scontent.html> (Ger.).

<sup>86</sup> The annual reports or *Jahresberichte* of the BaFin refer to some cases – still capable of a rather quick inventory, being modest in number. See, e.g., BaFin, *supra* note 16, '06 *Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht*, 163 (2006); BaFin, '07 *Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht*, 172 (2007); BaFin, '08 *Jahresbericht der Bundesanstalt für Finanzdienstleistungsaufsicht*, 154-55 (2008).

<sup>87</sup> Daniel Zimmer & Hans Logemann, *Der Private Rechtsschutz im Kartellrecht Zum Weißbuch der Kommission über Schadensersatzklagen wegen Verletzung des EG-Wettbewerbsrechts*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (2009) 489 (Ger.); Commission of the European Communities, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM (2008) 165 (April 2, 2008); see Treaty Establishing the European Community art. 4; see also ANTTI AINE ET AL., THE ENFORCEMENT OF COMPETITION LAW IN EUROPE 387 (Thomas M.J. Möllers & Andreas Heinemann eds., 2007).

<sup>88</sup> WERTPAPIERHANDELSGESETZ, *supra* note 39, at commentary on §37a ¶ 4, 12;

introduction of the Capital Markets Class Action Statute (KapMuG). Otherwise, however, much still lies in a sorry state. A specially provided cause of action only lies for incorrect *ad hoc* reporting. Because of the high test required to prove causation, it is hardly used. Other reporting duties are all too often denied the protective legislative intent required for a cause of action.<sup>89</sup>

*b. Introduction of Further Reaching Causes of Action*

The legislature attempted to create a normative structure for comprehensive liability for false capital market information two legislative periods ago with the Capital Markets Information Liability Statute (KapInHG). Even if the liability envisioned in this bill was excessive,<sup>90</sup> it represented a good starting point for further legislative initiatives.<sup>91</sup> European law also requires the introduction of causes of action enabling claims in damages for incorrect capital market information.<sup>92</sup> A purely internal cause of

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LEISCH, *supra* note 8, at §37a ¶ 33; Böhm, *supra* note 55, at 227; Volker Lang & Andreas Otto Kühne, *Anlegerschutz und Finanzkrise – noch mehr Regeln? – Zu den Gesetzesinitiativen des BMJ und des BMELV u.a im Rahmen des Gesetzes zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung* [SchV], 28 WERTPAPIER-MITTEILUNGEN 1301, 1304 (2009) (Ger.); Leuring & Zetsche, *supra* note 56, at 2858.

<sup>89</sup> See the recent BGH judgment of Feb. 19, 2008, NEUE JURISTISCHE WOCHENSCHRIFT, 1734, 1735 ¶ 14, §34b and §37v of the WpHG.

<sup>90</sup> See, e.g., HELLGARDT, *supra* note 77; Klaus J. HOPT & HANS-CHRISTIAN VOIGT, PROSPEKT- UND KAPITALMARKTINFORMATIONSHAFTUNG: RECHT UND REFORM IN DER EUROPÄISCHEN UNION, DER SCHWEIZ UND DEN USA 9, 107 (Klaus J. Hopt & Hans-Christian Voigt eds., 2005); TILMAN WEICHERT, DER ANLEGERSCHADEN BEI FEHLERHAFTEN KAPITALMARKTPUBLIZITÄT (2008); Thomas M.J. Möllers, *Die Infomatec-Entscheidungen des BGH – Marksteine auf dem Weg zu einem Kapitalmarkt-informationshaftungsgesetz*, 60 JURISTENZEITUNG 75, 79 (2005) (Ger.).

<sup>91</sup> *Die Beschlüsse des 64. Deutschen Juristentages Berlin 2002*, DEUTSCHER JURISTENTAGS, 41 (Sept. 20, 2002), <http://www.djt.de/files/djt/64/beschluesse.pdf>;

Patrick C. Leyens, *German Company Law: Recent Developments and Future Challenges*, 6 GERMAN LAW JOURNAL 1407, 1416 (2005), available at

[http://www.germanlawjournal.com/pdfs/Vol06No10/PDF\\_Vol\\_06\\_No\\_10\\_1407-1418\\_Developments\\_Leyens.pdf](http://www.germanlawjournal.com/pdfs/Vol06No10/PDF_Vol_06_No_10_1407-1418_Developments_Leyens.pdf).

<sup>92</sup> See Council Directive 2006/46/EC, of the European Parliament and of the Council of 14 June 2006 Amending Council Directives 78/660/EEC, 83/349/EEC, 86/635/EEC, and 91/674/EEC, art. 50b, 2006 O.J. (L 224/1); Council Directive 2004/109, of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in Relation to Information About Issuers

action within the company, as Section 93 AktG provides, cannot be regarded as sufficient to meet this requirement of community law in several respects. European law remains, as a result, incorrectly transposed in German law to this day.<sup>93</sup> *De lege ferenda*, the introduction of a claim in damages for incorrect quarterly, half-yearly and yearly reports should be considered.<sup>94</sup>

## VI. Legislation and Legal Methodology in Capital Market Law

### 1. *The Lamfalussy Process, Full Harmonization and Further Gaps*

The Lamfalussy Process brings about full harmonization without calling it by name. Thus, full harmonization should be assumed by the *Markets in Financial Instruments Directive*,<sup>95</sup>

Whose Securities Are Admitted to Trading on a Regulated Market and Amending Council Directive 2001/34/EC, art. 7(28), 2004 O.J. (L390/38) 17; Council Directive 2003/71/EC, of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC, art. 6(2), 2003 O.J. (L345/64); Fourth Council Directive 78/660/EEC of 25 July 1978 Based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, 1978 O.J. (L 222) 11.

<sup>93</sup> This applies, for example, to Article 7 of the Transparency Directive 2004/109/EC which reads:

Member States are to ensure that responsibility for the information to be drawn up and made public in accordance with Articles 4, 5, 6 and 16 lies at least with the issuer or its administrative, management or supervisory bodies and shall ensure that their laws, regulations and administrative provisions on liability apply to the issuers, the bodies referred to in this article or the persons responsible within the issuers.

Directive 2004/109, *supra* note 92. See also MICHAEL BRELLOCHS, PUBLIZITÄT UND HAFTUNG VON AKTIENGESELLSCHAFTEN IM SYSTEM DES EUROPÄISCHEN KAPITALMARKTRECHTS 95 (2005).

<sup>94</sup> On the current state of this debate, see, e.g., *supra* note 39, at commentary on §37b and §37c ¶ 24; Fuchs, *supra* note 39, at commentary on §37b and §37c ¶ 69.

<sup>95</sup> On the MiFID, see Thomas M.J. Möllers, *Zur 'Unverzüglichkeit' einer Ad-hoc-Mitteilung im Kontext* in, Festschrift für Norbert Horn 473, 485 (Andreas Schlüter et al. eds., 2006); Tobias Buchmann, *Umsetzung vollharmonisierter Richtlinien* 95 (2008); Fuchs (ed.), *supra* note 39, at commentary on §31 ¶ 254; Roman Jordans, *Die Umsetzung der MiFID in Deutschland und die Abschaffung des § 37d WpHG*, 37 Wertpapier-Mitteilungen 1827 (2007) (Ger.); Carsten Herresthal, *Die Pflicht zur Aufklärung über Rückvergütungen und die Folgen ihrer Verletzung*, ZBB, at 348, 352 (2009) (Ger.). Roman A. Kasten, *Das neue Kundenbild des § 31 a WpHG -*



*Market Abuse Directive*,<sup>96</sup> the *Prospectus Directive*,<sup>97</sup> and the *Transparency Directive*.<sup>98</sup> In this process, the jurisdiction of the ECJ to define unclear legal terms should also be considered. It is unclear, however, what jurisdiction the ECJ has to determine the level of harmonization brought about by an instrument when that is left undefined.<sup>99</sup> This applies to another important question, namely, the extent to which the national civil courts, along with the duties arising from Section 31 et seq. of the WpHG, can concretize questions left open such as the post-contractual duty of advice.<sup>100</sup>

Some are of the opinion that the national legislature is competent to answer particular questions that are not expressly dealt with.<sup>101</sup> According to the opposing camp, recourse to

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*Umsetzungsprobleme nach MiFID & FRUG*, 7 BKR 261, 267 (2007) (Ger.); Thomas M.J. Möllers, *Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht - Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 480, 500 (2008) (Ger.); Tilman Weichert & Thomas Wenninger, *Die Neuregelung der Erkundigungs- und Aufklärungspflichten von Wertpapierdienstleistungsunternehmen gemäß Art. 19 RiL 2004/30/EG (MiFID) und Finanzmarkt-Richtlinie-Umsetzungsgesetz*, 14 WERTPAPIER-MITTEILUNGEN 627, 628 (2007) (Ger.); On maximum harmonization, see Peter O. Mülbart, *Anlegerschutz bei Zertifikaten – Beratungspflichten, Offenlegungspflichten bei Interessenkonflikten und die Änderungen durch das Finanzmarkt-Richtlinie-Umsetzungsgesetz (FRUG)*, 25 WERTPAPIER-MITTEILUNGEN 1149, 1157 (2007) (Ger.); Peter O. Mülbart, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effktengeschäft der Kreditinstitute*, 172 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT 170, 176 (2008) (Ger.).

<sup>96</sup> CHRISTIAN BÜCHE, *DIE PFLICHT ZUR AD-HOC-PUBLIZITÄT ALS BAUSTEIN EINES INTEGRIEREN FINANZMARKTS* 85 (2005); BUCHMANN, *supra* note 95, at 100; THOMAS M.J. MÖLLERS, *EUROPÄISCHES FINANZMARKTRECHT* 473, 485 (Norbert Horn ed., 2003); Möllers, *supra* note 95, at 480; Mülbart, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effktengeschäft der Kreditinstitute*, *supra* note 95, at 181.

<sup>97</sup> On the Prospectus Directive, see ELLIS FERRAN, *BUILDING AN EU SECURITIES MARKET* 136 (2004); BUCHMANN, *supra* note 95; Mülbart, *supra* note 95, at 181.

<sup>98</sup> Holger Fleischer & Holger Schmolke, *Das Anschleichen an eine börsennotierte Aktiengesellschaft*, NZG 11 (2008) (Ger.); Mülbart, *supra* note 95, at 1157 (discussing maximum harmonization); see also Mülbart, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effktengeschäft der Kreditinstitute*, *supra* note 95, at 182.

<sup>99</sup> Möllers, *Vollharmonisierung im Privatrecht*, *supra* note 5, at 264.

<sup>100</sup> See *supra* note 61.

<sup>101</sup> See, e.g., RegE BT-Drs. 16/12814, at 28 on the question of professional memoranda of advice; Thorsten Voß, *Geschlossene Fonds unter dem Rechtsregime der Finanzmarkt-Richtlinie (MiFID)*, BKR 45, 48 (2007) (Ger.) (regarding undefined legal

national civil law should be excluded in cases of maximum and full harmonization.<sup>102</sup> The fact that the *Markets in Financial Instruments Directive* expressly excludes civil law from its scope of application stands against such a view.<sup>103</sup> According to an intermediate opinion, one has to assume that the Directives released within the framework of the Lamfalussy Process are in the nature of regulatory law, and, to this extent, the national civil law subsists and national provisions are applicable.<sup>104</sup>

Certain amendments to the *Markets in Financial Instruments* and *Market Abuse* directives should have brought about some clarification at the first or second level on the important question of civil claims. It is conceivable that a violation of the duties under WpHG Section 31 et seq. could also give rise to a civil claim in damages, as is the case under VVG Section 6(5).<sup>105</sup> In

terms).

<sup>102</sup> Peter O. Mülbert, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effktengeschäft der Kreditinstitute*, 172 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 170, 183 (2008) (Ger.).

<sup>103</sup> See Commission Directive 2006/73, Recital 37, 2006 O.J. (L 241) 26, 29 (EC):

Without prejudice to the provisions of this Directive relating to the production or dissemination of investment research, it is recommended that producers of investment research that are not investment firms should consider adopting internal policies and procedures designed to ensure that they also comply with the principles set out in this Directive as to the protection of the independence and objectivity of that research.

Commission Directive 2006/73, Recital 37, 2006 O.J. (L 241) 26, 29 (EC).

<sup>104</sup> See Ingo Koller, *Die Abdingbarkeit des Anlegerschutzes durch Information im europäischen Kapitalmarktrecht*, in Festschrift für Ulrich Huber 821 (Theodor Baums, Johannes Wertenbruch, and Marcus Lutter eds., 2006); Thomas M.J. Möllers, *Vollharmonisierung im Privatrecht* 247, 264 (Beate Gsell and Carsten Herresthal, eds., 2009); Thomas M.J. Möllers, *Vermögensbetreuungsvertrag, graue Vermögensverwaltung und Zweitberatung - Vertragstypen zwischen klassischer Anlageberatung und Vermögensverwaltung*, 3 WERTPAPIER-MITTEILUNGEN [WM] 93 (2008); Peter O. Mülbert, *Anlegerschutz bei Zertifikaten – Beratungspflichten, Offenlegungspflichten bei Interessenkonflikten und die Änderungen durch das Finanzmarkt-Richtlinie-Umsetzungsgesetz* [FRUG], 25 WM 1149, 1157 (2007); Peter O. Mülbert, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effktengeschäft der Kreditinstitute*, 172 ZHR 170, 183 (2008); Rüdiger Veil, *Vermögensverwaltung und Anlageberatung im neuen Wertpapierhandelsrecht – eine behutsame Reform der Wohlverhaltensregeln?* ZBB 34, 41 (2008).

<sup>105</sup> See Volker Lang and Andreas Otto Kühne, *Anlegerschutz und Finanzkrise – noch mehr Regeln? – Zu den Gesetzesinitiativen des BMJ und des BMELV u.a im Rahmen des Gesetzes zur Neuordnung der Rechtsverhältnisse bei*

that case, at least civil-law sanctions would apply that standard. Furthermore, it should be clarified to what extent civil law duties can go farther than the *Markets in Financial Instruments Directive* expressly regulates. Finally, the successor authority to the CESR, the European Securities and Markets Authority (ESMA), will be established with the task of releasing binding technical standards, in consultation with the European Commission.<sup>106</sup> This also contributes to legal certainty on the European level.

## 2. *Legal Methodology in the Application of Law*

An attempt has been made in the literature to present a systemic taxonomy of capital markets law with the internal and external system of Karl Larenz.<sup>107</sup> The methodology of the 1960s was certainly helpful to create legal certainty after the confusion of the National Socialist period.<sup>108</sup> The methodological approach now seems to be appropriate as a starting point in the administration of justice, but seems largely outdated and as such inappropriate in light of the following five considerations.

### a. *Capital Markets Law as an Interdisciplinary Field*

It is beyond challenge that capital markets law has an interdisciplinary profile, implemented through administrative law, civil law and criminal law.<sup>109</sup> It is also well known that different methodological considerations are required for each of these individual fields of law. In public law, for example, invasions of the citizen's rights require a sufficient legal basis: in criminal law the maxim *nulla poena sine lege* applies. Filling gaps with the

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*Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung [SchVG], 28 WM 130, 137 (2009).*

<sup>106</sup> *Commission Proposal for a Regulation of the European Council and of the Parliament Establishing a European Securities and Markets Authority*, at 5, COM (2009) 504 (Sept. 23, 2009). See also Thomas M.J. Möllers, *Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to Larosière*, in 10 EBOR (forthcoming 2010).

<sup>107</sup> See generally KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* 6 (1991).

<sup>108</sup> BERND RÜTHERS, *UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DES PRIVATRECHTS IM NATIONALSOZIALISMUS* (2005).

<sup>109</sup> Heribert Hirte & Tobias Heinrich, *Introduction to KÖLNER KOMMENTAR ZUM WPHG* ¶ 107 (Heribert Hirte & Thomas M.J. Möllers, eds., 2007).

civil law can soon reach its limits. This can lead to disharmonious interpretation.<sup>110</sup>

*b. Legal Development through Regulators and Private Parties*

To this comes the fact that broad areas of capital markets law consist of the so-called non-binding internal administrative law of national or European financial supervisory authorities<sup>111</sup> or of norms set by private bodies, such as the International Financial Reporting Standards (IFRS) of the German Accountancy Standards Committee (the DRCS)<sup>112</sup> or the Institut der Wirtschaftsprüfer (IDW) S4 of the accountants for the production of prospectuses. Here, too, the statutory interpretation methods of the civil law cannot be transferred directly. Moreover it is highly problematic whether, and to what extent private normative instruments hold binding force and how this law interacts with state law.<sup>113</sup> Also being considered is the proposition that standards and recommendations are indirectly binding.<sup>114</sup>

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<sup>110</sup> See Heinz-Dieter Assmann, *Introduction to WERTPAPIERHANDELSGESETZ* 60-92 (Heinz-Dieter Assmann and Uwe Schneider, eds., 2009); Hirte & Heinrich, *supra* note 118; SUSANNE KALSS, *EUROPÄISCHE METHODENLEHRE* § 20, ¶ 34 (Karl Riesenhuber, ed., 2006); Andreas Cahn, *Grenzen des Markt- und Anlegerschutzes durch das WpHG*, 162 ZHR 1, 8 (1998). Cf. Thomas M.J. Möllers & Sabrina Hailer, *Systembrüche bei der Anwendung strafrechtlicher Grundprinzipien auf das kapitalmarktrechtliche Marktmanipulationsverbot*, in *FESTSCHRIFT FÜR UWE SCHNEIDER ZUM 70 GEBURTSTAG* (forthcoming 2011).

<sup>111</sup> On the CESR, see generally Thomas M.J. Möllers, *Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht - Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards* ZEUP 480 (2008); see GERALD SPINDLER AND JAN HUPKA, *GELTUNG UND FAKTIZITÄT VON STANDARDS* 17 (Thomas M.J. Möllers, ed., 2009); Jan Hupka, *Kapitalmarktaufsicht im Wandel – Rechtswirkungen der Empfehlungen des Committee of European Securities Regulators (CESR) im deutschen Kapitalmarktrecht*, 29 WM 1351 (2009).

<sup>112</sup> See HBG § 342(2).

<sup>113</sup> Thomas M.J. Möllers, *Sekundäre Rechtsquellen – Eine Skizze zur Vermutungswirkung und zum Vertrauensschutz bei Urteilen, Verwaltungsvorschriften und privater Normsetzung*, in *FESTSCHRIFT FÜR HERBERT BUCHNER* 649, 660 (Jobst-Hubertus Bauer et al. eds., 2009). For a more in-depth analysis, see generally GELTUNG UND FAKTIZITÄT VON STANDARDS 16 (Thomas M.J. Möllers, ed., 2009). For an interpretation of the IFRS, see Hanno Merkt, *Introduction to KLAUS J. HOPT & ADOLF BAUMBACH, HANDELSGESETZBUCH* (C.H. Beck 2008) § 238, ¶ 135.

<sup>114</sup> See Thomas M.J. Möllers, *Sources of Law in European Securities Regulation – Effective Regulation, Soft Law and Legal Taxonomy from Lamfalussy to Larosière*, 10

c. *Capital Markets Law as European Law and a Research Area for Studies in Comparative Law*

German capital markets law is, to a large extent, European law.<sup>115</sup> The WpHG incorporates, for example, the *Market Abuse Directive* and the *Markets in Financial Instruments Directive* into German law, although the two directives have different audiences, namely listed companies and banks. To draw parallels between the two addressees on the basis of systematic considerations is unconvincing when one considers that the *Market Abuse Directive* is concerned with all market participants and the *Markets in Financial Instruments Directive* is primarily concerned with securities service providers. To this comes the ECJ's duty to interpret European law independent from national provisions and the national courts' duty to interpret national provisions in accordance with directives.<sup>116</sup> Time and again, national courts violate their duty to refer questions of European law to the ECJ.<sup>117</sup> Some believe that European capital markets law is grossly incomplete and incapable of any systematic approach. However, from the German perspective, the goal remains valid to attempt a systematization at the European level.

The financial crisis has made clearer exactly how global the financial markets have become; the German *Landesbanken* bought the toxic papers of American banks in quantity, and as a result were forced to merge and only narrowly escaped bankruptcy. All too often provisions of US law are adopted blindly. The interpretation of European directives can often only work where the origin of the rule in question is known and it can be compared with the "mother" provision and cases applying it.<sup>118</sup> As such it is

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EBOR (forthcoming 2010).

<sup>115</sup> See, e.g., NORBERT HORN, *EUROPÄISCHES FINANZMARKTRECHT* (2003).

<sup>116</sup> See Heinz-Dieter Assmann, *Introduction to HEINZ-DIETER ASSMANN AND UWE SCHEIDER, WERTPAPIERHANDELSGESETZ ¶ 96* (2009); Heribert Hirte & Tobias Heinrich, *Introduction to HERIBERT HIRTE & THOMAS M.J. MÖLLERS, KÖLNER KOMMENTAR ZUM WPHG 60-92* (2007).

<sup>117</sup> See, e.g., Thomas M.J. Möllers, *Der BGH, die BaFin und der EuGH: Ad-hoc-Publizität beim einvernehmlichen vorzeitigen Ausscheiden des Vorstandsvorsitzenden Jürgen Schremp*, NZG 330, 332 (2008) (Ger.). See also Joachim Vogel, *Scalping als Kurs- und Marktpreismanipulation* *Neue Zeitschrift für Strafrecht* 252, 254 (2004).

<sup>118</sup> See, e.g., Holger Fleischer, *Gutachten F für den 64, DEUTSCHEN JURISTENTAG* (2002).

always necessary to warn against the blind reception of US law.

*d. Capital Markets and Capital Markets Law – the Interdisciplinary Character of Capital Markets Law*

There remains one last criticism of the attempts at civil law systematization. Capital markets aim for efficiency.<sup>119</sup> Numerous models are based on economic considerations. As such, the model of *homo economicus* still underlies much of capital markets law. This figure is a rational actor who processes all available information before investing, so that the market always reflects the correct price. With this model, however, bubbles cannot be explained, nor can the phenomenon of limited information-processing capacity.<sup>120</sup> For this reason, what we need is not so much the ability to fill gaps systematically, but rather find a common language between the disciplines.<sup>121</sup> This will allow us to take hypotheses that are based on incorrect premises, and correct them through the medium of law.

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<sup>119</sup> See generally Thomas M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts - Die Verwendung empirischer und ökonomischer Argumente zur Begründung zivil-, straf- und öffentlich-rechtlicher Sanktionen*, 208 DAS ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 1 (2008). See also Johannes Köndgen in Daniel Fleischer and Holger Zimmer, *Effizienz als Regelungsziel im Handels- und Wirtschaftsrecht*, SUPPLEMENT TO ZHR, 100 (2009); Peter Sester, *Zur Interpretation der Kapitalmarkteffizienz in Kapitalmarktgesetzen, Finanzmarktrichtlinien und -standards*, 38 ZGR 310, 310-13 (2009).

<sup>120</sup> See *infra* Section III.2.

<sup>121</sup> This call has been made by Christoph Möllers. CHRISTOPH MÖLLERS, *Vorsichtsregulative*, in 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 3 ¶ 42 (Wolfgang Hoffman-Riem et al. eds., 2006); MATTHIAS JESTAEDT, *DAS MAG IN DER THEORIE RICHTIG SEIN* 74 (2006) (explaining legal theory as a 'gatekeeper discipline' that determines which ideas and theories from other disciplines are allowed into the inner sanctum of legal theory). See also Karl-Heinz Ladeur, *Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels*, 64 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RABELSZ] 60, 101 (2000) (calling for 'meta-dogmatik'); Stefan Grundmann, *Methodenpluralismus als Aufgabe - zur Legalität von ökonomischen und rechtsethischen Argumenten in Auslegung und Rechtsanwendung*, 61 RABELSZ 423 (1997) (also calling for 'meta-dogmatik').