# The Wirecard Accounting Scandal in Germany, and How the Financial Industry Failed to Spot It

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## I. Wirecard as an 'Insolvency With Notice', and the Failure of the Entire Financial Industry to Spot It

"Wirecard – a scandal for Germany" was how it was summed up by Felix Hufeld, the President of the German Federal Financial Supervisory Authority (BaFin).[1] The first insolvency of a company listed on the German DAX index has had an enormous impact. The scandal is to be investigated by an investigatory committee of the German Bundestag; and the first lawsuits have been filed.[2] The unravelling what happened will occupy the legislature, judiciary and academia for years. As a first step, the article aims to demonstrate why there has been a failure of the entire financial industry if not a single one of the players intervene, even though all market participants are aware of the allegations of inaccurate accounting. The causes lie in behavioural finance, but also the inadequate state of German and European capital markets law. There is insufficient consideration of individual duties (Part I). A system will then be set out that is more responsive to the validity of information, and more strongly clarifies the obligations with which market participants must respond to unproven information (Part II). Finally, we look at law enforcment and its complex questions about the correct level of regulation, and the intradisciplinary interaction of criminal, private and public law (Part III).

### A. THE WIRECARD STORY FROM APRIL 2015 TO JUNE 2020

#### 1. *The Apparent Success of Wirecard*

To summarise the facts of the Wirecard scandal goes beyond the scope of an academic article. Extensive factual hermeneutics are required,[3] as the

1. These were the exact words used at the Frankfurt Finance Summit conference, *see* Hanno Muβler, Henning Peitsmeier & Manfred Schäfers, *"Schande für Deutschland"*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] June 23, 2020, at 15. Hufeld has since been dismissed.

2. For this *see also* the information on the website of the Bundestag, *available at*: https://www.bundestag.de/ausschuesse/untersuchungsausschuesse/3untersuchungsausschuss, last accessed Feb. 2, 2021; Benedikt Becker, *Das Polittheater*, WIRTSCHAFTSWOCHE, July 24, 2020, at 30 et seqq.

3. For this legal technique *see* Thomas M.J. Möllers, LEGAL METHODS § 14 mn. 11 et seqq. (2020).

individual market participants report from their respective individual perspectives:[4] and thus only the most important key facts are mentioned here.[5] Wirecard AG was one of the few German success stories in the New Economy. Founded in 1999 as a payment processing company, the company based in Aschheim near Munich had been posting revenue and profit increases of thirty percent and more for years, with forecasts being increased several times a year.[6] The group had over fifty subsidiaries, and the most profitable were those operating in Singapore, India, and other Asian countries. Wirecard's clients included Visa, Mastercard and Paypal, as well as retail groups like Aldi or Ikea.[7] The auditing firm EY audited the single-entity annual financial statements of Wirecard AG, and those of the Wirecard Group, for the years 2009 to 2018, and in each case issued them with an unqualified audit opinion.

### 2. *A Decade of Accusations About False Accounting*

However, the company hit headwinds at an early stage. In 2008 there was the first short-sell attack and allegations of falsified accounting by a board member of the German Retail Investors' Association (SdK). At that time, participants of the SdK were convicted of market manipulation because they had bet on falling share prices without declaring this conflict of interest.[8] For a five-year period from April 2015, the reporters Dan McCrum and Paul Murphy of the *Financial Times* (FT) published more than sixteen articles in which they meticulously exposed untraceable payment flows and balance sheet entries at various Asian subsidiaries in the exposé they called *The House of Wirecard*.[9] Their information was supported by whistleblowers at

4. For example, KMPG, *Sonderbericht über die unabhängige Sonderuntersuchung*, WIRECARD AG (Apr. 27, 2020), https://www.wirecard.com/uploads/Bericht_Sonderpruefung_KPMG.pdf, last accessed Feb. 2, 2021 or Bundesministerium der Finanzen [BMF], *Aufzeichnung für den Finanzausschuss des Deutschen Bundestags. Sachstandsbericht und Chronologie Wirecard vom 16.7.2020*, 1 et seqq., https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Internationales_Finanzmarkt, last accessed Feb. 2, 2021.

5. The facts were supplemented with further references to national newspapers.

6. This was especially evident in the annual financial statements of 2016/2018 and several ad hoc disclosures of 2018 and 2019. In their five-year plan Wirecard was aiming to multiply their market value by five until 2023, *see* for example Investor presentation Wirecard of April 2018 and Aug. 7, 2018, *available at* www.wirecard.de, last accessed Feb. 2, 2021.

7. *See* for example Investor presentation Wirecard Nov. 6, 2019, 8.

8. For an extensive overview *see* Thomas M.J. Möllers & Sabrina Hailer, *Systembrüche bei der Anwendung strafrechtlicher Grundprinzipien auf das kapitalmarktrechtliche Marktmanipulationsverbot, in* FESTSCHRIFT FÜR UWE H. SCHNEIDER ZUM 70. GEBURTSTAG 831 et seqq. (Ulrich Burgard et al. eds., 2011); see also Martin Hesse, *Wette auf den Absturz*, 18 DER SPIEGEL 65 et seqq. (2016); René Bender, *Marktmanipulation: Erstes Urteil in SdK-Affäre und weiteres Geständnis*, JUVE NACHRICHTEN, https://www.juve.de/nachrichten/verfahren/2012/01/marktmanipulation-prozess-in-sdk-affare-gestartet-erster-angeklagter-kundigt-gestandnis-an, last accessed Feb. 2, 2021.

9. Listed in detail in KMPG, *supra* note 4, at 11 et seqq.

Wirecard,[10] and German national magazines also reported on the issue.[11] Other actors also warned of incorrect accounting, such as in the 100-page Zatarra Report[12], but that stated demonstrably incorrect facts and was also unlawful because the authorship remained hidden.[13] Numerous short sellers repeatedly raked in high profits when the share price plummeted.[14] As the rumours of false financial entries did not cease, in 2018 Wirecard appointed the law firm Rajah & Tann in Singapore to check the accounting. They found a few individual deficiencies, but in the opinion of Wirecard these did not have a material effect on the annual financial statements.[15] After the *Financial Times* had uncovered further inconsistencies, and in response to pressure from investors and the public, Wirecard commissioned the auditing firm KPMG to carry out a 'special investigation' in mid-October 2019.[16] On 27 April 2020, KPMG found that numerous financial entries could not be confirmed because documents were not provided, or were not provided in original form.[17] As a result, the planned publication date of the 2019 annual financial statements was postponed. On 18 June 2020, EY refused to certify the Wirecard accounts with the finding that $1.9 billion in trustee accounts of two Asian banks could not be found.[18] Just one week later, on 25 June 2020, Wirecard AG filed for insolvency and published this information by means of an ad-hoc notification.[19] The share price had reached a peak of almost $200 in 2018, remained at around $100 until the refusal of the auditors to certify the accounts on 18 June 2020, and then collapsed to below $2 within a few days.[20]

10. Tim Bartz & Martin Hesse, *FT Reporter on the Downfall of Wirecard Head*, SPIEGEL INTERNATIONAL, Nov. 5, 2020.

11. Henning Jauernig, *Das steckt hinter dem Börsenstar Wirecard*, 18 DER SPIEGEL 65 (2018).

12. Zatarra Research & Investigations, *Wirecard AG* (Feb. 2016), 1, https://www.heibel-unplugged.de/wp-content/uploads/2020/06/Zatarra-research-Wirecard-PDF.pdf, last accessed Feb. 2, 2021.

13. As a violation of Commission Delegated Regulation 2016/958, art. 2 (1), 2016 O.J. (L 160) 15 (EU). Thomas M.J. Möllers, *Marktmanipulationen durch Leerverkaufsattacken und irreführende Finanzanalysen*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 649, 652 (2018).

14. On this *Id.* at 649 et seq.; Peter O. Mülbert & Alexander Sajnovits, *Short-Seller-Attacken 2.0: der Fall Wirecard*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT [BKR] 313 et seqq. (2019); Martin Schockenhoff, *Schutzlos gegen Short-Seller-Attacken?*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT [WM] 1341 et seqq. (2020); Dörte Poelzig, *Shortseller-Attacken im Aufsichts- und Zivilrecht*, 184 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 697 et seqq. (2020).

15. WIRECARD, *Ad hoc disclosure* (Mar. 26, 2019).

16. The special audit is regulated in AKTIENGESETZ [AKTG] [STOCK CORPORATION ACT] Sec. 258 et seqq. and can be enforced judicially by a group of shareholders if necessary. However, Wirecard assigned KPMG to conduct a special investigation, which does not have to comply with the requirements of AKTG Sec. 258 et seqq., *see* KPMG, *supra* note 4, at 1.

17. *Id.*, at 12 et seq.

18. WIRECARD, *Ad hoc disclosure* (June 18, 2020), www.wirecard.de, last accessed Feb. 2, 2021; Henning Peitsmeier, *Kriminalfall Wirecard*, FAZ, June 19, 2020, at 17.

19. WIRECARD, *Ad hoc disclosure* (June 25, 2020).

20. https://www.boerse.de/aktien/Wirecard-Aktie/DE0007472060, last accessed Feb. 2, 2021.

### 3. *The Reactions of Wirecard, BaFin and the Financial Sector to the Allegations of False Accounting*

What did market participants do? The CEO of Wirecard, Dr. Markus Braun, repeatedly bought Wirecard shares and at the end held more than seven percent of all of the company's shares. Wirecard AG consistently rejected all allegations of false accounting, and a criminal complaint for defamation was filed against the FT journalists.[21] In numerous Tweets, CEO Braun emphasised "that everything will be fine" and that there was "no truth" in the accounting allegations.[22] This was confirmed by further ad-hoc notifications issued by Wirecard in May and June 2020.[23] When EY refused to certify the Wirecard 2019 annual financial statements in June 2020, Wirecard filed a criminal complaint for fraud against unknown persons.[24]

The Munich Public Prosecutor's Office investigated the short sellers, and there were a few convictions.[25] In early 2019, BaFin issued a two-month ban prohibiting the short selling of Wirecard shares,[26] and it also launched a criminal complaint against the FT journalist McCrum.[27] But BaFin also sought cooperation with several foreign authorities and, in February 2019, commissioned the German Financial Reporting Enforcement Panel (DPR) to audit the Wirecard 2018 financial statements.[28] After all, pursuant to Section 319a of the German Commercial Code (HGB) there is an Auditor Oversight Body (APAS) in the Federal Office for Economic Affairs and Export Control (BAFA). The latter is still investigating whether there were

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21. Anon., *Ermittlungen gegen "Financial Times"-Journalisten eingestellt*, Zeit Online (Sept. 4, 2020).

22. *See* on this the Twitter messages of Markus Braun (@_MarkusBraun), TWITTER (Jan. 10, 2020, Jan. 17, 2020, Jan. 31, 2020, Feb. 11, 2020, Mar. 6, 2020, Mar. 22, 2020, Apr. 19, 2020, May 17, 2020, June 18, 2020).

23. For example, with the assumption, that the special audit of KPMG does not include any substantive complaints, *see* WIRECARD, *Ad hoc disclosures* (Mar. 12, 2020 and Apr. 22, 2020).

24. Klaus Ott, Jörg Schmitt & Nils Wischmeyer, *Ein Dax-Konzern vermisst 1,9 Milliarden Euro*, SÜDDEUTSCHE ZEITUNG [SZ], June 19, 2020, at 15; ZEIT ONLINE, *Wirecard stellt Strafanzeige wegen Betrugsverdacht* (June 18, 2020), https://www.zeit.de/wirtschaft/unternehmen/2020-06/zahlungsdienstleister-wirecard-strafanzeige-betrugsverdacht-verschiebung-jahresabschluss-unklarheit?utm_referrer, last accessed Feb. 21, 2021.

25. The proceedings against the *Börsenbrief*-Editor Fraser Perring were closed upon payment of a five-figure fine, *see* Jörn Poltz, *Strafverfahren gegen Wirecard-Kritiker wird eingestellt*, REUTERS, May 11, 2020.

26. GERMAN FEDERAL FINANCIAL SUPERVISORY AUTHORITY [BAFIN], *Wirecard AG: Allgemeinverfügung zum Verbot der Begründung und Vergrößerung von Netto-Leerverkaufspositionen*, https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2019/meldung_190218_Allg_Vfg_Wirecard_Verbot_Leerverkaufspositionen.html, *last accessed Feb. 2, 2021*. On this Thorsten Voß, *Leerverkäufe*, *in* FESTSCHRIFT 25 JAHRE WPHG 715, 750 et seqq. (Lars Klöhn & Sebastian Mock eds., 2019); Christoph Splinter & Johannes Gansmeier, *Leerverkaufsbeschränkungen nach der Leerverkaufs-Verordnung*, 184 ZHR 761 et seqq. (2020).

27. Klaus Ott, Meike Schreiber & Jan Willmroth, *Der Schlingerkurs der Bafin*, SZ, July 13, 2020, at 15.

28. BMF, *supra* note 4, at 2, 6.

any errors on the part of the auditors.[29] There was an exuberantly euphoric mood about Wirecard across almost the entire financial sector. At the end of September 2018, Deutsche Börse included Wirecard in the DAX 30, the premier index of the Frankfurt Stock Exchange. And at the same time, the long-established Commerzbank had to leave the DAX.[30] Employees of the Japanese Softbank Group invested $900 million in Wirecard in 2019 and entered into a strategic cooperation agreement.[31] In the $5 billion equity fund of Deutsche Bank, DWS, the Wirecard share was more than ten percent.[32] Wirecard was the darling of the chat rooms. Buy recommendations clearly outweighed sell recommendations in the period from 2015 to 2019. The FT allegations were dismissed as *fake news*.[33] Until mid-2020, financial analysts were still forecasting a Wirecard share price of over $200.[34] The rating agency Moody's had also given Wirecard AG an investment grade rating in 2019.[35] After the share price collapse in the wake of manipulation allegations, Wirecard shares remained in the DAX as a penny stock until September 2020.

Markus Braun is currently on remand in prison, the board member responsible for the Asian business, Jan Marsalek, is still on the run, and the Munich Public Prosecutor's Office is conducting investigations into

29. The Abschlussprüferaufsichtsstelle [APAS] [Auditor Oversight Body] itself does not believe to be responsible for reveiling errors in balance sheets, *see* HANDELSGESETZBUCH [HGB] [COMMERCIAL CODE] Sec. 319a (1) sentence 1 and https://www.apasbafa.bund.de/SharedDocs/Kurzmeldungen/APAS/DE/20200918_stellungnahme.html, last accessed Feb.2, 2021.

30. Nils Wischmeyer, *Solider Nachfolger gesucht*, SZ, Aug. 3, 2020, at 15.

31. *See* for example WIRECARD, *Ad hoc disclosure* (Apr. 24, 2019); Christian Schnell, *Beteiligung durch die Hintertür: Softbank ist nicht direkt bei Wirecard eingestiegen*, HANDELSBLATT (Nov. 15, 2019), https://www.handelsblatt.com/finanzen/banken-versicherungen/zahlungsdienstleister-beteiligung-durch-die-hintertuer-softbank-ist-nicht-direkt-bei-wirecard-eingestiegen/25232756.html , last accessed Feb. 11, 2021.

32. Thomas Klemm, *Wetten, dass Wirecard. . .*, FAZ, Jan. 19, 2020, at 26; Tim Kanning, *„Ein Schaden für den gesamten Finanzplatz"*, FAZ, June 20, 2020, at 29; Nadine Oberhuber, *Die DWS und die magischen zehn Prozent*, CAPITAL (July 10, 2020), https://www.capital.de/geld-versicherungen/die-dws-und-die-magischen-zehn-prozent last accessed Feb. 11, 2021.

33. The analyst of the Commerzbank Heike Pauls, similar Simon Bentlage of Hauck & Aufhäuser, *see* Melanie Bergermann, Georg Buschmann, Karin Finkenzeller, Volker ter Haseborg & Lukas Zdrzalek, *Alle sind drauf reingefallen*, WIRTSCHAFTSWOCHE, June 26, 2020, at 26, 27.

34. The analyst of the Commerzbank Pauls stated a target price of $230 in the middle of May, Baader stated a target price of $240 (Apr. 26, 2020), the private bank Hauck & Aufhäuser a target price of $270 on Apr. 23, 2020, *see* https://www.boerse-online.de/analysen/wirecard, last accessed Feb. 2, 2021 as well as Nikolas Kessler, *Commerzbank: Wirecard-Verfechterin wird offenbar kaltgestellt*, DER AKTIONÄR (Jan. 14, 2021), https://www.deraktionaer.de/artikel/aktien/commerzbank-wirecard-verfechterin-wird-offenbar-kaltgestellt-20223801.html, last accessed Feb. 2, 2021.

35. Simon Seeser, *Wirecard: Das ist die Bewertung durch die Ratingagentur Moody's*, DER AKTIONÄR (Aug. 30, 2019), https://www.deraktionaer.de/artikel/aktien/wirecard-das-ist-die-bewertung-durch-die-ratingagentur-moodys-20190569.html, last accessed Feb. 2, 2021.

commercial gang fraud, accounting falsification, and other offences.[36] On 25 August 2020, the Regional Court (AG) in Munich opened insolvency proceedings.[37] Creditor claims amount to more than $12 billion,[38] but that does not include shareholder claims that will amount to many billions of euros. The first book on Wirecard has been published,[39] and there are plans for a film about the saga.[40] In the meantime, it has become known that BaFin employees and the head of the Auditor Oversight Body (APAS) had personally invested in Wirecard shares.[41] Dan McCrum has been awarded a journalistic prize.[42]

## B. A Failure of the Whole Financial Industry

### 1. *Inadequate Controls at Wirecard AG, and the Failures of EY as Auditors*

It is obvious that there were grave failures at the company, and that its internal corporate governance structures were inadequate. These include internal supervisory structures such as the Supervisory Board, and accounting, controlling and compliance functions. This is understandable as the company started out as a small start-up. CEO Braun dominated the company as its largest shareholder. He was the head of the company, and had been instrumental in building it. Jan Marsalek was the Wirecard board member responsible for expansion in Asia. It is still unclear to what extent Chief Financial Officer Alexander von Knopp actually controlled the figures. The legal department was staffed primarily with young professionals instead of experienced lawyers. The Chairman of the Supervisory Board was Klaus Rehning, but for years no real control was apparent.[43] It was not until the

36. Henning Peitsmeier & Tim Neuscheler, *Drei Haftbefehle im Fall Wirecard*, FAZ, July 23, 2020, at 15.

37. The receiver in insolvency is Michael Jaffé, *Pressemitteilung vom 25.08.2020, available at* https://www.jaffe-rae.de/index.php/DE/site/listing_aktuelles/insolvenzverfahren-ueber-vermoegen-der-wirecard-ag-eroeffnet, last accessed Feb. 2, 2021.

38. *See* Laura de la Motte, *Wirecard-Gläubiger fordern 12,5 Milliarden Euro – das müssen Anleger jetzt beachten*, Handelsblatt (Nov. 18, 2020), https://www.handelsblatt.com/finanzen/steuern-recht/recht/bilanzskandal-wirecard-glaeubiger-fordern-12-5-milliarden-euro-das-muessen-anleger-jetzt-beachten/26634856.html, last accessed Feb. 2, 2021.

39. Melanie Bergermann & Volker ter Haseborg, Die Wirecard Story (2021).

40. Julia Schaaf, *Dieser Mann verfilmt den Wirecard-Skandal*, FAZ.NET (Aug. 8, 2020), https://www.faz.net/aktuell/wirtschaft/unternehmen/nico-hofmann-verfilmt-das-bilanz-drama-von-wirecard-16891921.html, last accessed 2.2.21.

41. Georg Giersberg & Manfred Schäfers, *„Das hat mich befremdet"*, FAZ, Dec. 12, 2020, at 20.

42. McCrum was awarded with a special prize, Meike Schreiber, *Der Journalist, die Aufsicht und das Kartenhaus*, SZ (Dec. 07, 2020), https://www.sueddeutsche.de/medien/reporterpreis-dan-mccrum-wirecard-enthuellung-1.5139922, last accessed 2.2.21.

43. In an interview in December 2018 he predicted that Wirecard would soon be acquired, whereupon the share price promptly increased by 3%, *see* Angelika Ivanov, Stefan Reccius & Marius Wolf, *„Bald wird ein internationaler Konzern Wirecard kaufen"*, Handelsblatt Online (Dec. 27, 2018), https://www.handelsblatt.com/finanzen/banken-versicherungen/interview-mit-

very end that Wirecard AG was prepared to include independent individuals with the necessary expertise on its Management Board and Supervisory Board;[44] but this was far too late. Anyone who reads the special report by KPMG would be surprised at the information that EY had not obtained up to that point: EY employees accepted (falsified) copies for years, never visited Wirecard's Asian subsidiaries in person, and ignored whistleblowers' tips about incorrect accounting.[45]

### 2. *Ineffective Supervisors: BaFin, ESMA, DPR*

It appears that BaFin, the German supervisory authority, unilaterally protected Wirecard against attacks by short sellers, and did not take the FT's accusations seriously. The BMF report already indicates that the two-stage control procedure only works to a limited extent, as FREP needs to be involved before BaFin can act.[46] However, only one person at FREP works on the Wirecard case, and has not been able to contribute anything to the clarification since the report was filed on 15 February 2019.[47] If BaFin had been able to immediately initiate a special audit, the scandal would have been uncovered much earlier.[48] Meanwhile, the European Securities and Markets Authority (ESMA) has criticised BaFin's conduct.[49]

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ex-aufsichtsratschef-klaus-rehnig-bald-wird-ein-internationaler-konzern-wirecard-kaufen/23801726.html, last accessed Feb. 2, 2021.

44. Thomas Eichelmann was not elected as an impartial board member until June 2019, who then initiated the special report by KPMG, Daniel Mohr & Henning Peitsmeier, *Seine letzte Chance*, FAZ, May 13, 2020, at 19.

45. Olaf Storbeck, *Whistleblower warned EY of Wirecard fraud four years before collapse*, FINANCIAL TIMES [FT] (Sept. 30, 2020), https://www.ft.com/content/3b9afceb-eaeb-4dc6-8a5e-b9bc0b16959d, last accessed Feb. 2, 2021.

46. *See* Hanno Merkt, *in* HANDELSGESETZBUCH § 342b mn. 19 (Klaus J. Hopt et al. eds., 39th ed. 2020); BMF, *supra* note 4, at 1, 2, 9 et seq. Previously already Scholz, *see* Mischa Erhardt, *Multiples „Organversagen" von Kontrollen und Aufsichten*, DEUTSCHLANDFUNK (July 10, 2020), https://www.deutschlandfunk.de/der-fall-wirecard-multiples-organversagen-von-kontrollen.724.de.html?dram:article_id=480322, last accessed Feb. 2, 2021.

47. Georg Giersberg, *Wirecard-Skandal: Die „Bilanzpolizei" sieht sich als Bauernopfer*, FAZ (June 28, 2020), https://www.faz.net/aktuell/wirtschaft/unternehmen/der-fall-wirecard-wird-die-wirtschaftspruefung-ver—aendern-16836579.html, last accessed 2.2.21.

48. More specific on this *infra* II.3.

49. EUROPEAN SECURITIES AND MARKETS AUTHORITY [ESMA], FAST TRACK PEER REVIEW ON THE APPLICATION OF THE GUIDELINES ON THE ENFORCEMENT OF FINANCIAL INFORMATION (ESMA 2014/1293) BY BAFIN AND FREP IN THE CONTENT OF WIRECARD OF NOV. 3, 2020, *available at* www.esma.europa.eu, last accessed Feb. 2, 2021; *see* Henning Peitsmeier & Manfred Schäfers, *Das Wirrwarr um Wirecard*, FAZ, Nov. 4, 2020, at 17.

### 3. *The Ignorance of the Experts: Financial Analysts, Fund Operators, and Deutsche Börse AG*

Finally, what is astonishing is the failure of an entire economic sector, the financial intermediaries.[50] These include financial advisors, asset managers, fund managers, financial analysts and the rating agencies. As financial experts, they stand between the publicly listed company and investors, and are supposed to help investors in their buy or sell decision by providing positive or negative recommendations about a publicly listed company. As a trading platform, Deutsche Börse is also a market participant. The euphoric mood mentioned previously (section I.1.c) was understandable because the financial intermediaries mentioned are experts, but ultimately depend on information provided by the company. It is the company that produces the original corporate information, and is an information monopolist.[51] All other market participants are dependent on the information provided and can only process it as second-hand information. Tim Albrecht, as head of DWS Germany, openly admitted that he had been mistaken about Wirecard and had "gambled it away".[52] It is surprising, however, that the financial intermediaries had not done any research of their own, although the Federal Supreme Court had already developed an obligation to provide investment-appropriate advice (know-your-product) with corresponding research obligations in 1993. We will return to this later.[53]

Deutsche Börse AG also failed to take an interest in the negative rumours about Wirecard. According to its rules and regulations, only market capitalisation and trading volume have been relevant for inclusion in the DAX so far.[54] This has allowed companies to be included in the DAX although they are making losses.[55] The inclusion in the DAX, as the most important index of the German Stock Exchange, has the consequence that market participants who track the DAX are compelled to acquire these

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50. Similar Thorsten Voß, *Lessons to be learned? Zur causa Wirecard und der aufsichtsrechtlichen Regulierung von FinTechs*, RECHT DIGITAL [RDi] 11, 12 (2020): „Systemversagen" [systems failure].

51. For the first time Thomas M.J. Möllers & Franz C. Leisch, *Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach § 826 BGB*, WM 1648, 1654 (2001).

52. *See* references in note 32; he voluntarily renounced 10 % of his salary, *see* FAZ (June 19, 2020), https://www.faz.net/aktuell/finanzen/dws-zu-wirecard-schaden-fuer-den-gesamten-finanzplatz-16823434.html , *last accessed 2.2.21.*

53. *See infra* II.4.

54. Responsible is the STOXX Ltd., a subsidiary of Deutsche Börse Group. According to the Guide Equity Indices, in the past a company was admitted to the DAX index, if it ranked at least 25th in the DAX in terms of sales and market capitalisation, *see* STOXX, GUIDE TO EQUITY INDICES OF DEUTSCHE BÖRSE AG VOM 26.6.2019 (version 9.2.4).

55. On the new DAX-member Delivero Hero, *see* critically for example Andrea Künnen & Andreas Kröner, *Investoren fordern nach dem Wirecard-Skandal einen neuen Dax*, HANDELSBLATT (Sept. 16, 2020), https://www.handelsblatt.com/finanzen/anlagestrategie/trends/index-reform-investoren-fordern-nach-dem-wirecard-skandal-einen-neuen-dax-/26188474.html , *last accessed Feb. 2, 2021.*

shares. These include, for example, the providers of ETFs that mirror the DAX, and also various fund providers.

## C. Reasons for the Uncritical Attitude of the Financial Sector – Struck Blind by Behavioural Finance

What is left to note? In BaFin's defence, it was argued that this was a regrettable individual case, as criminal intent is always difficult to detect.[56] Moreover, the supervisory authority could not be blamed, since it could not exercise control over foreign subsidiaries.[57] One could perhaps agree with both theses if the accusation of accounting fraud had not raised until the summer of 2020. But that is not the case. Over a period of five years, the FT and other market participants had continuously and precisely substantiated the allegations of false accounting. The financial industry players mentioned previously had not seriously investigated these allegations. They simply ignored the FT's assertions because they probably trusted EY's audit opinions more than the FT, which was always portrayed as the bad guy.[58]

Behavioural finance can be used to explain the uncritical attitude of market participants.[59] Firstly, with the concept of *herding*, it is psychologically easier to follow the herd instinct than to go against the prevailing view. This is especially true for financial analysts.[60] Secondly,

56. In this direction BMF, *supra* note 4, at 1, 3: "Einen hundertprozentigen Schutz gegen kriminelles Verhalten wird es niemals geben, auch nicht auf dem Finanzmarkt." [There will never be a one hundred percent protection against criminal behaviour, not even in the financial market.].

57. *Cf.* Sebastian Mock, Rechnungslegungsenforcement nach Wirecard – alles auf Anfang oder punktuelle Reformen?, Betriebsberater [BB] 2020, 1 (2).

58. *See supra* note 25 et seqq.

59. Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 QJE 99 (1955); George A. Miller, *The magical number seven, plus or minus two: some limits on our capacity for processing information*, 63 Psych. Rev. 81 (1956); Herbert A. Simon, Models of Bounded Rationality (1982); Andreas Oehler, *„Anomalien", „Irrationalitäten" oder „Biases" Relevanz für Finanzmärkt*, Zeitschrift für Bankrecht und Bankwirtschaft [ZBB] 97 (1992); Hersch Shefrin, Beyond Greed and Fear: Understanding Behavioral Finance and the Psychology of Investing (2000); Andreas Oehler, *Behavioral Finance - Theoretische, empirische und experimentelle Befunde unter Marktrelevanz*, BankArchiv [ÖBA] 978 (2000); David Hirshleifer, *Investor Psychology and Asset Pricing*, 56 J. Fin. 1533 (2001); Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. Econ. Persp. 83 (2003); Hartmut Kiehling, Börsenpsychologie und Behavioral Finance (2001); Richard H. Thaler, Advances in Behavioral Finance (2005); Gary Belsky & Thomas Gilovich, Das Lemming Prinzip, 11 (2007).

60. *See* already John Maynard Keynes, The General Theory of Employment Interest and Money, 158 (1936): "Worldy wisdom teaches that it is better for reputation to fail conventionally than to succeed unconventionally."; Gunter Löffler, Der Beitrag von Finanzanalysten zur Informationsverbreitung, 48 et seqq., 97 et seqq. (1998); Kiehling, *supra* note 59, at 143 et seqq.; Holger Fleischer, *in* Verhandlungen des 64. Deutschen Juristentages at F 129 (Ständige Deputation des Deutschen Juristentages ed., 2002); Holger Fleischer, *Behavioral Law and Economics im Gesellschafts- und Kapitalmarktrecht –*

there was an *overconfidence bias*, an overoptimism[61] and euphoria to include another new economy company, Wirecard, as a FinTech company in the DAX alongside SAP. Further behaviours of stock market psychology can be observed. For years, capital market participants ignored the warnings of the FT or even took legal action against them. Thirdly, we speak of *selective perception*,[62] and thus of blocking out and ignoring unwanted information. The fourth explanation is the desire to avoid *cognitive dissonance*,[63] and the fifth is to orient oneself to the financial intermediaries as *anchors*.[64] In summary, one can speak of "collective stupidity," as the risks were laughed at.[65]

## II. The Inadequate Liability of Market Participants as a Failure of the Legislature

Astonishingly, liability claims against the parties involved turn out to be difficult.

### A. The Inadequate Liability of the Insolvent Company

Liability claims against the management board and the supervisory board are possible under company law. Pursuant to Section 91(2) of the Stock Corporation Act (AktG), the management board must institute a monitoring system; and the supervisory board must monitor its operation. However, claims for damages against the management board and supervisory board pursuant to Sections 116 and 93(2) of the Stock Corporation Act can only be exercised by the company, and not by the investors and creditors who have suffered damage, with the result that corresponding claims for damages are manageable.[66] It is not very attractive to bear the risk of a legal action without being able to claim damages yourself. If the insolvency administrator sues, the money flows into the insolvency estate. Wirecard

*ein Werkstattbericht*, *in* Festschrift für Ulrich Immenga zum 70. Geburtstag 575, 583 et seq. (Andreas Fuchs et al. eds., 2004); Lars Klöhn, Kapitalmarkt, Spekulation und Behavioral Finance 125 et seq. (2006).

61. *See* Kiehling, *supra* note 59, at 141 et seqq.; Klöhn, *supra* note 60, at 118 et seqq.

62. Norman H. Anderson & Ann Jacobson, *Effect of stimulus inconsistency and discounting instructions in personality impression formation*, 2 J. Personality & Soc. Psych. [JPSP] 531 (1965); Andreas Oehler, *"Anomalien", "Irrationalitäten" oder "Biases" Relevanz für Finanzmärkt*, ZBB 97, 100 (1992); Kiehling, *supra* note 59, at 53.

63. Leon Festinger, A Theory of Cognitive Dissonance (1957); Joachim Goldberg & Rüdiger von Nitzsch, Behavioral Finance 118 et seqq. (2004).

64. On the basics of anchoring Amos Tversky & Daniel Kahneman, *Judgment under uncertainty*, 185 Science 1124, 1128 (1974).

65. Kiehling, *supra* note 59, at 68.

66. *See* however Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 18, 2018, 219 Entscheidungen des Bundsgerichtshofes in Zivilsachen [BGHZ] 356; Landgericht [LG] [Regional Court] Munich I, Dec. 10, 2013, NZG 345, 2014 - Siemens/Neuberger; on this for example Hans Christoph Grigoleit & Lovro Tomasic, *in* Aktiengesetz § 93 mn. 120 et seq. with further references (Hans Christoph Grigoleit et al. eds., 2nd ed. 2020).

also failed to apply numerous provisions of the German Corporate Governace Code. But this did not alarm the markets, as the Code is overwhelmingly regarded only as non-binding soft law.[67] As long as a company is successful, the markets are obviously willing to turn a blind eye to non-observance of the Code.[68]

CEO Braun and Wirecard AG misled the capital markets with numerous pieces of false information. Claims for damages under capital markets law would therefore not only be successful due to false ad-hoc notifications and a failure to issue ad-hoc notifications pursuant to Sections 97 and 98 of the Securities Trading Act (WpHG), but also due to the contravention of various protective laws.[69] Not least, because the company is insolvent and therefore claims against the company are limited to the insolvency estate. Investors therefore have to register their claims with the insolvency administrator.[70] Due to priority claims by third parties, the quota of Wirecard's insolvency estate will probably be limited to less than ten percent.[71] Claims for intentional damage contrary to public policy under Section 826 of the Civil Code (BGB) are conceivable against Braun, Marsalek and other participants; but here, too, it is questionable how high the respective insolvency assets of the parties involved will be.

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67. *See* Marcus Lutter, *Das europäische Unternehmesrecht im 21. Jahrhundert*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 1, 18 (2000); Axel von Werder, *Der Deutsche Corporate Governance Kodex - Grundlagen und Einzelbestimmungen*, DER BETRIEB [DB] 801 (2002); Georg Borges, *Selbstregulierung im Gesellschaftsrecht - zur Bindung an Corporate Governance-Kodizes*, ZGR 508 et seqq. (2003); Eberhard Vetter, *Deutscher Corporate Governance Kodex*, DEUTSCHE NOTAR-ZEITSCHRIFT [DNOTZ] 748, 754 (2003); Michael Kort, *Corporate Governance-Fragen der Größe und Zusammensetzung des Aufsichtsrats bei AG, GmbH und SE*, DIE AKTIENGESELLSCHAFT [AG] 137, 138 (2008); Markus Linnerz, *LG München I 16.08.2007 – Praxisfolgen*, BB 581, 582 (2008); in this direction also Hans Christoph Grigoleit & Maria Zellner, in: AKTIENGESETZ § 161 mn. 4 (Hans Christoph Grigoleit et al. eds., 2nd ed. 2020). Differing view MÖLLERS, *supra* note 3, at § 3 mn. 63 et seqq. with further references. An appeal of the shareholders' meetings' decision due to an incorrect compliance declaration according to AKTG Sec. 161 is still possible, BGH, Sept. 21, 2009, 182 BGHZ 272 (mn. 16) – Umschreibungstopp.

68. Some authors vividly speak of "comply or perform", *see* Iain MacNeil & Xiao Li, *"Comply or Explain": market discipline and non-compliance with the Combined Code*, 14 CORP. GOVERNANCE 486, 492 (2006); Sridhar Arcot, Valentina Bruno & Antoine Faure-Grimaud, *Corporate governance in the UK: Is the comply or explain approach working?*, 30 INT'L REV. OF L. & ECON. 193, 199 (2010); Alain Pietrancosta, *Enforcement of corporate governance codes: A legal perspective*, *in* FESTSCHRIFT FÜR KLAUS J. HOPT ZUM 70. GEBURTSTAG 1109, 1135 (Stefan Grundmann et al. eds., 2010).

69. As for example AKTG Sec. 400, *see* on this Thomas M.J. Möllers & Franz C. Leisch, *in* KÖLNER KOMMENTAR ZUM WPHG §§ 37 b, c mn. 486 et seqq. (Heribert Hirte & Thomas M.J. Möllers eds., 2nd ed. 2014).

70. So also die recommendation of Kanzlei Tilp, *see* https://tilp.de/faelle/der-fall-wirecard-ag/

71. de la Motte, *supra* note 38. *See id.* regarding the claims of the prior creditors in insolvency.

## B. The Limitation of the Auditor's Liability

Auditors must display a critical basic approach to their work in order to recognise unlawful or fraudulent conduct by employees of the company they are auditing: Section 43(4) of the Auditing Code (WPO). Such a critical basic stance also includes the questioning of employees.[72] That EY has not fulfilled its audit mandate if whistleblower tips have not been followed up seems more than obvious at this stage. But here, too, one must dampen the hopes of the aggrieved investors: If the auditor only acts negligently, claims are limited to $4 million: Section 323(2) sentence 2 of the Commercial Code (HGB). It is obvious that the limit is far too low.[73] The claim for damages pursuant to Section 323(1) sentence 3 of the Commercial Code falls to the contracting party – i.e. the company. Section 323(1) of the Commercial Code is not a protective law in the sense of Section 823(2) of the Civil Code (BGB),[74] but at least the case law has extended auditor liability extensively in favour of third parties.[75] Exceptionally, a claim under Section 826 of the Civil Code may also be considered.[76] Consequently, the first claims for damages have been filed against EY.[77] The requirements for establishing damage contrary to public policy by means of omission are also very high.[78] Whether intent can be proven, which would then render the limitation of liability inapplicable, is completely open as things stand.

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72. The wording of the Gesetz über eine Berufsordnung der Wirtschaftsprüfer [WPO] [Code of Conduct for Certified Public Accountants] Sec. 43 (4) is as follows: "Berufsangehörige haben während der gesamten Prüfung eine kritische Grundhaltung zu wahren. Dazu gehört es, Angaben zu hinterfragen, auf Gegebenheiten zu achten, die auf eine falsche Darstellung hindeuten könnten, und die Prüfungsnachweise kritisch zu beurteilen." [Professionals are to remain in a critical attitude during the entire audit. Part of this is to question information, take circumstances into account that man lead to a false exposition and evaluate the examination evidence critically.].

73. Walter Doralt, *Die Haftung des gesetzlichen Abschlussprüfers - Mitverschulden, Ansprüche Dritter und Wege der Haftungsbegrenzung*, ZGR 266, 298 et seqq. (2015); Hanno Merkt, *in* Handelsgesetzbuch § 323 mn. 9 (Klaus J. Hopt et al. eds., 39th ed. 2020).

74. Prevailing opinion *see* for example *Michael Bormann/Sven Greulich*, in: MünchKomm-Bilanzrecht, 2013, § 323 mn. 158 with further references.

75. For references on the legal concept of a Vertrag mit Schutzwirkung zugunsten Dritter [contract for the benefit of a third party] and Drittschadensliquidation [liquidation of damages by a third party] *see* Merkt, *supra* note 73, at § 347 mn. 21 et seq.; Thomas M.J. Möllers, *Zu den Voraussetzungen einer Dritthaftung des Wirtschaftsprüfers bei fahrlässiger Unkenntnis der Testatverwendung*, JuristenZeitung [JZ] 909 et seqq. (2001).

76. Federal Court of Justice Nov. 11, 2013, Neue Juristische Wochenschrift [NJW] 383, 2014: liability of an auditor due to willfully misleading statements.

77. For example, Kanzlei Tilp as well as the 'Schutzgemeinschaft der Kapitalanleger e.V.' [SdK].

78. For the scope of an ommitted ad hoc disclosure *see* Thomas M.J. Möllers, *Die unterlassene Ad-hoc-Mitteilung als sittenwidrige Schädigung gem. § 826 BGB*, WM 2393 et seqq. (2003).

## C. BaFin Acting in the Public Interest, and the Exclusion of State Liability

While the German Bundesbank was still held liable for inadequate supervision in the *Herstatt* bankruptcy,[79] the German legislature has now put a stop to such state liability. Under Section 4(4) of the Act Establishing the Federal Financial Supervisory Authority (FinDAG), BaFin performs its duties only in the public interest. This has the consequence that a state liability claim pursuant to Section 839(1) sentence 1 of the Civil Code (BGB) in conjunction with Article 34 sentence 1 of the Basic Law (GG) is excluded because there is no contravention of a duty to a third party.[80] Such an exclusion of liability was confirmed by the Court of Justice of the European Union (CJEU).[81] However, in the final decision after the preliminary ruling procedure, the German Federal Court of Justice (BGH) considered it possible that in cases of abuse of office, state liability may nevertheless be possible.[82]

The law firm Tilp now alleges such misuse of authority by BaFin and submits that the authority did not inform the public on 19 February 2019 that there were concrete indications of a breach of accounting rules, because this was a prerequisite for instructing FREP to carry out an investigation of Wirecard.[83] However, according to the clear wording of Section 342b(2) sentence 3 of the Commercial Code (HGB), an audit is possible if there are concrete indications of a breach of accounting regulations (No. 1) *or* at the request of BaFin. BaFin can thus initiate an investigation even without such concrete indications.[84] Moreover, the previous cases of abuse of office were much more serious.[85] A second legal action brought by the German Retail Investors' Association (SdK) against BaFin considers Section 4(4) of the Act Establishing the Federal Financial Supervisory Authority (FinDAG) to be incompatible with the liability rule of the Transparency Directive 2013/50/

79. Federal Court of Justice Feb. 15, 1979, 74 BGHZ 144 (149 et seqq.) - Herstatt; Federal Court of Justice July 12, 1979, 75 BGHZ 120 (122 et seqq.) - Herstatt.

80. Federal Court of Justice Jan. 20, 2006, 162 BGHZ 49 – no liability of the government due to deficient bank supervision; Oberlandesgericht [OLG] [Higher Regional Court] Frankfurt on the Main Feb. 2, 2020, Beck-Rechsprechung [BeckRS] 8916, 2020 – no liability of the BaFin.

81. Case C-222/02, Peter Paul et al. v. Fed. Republic of Ger., 2004 ECR I-09425 (mn. 41 et seqq.).

82. 162 BGHZ 49 (66). Previously already Federal Court of Justice May 15, 2003, Rechtsprechungsreport Verwaltungsrecht [NVwZ-RR] 714, 2003 – public liability for abuse of authority.

83. *See* press release of Kanzlei Tilp of July 24, 2020, https://tilp.de/press/wirecard-bafin-skandal-tilp-hat-amtshaftungsklage-gegen-die-bafin-eingereicht-wegen-jahrelangem-amtsmissbrauch-im-fall-wirecard-antrag-auf-einleitung-eines-kapmug-musterverfahrens-vor-dem-o/, last accessed Feb. 2, 2021. Kanzlei Tilp filed a lawsuit at the VG Frankfurt against the BaFin on July 23, 2020.

84. In this instance probably also Merkt, *supra* note 73, at § 342b mn. 3.

85. *See* for example Hans-Jürgen Papier & Foroud Shirvani, *in* Münchener Kommentar zum Bürgerlichen Gesetzbuch § 839 mn. 328 (Franz J. Säcker et al. eds., 8th ed. 2020).

EU, which also serves to protect small investors.[86] We will return to this point later.[87]

## D. No Liability of Financial Intermediaries: Financial Advisors, Financial Analysts, Deutsche Börse AG Etc.

The duties of financial intermediaries are not very well defined, because the necessary specifics are often lacking. Fortunately, many years ago, in the well-known *Bond* case, the Federal Court of Justice (BGH) established a legal obligation for investment advisors, which provides an obvious solution here: the obligation to *know your product* before it may be recommended. The Court took a literal formulation: "If foreign securities are included in its programme, [the advisor] must inform itself about the quality of these securities – also using foreign sources of information – and subject them to its own examination. The prospective investor may assume that the bank advising him – which he trusts on the basis of its claimed expertise – has itself looked at the securities included in the investment programme and judged them to be good."[88] The Court maintained this case law even after the enactment of MiFID II.[89] However, due to the supervisory character and the full harmonisation intentions of MiFID II, some academic literature now expresses doubts as to whether national courts are still allowed to impose such obligations.[90]

Liability claims against other financial intermediaries such as financial analysts or rating agencies are even less clear. The duties of financial analysts remain blurred because BaFin and the courts have so far failed to specify the requirements for when an investment recommendation is to be considered erroneous. There is a lack of subsumable facts as well as relevant decisions.[91] Financial analysts have a duty to present objective information. However, the necessary substantiation is lacking here, so that this duty has

86. Anon., *Anlegerschützer bereiten Massenklage gegen Bund vor*, FAZ, Nov. 4, 2020, at 25.

87. *See infra* III.2.b.

88. Federal Court of Justice July 6, 1993, 123 BGHZ 126 (129) – Bond.

89. Federal Court of Justice Mar 22, 2011, 189 BGHZ 13 (mn. 20) - CMS Spread Ladder Swap; Federal Court of Justice Sept. 27, 2011, 191 BGHZ 119 (mn. 22, 47 at the end) - Lehman Brothers; on 'Bond' *see supra* note 88.

90. Negating for example Peter O. Mülbert, *Anlegerschutz bei Zertifikaten*, WM 1149, 1156 (2007): "Das Ende von Bond durch die MiFID" [The end of bonds through MiFID]; Peter O. Mülbert, *Auswirkungen der MiFID-Rechtsakte für Vertriebsvergütungen im Effektengeschäft der Kreditinstitute*, 172 ZHR 170, 183 (2008); Max Nikolaus & Stefan d'Oleire, *Aufklärung über „Kick-backs" in der Anlageberatung: Anmerkungen zum BGH-Urteil vom 19.12.2006*, WM 2129, 2134 (2007); Carsten Herresthal, *Die Pflicht zur Aufklärung über Rückvergütungen und die Folgen ihrer Verletzung*, ZBB 348, 351 et seqq. (2009); Rolf Sethe, *Die Zulässigkeit von Zuwendungen bei Wertpapierdienstleistungen*, *in* Festschrift für Gerd Nobbe 769, 786 et seq. (Mathias Habersack et al. eds., 2009). *See* also *infra* III.4.a).

91. More specific on this Thomas M.J. Möllers, *in* Kölner Kommentar zum WpHG §§ 34b mn. 118 et seqq. with further references (Heribert Hirte & Thomas M.J. Möllers eds., 2nd ed. 2014).

not yet been defined by the supervisory authority.[92] As will be shown, financial analysts violated their duty to present objectively by ignoring the negative rumours.[93] However, financial analysts typically do not have a contractual relationship with investors.[94] If rumours are ignored where there is a breach of duty, there is a failure to act. In this case, the requirements for intentional damage contrary to public policy pursuant to Section 826 of the German Civil Code (BGB) are particularly high. There are also hardly any judgments on rating agencies.[95]

## III. Verification of Rumours as Non-Valid Information

### A. The Role of Information for the Markets

The stock exchange is one of the most efficient markets of all, because it brings together supply and demand during stock exchange hours, thus making the stock exchange price possible. What is traded is relevant information about the company, as well as the company's future revenues and profit expectations. Under the *efficient market hypothesis*, stock exchanges price in all relevant information.[96] In the past, the focus was therefore on providing fast and comprehensive information. The numerous informational duties aim to channel the available information - for example, by preventing insiders from using their information advantage to the detriment of other market participants. At the same time, with obligatory ad hoc notifications, the information should reach the market as quickly as possible so that the insider loses their information advantage. All this serves to facilitate efficient markets.

#### 1. *The Relevance of the Validity of Information*

The efficient market hypothesis has now been extended by behavioural finance.[97] In recent years, legislatures have already reacted by creating rules to prevent information overload. This includes a wealth of easy-to-understand summaries, which supplement the extensive reporting in an easily comprehensible form for the (small) investor.[98] Shares are not goods

92. For references *see* Thomas M.J. Möllers, *Marktmanipulationen durch Leerverkaufsattacken und irreführende Finanzanalysen*, NZG 649, 651 (2018).

93. *See infra* III.4.b).

94. Möllers, *supra* note 91, at § 34b mn. 290.

95. For the Australian case *see Bathurst Reg'l Council v Local Gov't Fin Serv Pty Ltd* [No. 5] 2012 FCA 1200; Möllers, *supra* note 91, at § 17 mn. 29 et seqq., 36 et seqq.

96. Eugene F. Fama, *Efficient Capital Markets, A Review of Theory and Empirical Work*, 25 J. Fin. 383, 384 et seq. (1970); Eugene F. Fama, *Efficient Capital Markets: II*, 46 J. Fin. 1575, 1576 (1991); Daniel R. Fischel, *Efficient Capital Markets the Crash and the Fraud on the Market Theory*, 74 Cornell L.Rev. 907 (1989).

97. *See supra* note 59 et seqq. and Klöhn, *supra* note 60, at 90 et seqq.

98. Thomas M.J. Möllers & Eva Kernchen, *Information Overload am Kapitalmarkt*, ZGR 1 et seqq. (2011); Holger Fleischer, Klaus Ulrich Schmolke & Daniel Zimmer, *Verhaltensökonomik als Forschungsinstrument für das Wirtschaftsrecht*, *in* Beitrag der Verhaltensökonomie

whose value can be assessed from afar, or when you can inspect them, but goods whose value is taken on trust.[99] It is not a good or commodity that is traded, but "hopes and promises".[100] Above, the example of Wirecard was used to show how the market irrationally systematically ignored bad news and believed in supposedly good news (section I.1.c). In the following, a system will be set out to show how financial intermediaries should deal with rumours and the validity of information in the future. Validity means the intrinsic value and correctness of information. The aim is to prevent market participants from blanking out certain information on the one hand and blindly trusting certain information on the other. But: if the stock exchange trades on the future[101] – is it not then part of the game that forecasts and rumours are fraught with uncertainty, so that in the end one is always smarter with hindsight? Are companies and financial analysts not allowed to err when they (should) predict the future financial development of the company? Nobody has a magic crystal ball. Who was good or bad – whether EY or the FT was right, and whether the balance sheets were right or wrong – it could be argued that neither investors nor financial intermediaries could foresee this at the time. And did it not speak even more in favour of the short sellers, even if these – like the Zatarra financial analysis – were unlawful?[102] Could short-sellers trigger obligations unjustifiably through targeted misinformation - i.e. cause costs or harm the company with stop rules? These are all valid objections. Legal structures must be found to avoid the behavioural patterns of behavioural finance such as herd behaviour, over-optimism, selective perception or anchor behaviour (section I.3). At its core is the question of how market participants should deal with rumours. In the process, the duties previously regulated in the law are to be further substantiated. Distinctions must be made between market participants, and between active duties to search and provide information and prohibitions on publication.

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(BEHAVIORAL ECONOMICS) ZUM HANDELS- UND WIRTSCHAFTSRECHT 9, 50 et seqq. (Holger Fleischer & Daniel Zimmer eds., 2011); CAROLIN STAHL, INFORMATION OVERLOAD AM KAPITALMARKT (2013); *see* for example Directive 2009/65, art. 78, 2009 O.J. (L 302) 32 (EC); Regulation 2017/1129, art. 7, 2017 O.J. (L 168) 12 (EU).

99. SUSANNE KALSS, ANLEGERINTERESSEN 164 (2001); Holger Fleischer, *in* VERHANDLUNGEN DES 64. DEUTSCHEN JURISTENTAGES at F 23 (Ständige Deputation des Deutschen Juristentages ed., 2002).

100. Michael Taylor, *Accountability and Objectives of the FSA*, *in* BLACKSTONE'S GUIDE TO THE FINANCIAL SERVICES & MARKETS ACTS 2000, 17, 29 (Michael C. Blair et al. eds., 2001): "The essence of a financial contract is that involves a promise: money is exchanged today for an (often vague) promise of money in the future."

101. Fleischer, *supra* note 99, at F 48.

102. *See supra* note 12 et seq.

## 2. *A Sufficiently Accurate Rumour*

Interestingly, discussions on how a company should react to rumours have been going on for years.[103] Rumours are effectively uncertain information about facts with a certain degree of dissemination.[104] They may qualify as "circumstances" in the sense of inside information (Article 7(2) Market Abuse Regulation (EU) No. 596/2014). Pursuant to Article 17(4) and (5) of the Market Abuse Regulation, the publicly listed company may exceptionally postpone the obligation to publish insider information if this is in the public interest and, in addition, confidentiality is ensured. However, pursuant to the second paragraph of Article 17(7) of the Market Abuse Regulation, a rumour that is "sufficiently accurate" does not permit the company to postpone the ad-hoc notification. It is then irrefutably presumed that confidentiality is no longer guaranteed. In this context, there is intensive discussion about the 'whether' – i.e. the question of when an ad-hoc notification obligation kicks in because the rumour is accurate, such as when there is an information leak in the company[105] – because it shows a high degree of accuracy and substance[106] or it contains a factual core or a core that

103. For an overview *see* KLÖHN, *supra* note 60, at 237 et seqq.; Lars Klöhn, *in* KÖLNER KOMMENTAR ZUM WPHG § 15 mn. 238 et seqq. (Heribert Hirte & Thomas M.J. Möllers eds., 2nd ed. 2014).

104. Klöhn, *supra* note 103, § 13 mn. 53; Lars Klöhn, *in* MARKTMISSBRAUCHSVERORDNUNG Art. 7 mn. 57 (Lars Klöhn et al. eds., 2018); previously already JOACHIM VON KLITZING, AD-HOC-PUBLIZITÄT 88 (1999): unvouched news of uncertain reliability; Holger Fleischer & Klaus Ulrich Schmolke, *Gerüchte im Kapitalmarktrecht, Insiderrecht, Ad-hoc-Publizität, Marktmanipulation*, AG 841, 842 (2007): uncertain truth content. *See also* Klaus J. Hopt & Christoph Kumpan, *in* BANKRECHTS-HANDBUCH § 107 mn. 50 (Herbert Schimansky et al. eds., 5th ed. 2017); Differing view Heinz-Dieter Assmann, *in* WERTPAPIERHANDELSRECHT Art. 7 MAR mn. 35 (Heinz-Dieter Assmann, Uwe H. Schneider & Peter O. Mülbert eds., 7th ed. 2019).

105. ESMA, FINAL REPORT, DRAFT TECHNICAL STANDARDS ON THE MAR, ESMA/2015/1455, 53, mn. 242, https://www.esma.europa.eu/sites/default/files/library/2015/11/2015-esma-1455_-_final_report_mar_ts.pdf: "Would the confidentiality be no longer maintained, including due to rumours that are sufficiently accurate to indicate that a leak of information has occurred, and irrespective from where the breach of confidentiality originates, the issuer must publicly disclose this inside information (Article 17(7))."; BAFIN, ART. 17 MAR – VERÖFFENTLICHUNG VON UND UMFANG MIT INSIDERINFORMATIONEN (FAQS) OF 31.1.2019, 6, mn. III.3; concurring Assmann, *supra* note 104, at Art. 17 MAR mn. 138. Similar Christoph H. Seibt & Bernward Wollenschläger, *Revision des Marktmissbrauchsrechts durch Marktmissbrauchsverordnung und Richtlinie über strafrechtliche Sanktionen für Marktmanipulation*, AG 593, 600 (2014) with the assumption that the rumour needs to be based upon the insider information; Lars Klöhn, *Ad-hoc-Publizität und Insiderverbot im neuen Marktmissbrauchsrecht*, AG 423, 431 (2016); Rüdiger Veil & Alexander Brüggemeier, *in* HANDBUCH ZUM MARKTMISSBRAUCHSRECHT § 10 mn. 131 (Andreas Meyer et al. eds., 2018); Markus Pfüller, *in* WERTPAPIERHANDELSGESETZ § 15 mn. 148 (Andreas Fuchs ed., 2016).

106. Alexander Retsch, *Die Selbstbefreiung nach der Marktmissbrauchsverordnung*, NZG 1201, 1205 (2016); following him Veil & Brüggemeier, *supra* note 105, at § 10 mn. 131. Critically but [precise when precise] ["präzise, wenn präzise. . ."]. Polemically Assmann, *supra* note 104, at Art. 17 MAR mn. 138 fn. 1: "Was soll das sein?" [What is that supposed to be?].

is to be taken seriously.[107] In the following, the various steps are discussed as part of the company's research obligations, which precede the ad-hoc notification. These are duties of the management board that can lead to breaches of duty within the meaning of Section 93 of the Stock Corporation Act (AktG).

## B. Research and Information Obligations of the Publicly Listed Company

### 1. *The expansion of Information Channels to Include Critical Voices Such as Short-Sellers, Investigative Journalists and Whistleblowers*

The first step is to expand the sources of information and thus the scope of information. At the German and European level, there is still a lack of clarity about how to deal with short sellers. Negative rumours can also originate externally, as has been the case in recent years with short-sell attacks, but also from investigative journalists. The Wirecard case demonstrates that their information was ignored, and even fought against in the strongest possible way. In the USA, the Securities and Exchange Commission (SEC), as the regulator, has explicitly acknowledged the positive work of short-sellers because they help to feed negative news into the market more quickly and thus reduce information asymmetries.[108] The same applies to whistleblowers. Someone who exposes criminal wrongdoing is not a 'traitor' who may be dismissed for breaching fiduciary duties to their employer.[109] They support the work of supervision, and are more like heroes who should be rewarded. European law is more far-reaching here

107. Hopt & Kumpan, *supra* note 104, at § 107 mn. 50; Petra Buck-Heeb, *in* Handbuch des Kapitalanlagerechts § 8 mn. 64 (Heinz-Dieter Assmann et al. eds., 2020).

108. SEC Order Halting Short Selling in Financial Stock, Exchange Act Release No. 34-58592 (Sept. 18, 2008), as well as SEC, Statement of Securities and Exchange Commission Concerning Short Selling and Issuer Stock Repurchases, Press Release No. 2008-235 (Oct. 1, 2008): "The Commission notes that short selling plays an important role in the market for a variety of reasons, including contributing to efficient price discovery, mitigating market bubbles, increasing market liquidity, promoting capital formation, facilitating hedging and other risk management activities, and importantly, limiting upward market manipulations"; *see* also Thomas Lee Hazen, The Law of Securities Regulation § 6.2., 8 (6th ed. 2009); Melissa W. Palombo, *The Short-Changing of Investors: Why a Short Sale Price Test Rule is Necessary in Today's Markets*, 75 Brook. L. Rev. 1447, 1458 (2010); Christian Bonser, *If You Only Knew the Power of the Dark Side: An Analysis of the One-Sided Long Position Hedge Fund Public Disclosure Regime and a Call for Short Position Inclusion*, 22 Fordham J. Corp. & Fin. L. 328 (2017); *see* Möllers, *supra* note 92, at 650; Milan Bayram & Dominik Meier, *Marktmanipulation durch Leerverkaufsattacken*, BKR 55, 56 (2018); Jasper Wentz, *Shortseller-Attacken - ökonomische und juristische Bewertung eines ambivalenten Geschäftsmodells*, WM 196, 197 (2019); Marcus Commandeur, *Short-Attacken aktivistischer Leerverkäufer, Rechtliche Bewertung und Abwehrmöglichkeiten für betroffene Unternehmen*, AG 575, 577 mn. 8 (2020).

109. On the obligation to refer to the employer *see* Arbeitsschutzgesetz [ArbSchG] [German Occupational Safety and Health Act] Sec. 17 (2) sentence 1; Bundesarbeitsgericht [BAG] [Federal Labour Court] Dec. 15, 2016, Neue Zeitschrift für Arbeitsrecht [NZA] 702 (mn. 15 et seqq.), 2017.

than the previous German law because it protects the whistleblower. The rules can be found in the Whistleblowing Directive (EU) 2019/1937.[110] According to Articles 7(2) and 10 of the Whistleblowing Directive, it is also permissible to contact public bodies directly.[111] It is rightly emphasised that the legal situation of whistleblowers must therefore be fundamentally restated by means of a separate, national law. Good corporate governance now requires a company to set up internal whistleblowing structures in order to better investigate rumours.[112] This is the goal of effective compliance departments of publicly listed companies, who should set up whistleblower structures. A look at antitrust law can be useful here. Game theory already shows that incentives have to be set in order to break the silence in the cartel, for instance.[113] Leniency rules are common, as are incentives for whistleblowers.[114] Meanwhile, Article 32 of the Market Abuse Regulation also introduces the obligation to establish effective mechanisms for reporting breaches of the Regulation.[115] However, too many rules are designed as option clauses, which again stand in the way of a level playing field.[116] Whether under German law the authority can lure whistleblowers with financial incentives - as provided for in Section 21F of the US Securities Exchange Act (SEA) - is still up in the air.[117] As a result, however, this requires a fundamental reassessment of short-sellers and whistleblowers. For this, the rumours from both groups of people must first be acknowledged.

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110. Directive 2019/1937, 2019 O.J. (L 305) 17 (EU).

111. Florian Garden & Mayeul Hiéramente, *Die neue Whistleblowing-Richtlinie der EU - Handlungsbedarf für Unternehmen und Gesetzgeber*, BB 963, 964 (2019); Thomas Sonnenberg, *EU-Whistleblower-Richtlinie verlangt Gesetzgeber und Unternehmen erhebliche Umsetzungsanstrengungen ab*, BB I (2019); Klaus Ulrich Schmolke, *Die neue Whistleblower-Richtlinie ist da! Und nun? Zur Umsetzung der EU-Richtlinie zum Schutz von Hinweisgebern in das deutsche Recht*, NZG 5, 9 et seqq. (2020).

112. Directive 2019/1937, art. 8 (1), 2019 O.J. (L 305) 17 (EU).

113. MANFRED J. HOLLER, GERHARD ILLING & STEFAN NAPEL, EINFÜHRUNG IN DIE SPIELTHEORIE (2019); MÖLLERS, *supra* note 3, at § 5 mn. 152 et seqq.

114. On the chief witness *see* Commission Notice on Immunity from fines and reduction of fines in cartel cases, 2006 O.J. (C 298) 17; extensively now the Directive 2019/1, 2008 O.J. (L 11) 3 (EU). On a national level *see* BUNDESKARTELLAMT [BKartA] [FEDERAL CARTEL OFFICE], BEKANNTMACHUNG NR. 9/2006 ÜBER DEN ERLASS UND DIE REDUKTION VON GELDBUßEN IN KARTELLSACHEN – BONUSREGELUNG – (Mar. 7, 2006), www.bundeskartellamt.de and GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN [GWB] [ACT AGAINST RESTRAINTS OF COMPETITION] Sec. 33e (1).

115. In German national law, GESETZ ÜBER DIE BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT [FINDAG] [ACT ESTABLISHING THE FEDERAL FINANCIAL SUPERVISORY AUTHORITY] Sec. 4d was introduced.

116. *See* for example MARKET ABUSE REGULATION [MAR] art. 32 (4): "Member states may implement."

117. Theresa Pfeifle, *Finanzielle Anreize für Whistleblower im Kapitalmarktrecht* (2016). Klaus Ulrich Schmolke, *Whistleblowing als Regelungsaufgabe*, ZGR 876, 918 (2019) and Boris Dzida & Thomas Granetzny, *Die neue EU-Whistleblowing-Richtlinie und ihre Auswirkungen auf Unternehmen*, NZA 1201, 1206 (2020) who suggest bonuses if the employee uses the company's internal whistleblower system first.

### 2. *The Duty to Deal With Plausible Rumours in Terms of Content*

In a second step, we need to address the content of the market rumours, i.e. to verify or disprove them. How can we prevent short sellers from spreading unjustified fake news, and forcing the company to incur costs that could be better saved? The more credible and well-founded a rumour is, the greater the company's efforts must be to verify or disprove it. Indicators for this are the source's reputation and the substance of the allegations, i.e. the depth of substantiation. In terms of content, the rumour must not only have a certain plausibility, but must also be based more strongly on reasonable and comprehensible considerations. To this end, it must also be asked whether a reasonable third party would also investigate these rumours. The duty to address negative rumours may oblige the publicly listed company to investigate – for example, by obtaining a second opinion in the form of a special report. A special report in which third parties confirm the accuracy of the data by reacting quickly – as recently in the *Grenke* case - can be effective.[118] In summary, good corporate governance and compliance require that the relevant bodies in the company investigate the allegations. If necessary, the Supervisory Board could optimise its monitoring by exercising these rights itself. Both Supervisory Board and auditors should be able to interview workers and access internal monitoring units such as audit, compliance and whistleblower systems.[119]

Both the FT and German business journals had reported the allegations of false accounting. When McCrum specifically and substantively pointed out inaccuracies in the balance sheets in sixteen articles in the *Financial Times*,[120] these constituted highly plausible and concrete indicators of false accounting. Wirecard should not have ignored this information, and it should have investigated the allegations. However, the opposite is the case where – as in the case of the Zatarra study information is demonstrably false and the authorship is hidden.[121] Wirecard was not required to respond to such a document.

### 3. *The Scope of the Company's Duty to Respond to Plausible Rumours*

As just explained, publicly listed companies must (1) be aware of the rumours, (2) deal with them, and (3) if necessary, react to them in a substantiated manner. A precise rumour requires an ad-hoc notification. But when is such a rumour regarded as precise? Recital 14 of the Market Abuse

118. On KPMG, Warth & Klein Grant Thornton and Standard & Poor's *see* Georg Giersberg, *Gutachten stützen Grenke*, FAZ, Dec. 12, 2020, at 23.

119. For the planned changes *see* AktG-draft, Sec. 93, 100, 107 in the draft bill (Gesetz zur Stärkung der Finanzmarktintegrität [FISG] [Financial Market Integrity Strengthening Act]); *available at* www.bmjv.de, last accessed Feb. 2, 2021; concurring ARBEITSKREIS DER BILANZRECHTSPROFESSOREN (AKBR), STELLUNGNAHME ZUM FISG, III.1., *available at* www.bmf.de.

120. On this *supra* note 9.

121. *See supra* note 12 et seq.

Regulation lists the reliability of the information source as an example of a criterion. This is not sufficient in itself. Beyond the originator of the source of information, the rumour itself must be considered. In terms of content, the rumour must not only have a certain plausibility, but even more so be based on reasonable and comprehensible considerations.[122] Consequently, it is only a question of the behaviour that is reasonable and obvious for all parties involved within the framework of the clarification. These criteria can be used to assess whether the probability of the event is increased and, conversely, whether the uncertainty of it being inside information is reduced.[123] On the other hand, purely subjective rumours without concrete evidence are not precise.[124] The bottom line is how well founded and convincing the rumour is. Thus, it is part of the management board's duty to look into the rumours itself in a substantiated manner. This is also consistent with the regulatory purposes of capital markets law. It is also economically efficient because speculation is reduced. The starting point is again the consideration that fundamentally the company itself, as an information monopolist,[125] controls its own corporate information.[126] Financial intermediaries are fundamentally dependent on this monopoly information. This gives the company an information advantage, and the market participants a corresponding deficit. The company concerned is required to counter fake news through accurate information.

CEO Braun was able to influence share prices for years with the help of interviews, press releases, Twitter and ad-hoc notifications without BaFin stepping in to stop this.[127] Tweets or ad-hoc notifications along the lines of "everything will be fine" are legally inadmissible. Article 17(1) paragraph 2 sentence 2 of the Market Abuse Regulation prohibits the publication of certain marketing measures as ad-hoc notifications. Section 15(2) sentence 1 of the old version of the Securities Trading Act (WpHG) already prohibited the publication of unimportant marketing news that did not contain insider information.[128] Pursuant to Article 17(1) paragraph 2 sentence 1 of the Market Abuse Regulation, the information must be made public "in a

122. *See supra* II.4 and note 107.

123. Less subtle is Grundmann, who refers to a sufficient level of objective reliability of the statement ["einem hinreichenden Grad an objektiver Zuverlässigkeit der Aussage"], Stefan Grundmann, *in* GROßKOMMENTAR-HGB, Bankvertragsrecht, part 6 mn. 344 (Claus-Wilhelm Canaris et al. eds., 2017).

124. *Id.*

125. *See supra* note 51.

126. Similar KLÖHN, *supra* note 60, at 243: The issuer himself can make reliable statements about the truth of a rumour for a significantly lower cost.

127. *See supra* notes 22 et seq. In the USA however, the SEC reacted much more effectively as Elon Musk falsly claimed to go private with Tesla, *Judge Approves Musk SEC Settlement*, AUTOMOTIVE NEWS EUROPE (May 1, 2019), https://europe.autonews.com/automakers/judge-approves-musk-sec-settlement, last accessed Feb. 2, 2021; Thomas M.J. Möllers, *Market manipulation through short selling attacks and misleading financial analyses*, 53 THE INT'L LAW. 91, 92 et seq. (2020).

128. Pfüller, *supra* note 105, at § 15 mn. 397 et seq.

manner which enables fast access and complete, correct and timely assessment of the information by the public." From this, one should derive a general prohibition of publication of unimportant information and thus a prohibition of information overkill.[129] In the present case, Braun's messages were also misleading and incorrect.

## C. The Supervisory Authority's Duty to Clarify Conflicting Information

In the Wirecard case, BaFin stands accused of being turning a blind eye by only taking unilateral action against the short-sellers, but ignoring the underlying accusations. In the future, it will be necessary to demand that the supervisory authority also pursue verifiable rumours. In this way, damage to the financial sector can be averted. For this purpose, the supervisor must also have its own rights to investigate. If the authority does not have the necessary expertise, it must seek external support by hiring expert consultants. The two-step procedure under accounting law was too sluggish here. The supervisory authority must have the right to initiate a special audit immediately or to take over the investigation.[130] In the *Grenke* case, the entire group was subject to the Banking Act (KWG), and thus BaFin was able to directly arrange for a special expert opinion pursuant to Section 44(1) sentence 2 of the Banking Act (KWG).[131] The new Financial Market Integrity Strengthening Act (FISG) intends to extend such a special audit right of the supervisory authority to all publicly listed companies.[132] In these cases, the supervisory authority has a duty to act. It does not have the

129. Convincingly Grundmann, *supra* note 123, at part 6 mn. 530.

130. Thomas Loy & Sebastian Steuer, *Der „Fall Wirecard" und die aufsichtsrechtliche Bilanzkontrolle*, Internationale und kapitalmarketorientierte Rechnungslegung [KoR] 413, 421 et seq. (2020).

131. *See* Andreas Körner & Felix Holtermann, *Bafin zieht Bilanzprüfung von Leasingfirma Grenke an sich*, Handelsblatt (Sept. 30, 2020), https://www.handelsblatt.com/finanzen/banken-versicherungen/nach-betrugsvorwuerfen-bafin-zieht-bilanzpruefung-von-leasingfirma-grenke-an-sich-/26232292.html?ticket=ST-5083881-mffM5ZZswb39sfVUiUAf-ap1, last accessed Feb. 2, 2021.

132. *See* now the reworded draft of Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] Sec. 107 (5), (7), Sec. 108 (1)-(3), *cf.* draft bill FISG, *supra* note 119, at 1: "Die BaFin braucht ein Prüfungsrecht gegenüber allen kapitalmarktorientierten Unternehmen einschließlich Auskunftsrechte gegen Dritte, die Möglichkeit forensischer Prüfungen sowie das Recht, die Öffentlichkeit früher als bisher über ihr Vorgehen bei der Bilanzkontrolle zu informieren." [The BaFin needs an audit right regarding all companies orientated towards capital markets, including a right to information against third parties, the possibility of forensic examinations as well as the authority to inform the public about the process of balance sheet audits earlier as before.] Concurring AKBR, Stellungnahme zum FISG, I.1, *available at* https://www.bundesfinanzministerium.de/Content/DE/Gesetzestexte/Gesetze_Gesetzesvorhaben/Abteilungen/Abteilung_VII/19_Legislaturperiode/2020-10-26-Finanzmarktintegritaetsstaerkungsgesetz/Stellungnahme-akbr.pdf?__blob=publicationFile&v=1, last accessed Feb. 2, 2021.

discretion to ignore the rumours. In other words, a failure to act constitutes a breach of duty.

## D. Prohibiting Publication by Market Participants in Order to Prevent Fake News

### 1. *Know Your Product, and Recommendation Prohibitions for Investment Service Providers (Section 63 WpHG)*

In contrast to the obligations just mentioned, financial intermediaries do not initially have their own investigative duty, because they can decide for themselves which company they analyse. However, this changes when the investment advisor wants to actively recommend a financial product. Pursuant to Section 63(5) of the Securities Trading Act (WpHG), the investment services company must understand the financial instruments it offers or recommends.[133] Contrary to the view expressed above, the private-law rules of the *Bond* case continue to apply despite MiFID II, because European law has so far not harmonised private law liability.[134] Thus, the *know-your-product* research obligation continues to apply as a private law obligation. The Federal Court of Justice (BGH) convincingly emphasises in the *Bond* case that it would be contrary to good faith in an advisory contract if the risk of insufficient information were to be passed on to the client. If the advisor does not comply with their duty to do research, they are prohibited from recommending the financial product.[135] This also

133. Kay Rothenhöfer, *in* Kapitalmarktrechts-Kommentar § 63 WpHG mn. 17 (Eberhard Schwark & Daniel Zimmer eds., 5th ed. 2020). Möllers, *supra* note 91, at § 31 mn. 99 et seqq.; Thomas M.J. Möllers & Kristian J. Puhle, *Know your product - Ermittlungspflichten von Zertifikate-Emittenten*, JZ 592 et seqq. (2012); Andreas Fuchs, *in* Wertpapierhandelsgesetz § 31 mn. 275 (2016); Hervé Edelmann, *in* Handbuch des Kapitalanlagerechts § 3 mn. 20 et seq. (Heinz-Dieter Assmann et al. eds., 2020); Martina Kern, *in* Bank- und Kapitalmarktrecht mn. 17.52 et seqq. (Peter O. Mülbert et al. eds., 5th ed. 2019).

134. Higher Regional Court Düsseldorf Dec. 16, 2010, WM 399 (400), 2011; Dörte Poelzig, *Private enforcement im deutschen und europäischem Kapitalmarktrecht*, ZGR 801, 814 (2015); Ingo Koller, *in* Wertpapierhandelsrecht § 63 WpHG mn. 11 (Heinz-Dieter Assmann, Uwe H. Schneider & Peter O. Mülbert eds., 7th ed. 2019); Kay Rothenhöfer, *in* Kapitalmarktrechts-Kommentar § 63 WpHG mn. 13 (Eberhard Schwark & Daniel Zimmer eds., 5th ed. 2020); Fuchs, *supra* note 133, at Vor § 31 mn. 84. Differing view the authors in note 90.

135. Federal Court of Justice July 6, 1993, 123 BGHZ 126 (131) – Bond: "Wenn eine Bank den mit der Informationsbeschaffung im Ausland verbundenen gesteigerten Aufwand und die Gefahren einer lückenhaften Unterrichtung scheut, muß sie auf eine Empfehlung verzichten und entsprechende Fragen des Kunden nach dieser Anleihe mit dem Hinweis auf das Risiko der von ihr nicht einzuschätzenden Bonität des Emittenten beantworten. Sie kann die Folgen ihrer eigenen Versäumnisse nicht auf den Kunden abwälzen, der auf ihre Beratung vertraut." [If a bank dreads the increased effort of acquiring information abroad and the dangers of an incomplete notice, it has to refrain from giving recommendations. Concerning a respective question of a customer regarding this bond, the bank also has to point out the increased risk due

corresponds to US law, which has a comparable legal concept (*know your security*).[136] In this respect, there is a prohibition on recommendations.

## B. The Justification of an Investment Recommendation

What applies to investment research, which since the Market Abuse Regulation has been referred to as 'investment recommendations'?[137] They reference a future that no-one can know.[138] Because no one can predict the future, ninety-percent of all financial analyses are therefore justifiable *ex-ante* in terms of their content, even if in retrospect the forecast does not materialise. Since the Market Abuse Regulation came into force, what used to be known as 'financial analyses' are now referred to as 'investment recommendations.' Since 2019, they must be registered with BaFin; this enables the originator of an investment recommendation to be identified, and BaFin to warn the public if it is published anonymously.[139] In the meantime, BaFin has also for the first time given out warnings against individual investment recommendations.[140] However, such a formal check can only be a first step to keep inadmissible investment recommendations out of the market. Furthermore, investment recommendations may also be unlawful in terms of content if they demonstrably disseminate incorrect facts, fail to point out doubts about the information, or are not verifiable.[141] Article 3(1)(c) of Delegated Regulation 2016/958[142] requires that the sources of information are reliable or that doubts about the reliability of the source are indicated.[143] Pursuant to Article 3(3) of Delegated Regulation 2016/958, the recommendation must be substantiated at the request of the Authority. Objectively incorrect investment recommendations will also include those that make only positive or only negative recommendations and omit any contradictory considerations, because these do not disclose doubts about the information.

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to their difficulty in judging the issuers' solvency. It cannot blame the customer trusting the bank for advice with the consequences of their own failures.]

136. SEC v. Dain Rauscher, Inc., 254 F.3d 852 (9th Cir. 2001): "A securities professional has an obligation to investigate the securities he or she offers to customers"; Thomas Lee Hazen, The Law of Securities Regulation § 14.25 (7th ed. 2017).

137. *Cf.* MAR (No. 596/2014) art. 20 in conjunction with MAR art. 3 (1) No. 35 and WpHG Sec. 85.

138. "Predition is very difficult, especially about the future."

139. *Cf.* WpHG Sec. 86 (1).

140. WpHG Sec. 86, Sec. 6 (9). Interestingly, it is a matter of genuine national law. On the question if this violates MAR (No. 596/2014), *see* Rüdiger Veil, *Maximalharmonisierung und mitgliedstaatliche Gesetzgebung im europäischen Marktmissbrauchsrecht*, *in* Festschrift für Alfred Bergmann zum 65. Geburtstag 765, 773 et seqq. (Meinrad Dreher et al. eds., 2018); Torsten Fett, *in* Kapitalmarktrechts-Kommentar § 86 mn. 1 (Eberhard Schwark & Daniel Zimmer eds., 5th ed. 2020).

141. Going into detail Möllers, *supra* note 92, at 652; previously already Möllers, *supra* note 91, at § 34b mn. 135–94.

142. Commission Delegated Regulation 2016/958, 2016 O.J. (L 160) 15 (EU).

143. Möllers, *supra* note 92, at 651; rightly also Fett, *supra* note 140, at § 85 WpHG mn. 46.

In the Wirecard case, the FT's ongoing reporting should have raised doubts about the accuracy of Wirecard AG's statements or EY's unqualified certifications of the accounts. The rumours were also substantiated by the FT - of the most renowned international business newspapers - through relevant sources and further elaborated and substantiated in numerous articles and reports over several months. This distinguished the claims from investment recommendations whose authors were not known. The investment recommendations should have pointed out these doubts. If this had happened, it would not have been possible to forecast share target prices of $230-270 shortly before the insolvency. This was only possible because the analysts ignored the previous rumours and the preparation of the special report in their investment recommendations.[144] Alternatively, the analysts would have had the option of waiving their recommendation or issuing a clear 'sell' recommendation. Interestingly, in the Wirecard case, some financial analysts had significantly reduced their investment recommendations following the KMPG report.[145] The background to this is the consideration that financial intermediaries enjoy special trust due to their expertise.[146]

## IV. Enforcing the Law

### A. Law Matters – Using the Law as a Means to Instil Trust

Europe is in competition with the USA and the People's Republic of China. Most of the world's twenty largest companies are from the USA or China.[147] The EU is desperately trying to catch up with modern technologies such as IT, AI and autonomous driving. One reason for the deficit lies in the lower amount of venture capital that market participants in Europe make available to start-ups.[148] Investor confidence is a strong protective purpose for stock market participation.[149] Market participants must be able to trust that they are basically treated equally - i.e. that no

144. On the investment recommendations of the Commerzbank, Baader and Hauck & Aufhäuser, *see supra* note 34.

145. For example, on May 4, 2020, HSBC decrease of target price from $210 to $105, NordLB on Apr. 28, 2020, to $102: "Wesentliche Fragen blieben ungeklärt." [Important questions remained unresolved.]

146. *See supra* note 88 and Möllers, *supra* note 91, at § 34b WpHG, mn. 1 et seqq.

147. Only two European companies are on this list (Nestlé und Roche Holding), Anon., *Die größten Unternehmen der Welt nach Börsenkapitalisierung*, FAZ, July 8, 2020, at 21.

148. Alexandre Lamfalussy et al., Lamfalussy Final Report of 15.2.2001, 15, German version *available at* https://docplayer.org/12130686-Schlussbericht-des-ausschusses-der-weisen-ueber-die-regulierung-der-europaeischen-wertpapiermaerkte.html, last accessed Feb. 2, 2021.

149. *See* for example MAR (No. 596/2014) art. 1: "enhance investor protection". On the different purposes of protection *see* Klaus J. Hopt, Der Kapitalanlegerschutz im Recht der Banken 51 et seqq. (1975); C-384/93, Alpine Investments BV v. Minister van Financiën, 1995 ECR I-01141 (mn. 42); Fleischer, *supra* note 99, at F 20; Thomas M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts*, 208 Archiv für die civilistische Praxis [AcP] 1, 8 (2008);

market participant uses insider knowledge or market manipulation to take financial advantage at the expense of other market participants. If there is no regulatory regime, or if it is not enforced, Wild West methods prevail and market participants withdraw from the stock market. The law plays a dual role: as an imperative, it commands or prohibits certain actions.[150] The law must be a deterrent to prevent illegal insider trading and market manipulation on the stock exchanges.[151] Enforcement of the law is therefore indispensable for trust in the markets – *law*, or rather *enforcement, matters*.[152] The now-prevailing thesis is that there is a correlation between the enforcement of these rules and the success of stock exchanges.[153]

The sanctions regime is undoubtedly stricter in the USA and in China than in Europe. In the USA, this is because civil sanctioning takes place through class actions, and considerable pressure is generated by the authorities to force a settlement.[154] In the People's Republic of China, the

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SUSANNE KALSS, MARTIN OPPITZ & JOHANNES ZOLLNER, KAPITALMARKTRECHT § 1 mn. 17 (2nd ed. 2015).

150. On the behavioral control of law *see* for example JOHN AUSTIN, LECTURES ON JURISPRUDENCE ON THE PHILOSOPHY OF POSITIVE LAW, vol. I, 90, 94 (1885); MÖLLERS, *supra* note 3, at § 2 mn. 7 et seqq.

151. On the deterrent effect *see* VIKTOR MATAJA, DAS RECHT DES SCHADENSERSATZES VOM STANDPUNKTE DER NATIONALÖKONOMIE 19 et seqq. (1888); MÖLLERS, *supra* note 3, at § 5 mn. 142 et seqq.

152. BMF, *supra* note 4, at 1 (3): "Genauso wichtig ist es, eine wirksame Verfolgung und Bestrafung der Täter und der von der Straftat profitierenden Unternehmen sicherzustellen. Nur so sichern wir das Vertrauen der Anleger, die Reputation unseres Finanzmarkts und die Arbeitsplätze in den Banken, Versicherungen und anderen Finanzdienstleistern." [It is equally as important to ensure effective prosecution of criminals and companies profiting from the criminal actions. Only so can we mantain the trust of investors, the reputation of our financial market and the jobs in banks, insurances and other financial services providers.]

153. Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1140 (1998); Rafael La Porta et al., *Investor protection and corporate governance*, 55 J. FIN. 1, 5 et seqq. (2000); Franco Modigliani & Enrico Perotti, *Security Markets versus Bank Finance: Legal Enforcement and Investors' Protection*, 1-2 INT'L REV. FIN. 81 et seqq. (2000); Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781, 834 et seqq. (2001); Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1 (2006); Howell E. Jackson & Mark J. Roe, *Public and private enforcement of securities laws: Resource-based evidence*, 93 J. FIN. ECON 207 (2009); John C. Coffee Jr., *Privatization and Corporate Governance: The Lessons from Securities Market Failure*, 25 J. CORP. L. 1, 2 (1999); John C. Coffee Jr., *Law and the Market: the Impact of Enforcement*, 156 U. PENN. L. REV. 229 (2007); Uptal Bhattacharya & Hazem Daouk, *When No Law is Better than a Good Law*, 13 REV. FIN. 577, 578 (2009). On the discussion in Germany *see* Möllers, *supra* note 149, at 1 et seq.; Lars Klöhn, *Private versus Public Enforcement of Laws – a Law & Economics perspective*, *in* COMPENSATION OF PRIVATE LOSSES 179 et seqq. (Reiner Schulze eds., 2011); DÖRTE POELZIG, NORMDURCHSETZUNG DURCH PRIVATRECHT 361 et seqq. (2012); Poelzig, *supra* note 134, at 817 et seqq.; Gerhard Wagner, *Rechtsdurchsetzung im Kapitalmarktrecht: Public versus Private Enforcement*, *in* FESTSCHRIFT FÜR JOHANNES KÖNDGEN 649, 673 (Matthias Caspar et al. eds., 2016); Philipp Maume, *Staatliche Rechtsdurchsetzung im deutschen Kapitalmarktrecht: eine kritische Bestandsaufnahme*, 180 ZHR 358, 361 et seqq. (2016).

154. Thomas M.J. Möllers & Bernhard Pregler, *Zivilrechtliche Rechtsdurchsetzung und kollektiver Rechtsschutz im Wirtschaftsrecht*, 176 ZHR 144, 146, 151 et seqq. (2012). On the settlement in

state has a strong influence on economic events and can also intervene in companies with relative ease. The visible hand of the state and the invisible hand of the market are combined into a *sui generis* system by applying the principle of concentration of powers by the party.[155] Although US stock exchanges still lead the world, US law cannot simply be adopted elsewhere. The principle of proportionality, which dominates in Europe, and criminal law principles such as the presumption of innocence, stand in the way of adopting legal concepts such as punitive damages or forced public law settlements.[156] Europe has a different understanding of the separation of powers and law.[157] Because comparable tools are lacking or much weaker in Europe, the European legislature must find other solutions. Otherwise, there is a danger that the stock markets in Europe will fall even further behind the stock markets in New York, Hong Kong or Shanghai. The risk capital required for new developments in the fields of the environment, IT or AI is then just as unavailable as using shares as a high-yield asset class for private old-age provision.[158] In this respect, it makes sense to interlock different legal channels in order to compensate for possible disadvantages, and in this way to effectively control behaviour.[159]

## B. Demands to Optimise Public Law Enforcement

### 1. *Monitoring the Supervisors*

As is well known, the Lamfalussy process has massively expanded lawmaking. Through full harmonisation on three levels, the European

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the USA regarding the VW emissions scandal, *see* for example Amy J. Schmitz, *in* Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal 339 et seqq. (Beate Gsell & Thomas M.J. Möllers eds., 2020).

155. Stefan Baron & Guangyan Yin-Baron, Die Chinesen. Psychogramm einer Weltmacht 265 (2019). On the principle of concentration of powers, *see* Knut Benjamin Pißler, *Höchstrichterliche Interpretationen als Mittel der Rechtsfortbildung in der Volksrepublik China*, 80 Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ) 373, 392 et seq. (2016).

156. Beate Gsell & Thomas M.J. Möllers, *in* Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal 465, 467 et seq. (2020) and *supra* note 154.

157. On the rejection of punitive damages in Germany *see* for example Federal Court of Justice June 4, 1992, 118 BGHZ 312 - punitive damages. In Europe, punitive damages were not implemented into the Directive 2014/104, *see* art. 3 (3) and recital 13 sentence 3, 2014 O.J. (L 349) 1 (EU). The same applies for Directive 2020/1828, *see* recital 10 sentence 2 and recital 42 sentence 3, 2020 O.J. (L 409) 1 (EU).

158. Jeremy Greenwood & Bruce D. Smith, *Financial markets in development, and the development of financial markets*, 21 J. Econ. Dynamics & Control 145 (1997); Möllers, *supra* note 149, at 4, 7; Grundmann, *supra* note 123, at part 6 mn. 8 et seq.; on the functioning protection *see* Mark Oulds, *in* Bank- und Kapitalmarktrecht mn. 11.53 et seqq. (Peter O. Mülbert et al. eds., 5th ed. 2019); Petra Buck-Heeb, Kapitalmarktrecht mn. 2 (11th ed. 2020). Instructively for example Deutsches Aktieninstitut (DAI), Lebensstandard im Alter sichern – Rentenlücken mit Aktien schliessen (Dec. 2016).

159. Poelzig, *supra* note 134, at 821.

legislature is attempting to clarify all individual issues.[160] In this respect, the core of the Lamfalussy process is correct: in principle, the supervisory authority is in a position to take quick decisions. Due to the principle of investigation, authorities have to investigate. Judicial clarification has the disadvantage that it is ultimately much too slow for the markets. If courts take ten years or more to rule on the legality of an act, this is certainly far too late. In addition, there is often the risk that private individuals do not want to sue. Criminal proceedings require full proof because the principle of innocence until proven guilty applies. There are thus weighty arguments in favour of supervision by the supervisory authority. However, four requirements are set out below in order to make the work of the authorities more effective. If compliance structures are expanded, the authority's competences should also be expanded: For the last thirty years, Germany has been working to improve corporate governance and compliance structures. However, company law in the form of corporate law has structural limits. In case of doubt, information rights to inspect the report of the special audit or liability claims of the supervisory board against the management board must give way to the company's interests.[161] In addition, there is the problem that liability claims and the rules of the German Corporate Governance Code can only be enforced to a limited extent.[162] BaFin should be responsible for introducing the new monitoring duties: Firstly, this would not only be a special audit, but also a review of the corresponding compliance structures.[163] Secondly, the question of whether the EU should be responsible for prosecuting insider trading and market manipulation needs to be examined in greater detail. This would have the advantage of a level playing field and powerful enforcement. A European intervention force would be responsible for market manipulation by short-sellers, for example.[164] European antitrust law could be used as a model.

160. Heinz-Dieter Assmann & Uwe H. Schneider, *Foreword*, *in* WERTPAPIERHANDELSGESETZ, WPHG (2006); Peter O. Mülbert, *Regulierungstsunami im europäischen Kapitalmarktrecht*, 176 ZHR 369 et seq. (2012); Thomas M.J. Möllers, *Europäische Gesetzgebungslehre 2.0: Die dynamische Rechtsharmonisierung im Kapitalmarktrecht am Beispiel von MiFID II und PRIIP*, ZEUP 325, 330 et seqq. (2016); extensively Thomas M.J. Möllers, *Für eine horizontale Arbeitsteilung zwischen nationalem und europäischem Wertpapierhandelsrecht – Gesetzgebung und Methodik*, *in* FESTSCHRIFT 25 JAHRE WPHG 19, 24 et seqq. (Lars Klöhn & Sebastian Mock eds., 2019); Rüdiger Veil, *Kodifikation der Wertpapierregulierung – Prolegomena zu einem Europäischen Kapitalmarktgesetzbuch*, *in* FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG, vol. 2, 571, 574 (Katharina Boele-Woelki et al. eds., 2019).

161. Hans Christoph Grigoleit & Richard Rachlitz, *in* AKTIENGESETZ § 142 mn. 24, 31 (Hans Christoph Grigoleit et al. eds., 2nd ed. 2020).

162. A cease and desist order can be filed against the supervisory board according to AktG Sec. 116, Sec. 93. But the board is allowed to take the companies interest into account, for example if it refrains from asserting a right against the board of executive directors, Federal Court of Justice Apr. 21, 1997, 135 BGHZ 244 (255 et seqq.) - ARAG/Garmenbeck.

163. *See supra* note 119.

164. Hanno Merkt, *in* VERHANDLUNGEN DES 64. DEUTSCHEN JURISTENTAGES at G 125 (Ständige Deputation des Deutschen Juristentages ed., 2002); Klaus J. Hopt, *Auf dem Weg zu einer neuen europäischen und internationalen Finanzmarktarchitektur*, NZG 1401, 1404 (2009);

### 2. *Avoiding Conflicts of Interest and Removing the Liability Privilege*

As a third requirement, an important steering instrument of capital markets law must be observed and extended to other market participants, namely the avoidance of conflicts of interest.[165] It can be found, for example, in the regulation of financial intermediaries. But if intermediaries are to avoid conflicts of interest, this must apply all the more to the supervisory authority itself: trading in the securities of companies that one is supposed to supervise[166] must be prohibited. This has already happened.[167] And finally, the liability privilege of the supervisory authority is not convincing because it has a counterproductive effect. Those who are not responsible for their actions may work less carefully. They must be liable for grossly negligent conduct.[168]

## C. Judicial Control by Means of Private Law

### 1. *The Necessity of Ex-Post Control and Civil Liability*

The standardisation density of the Lamfalussy process is reaching its limits. It is reminiscent of Frederick II's attempt to cover all living conditions with the General Prussian Land Law (ALR) and its 17,000 paragraphs.[169] The above-mentioned attempt to correctly classify rumours in terms of capital markets law clearly shows that ESMA and BaFin also find it difficult to come up with a suitable specification.[170] On the other hand,

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Thomas M.J. Möllers, *Auf dem Weg zu einer neuen europäischen Finanzmarktaufsichtsstruktur*, NZG 285, 289 (2010); Möllers, *supra* note 92, at 654; Möllers, *supra* note 160, *in* Festschrift 25 Jahre WpHG at 33 et seqq.; now also AKBR, *Bekämpfung von Unregelmäßigkeiten bei der Rechnungslegung einschließlich Betrug*, NZG 938, 945 (2020); Jan Krahnen & Katja Langenbucher, *Working Paper: The Wirecard lessons: A reform proposal for the supervision of securities markets in Europe*, SAFE Policy Letter No. 88 (July 2020); Ignazio Angeloni, *Wirecard scandal raises need for common EU market rules*, SAFE Policy Blog, Jul. 2, 2020); on this also Loy & Steuer, *supra* note 130, at 422.

165. *Cf.* Directive 2004/39, recitals 71, 74 and art. 24 (1), 2004 O.J. (L 145) 1 (EC); Regulation 1060/2009, recitals 10, 16, 22, 27, 30 and art. 1 sentence 2, art. 6 annex 1, 2009 O.J. (L 302) 1 (EC); Directive 2014/56 amending Directive 2006/43/EC, art. 22 (1) subparagraph 3, 2014 O.J. (L 158) 196 (EU). As a general legal concept *see* Thomas M.J. Möllers, *Anlegerschutz im System des Kapitalmarktrechts, Rechtsgrundlagen und Ausblicke*, *in* Festschrift für Klaus J. Hopt zum 70. Geburtstag 2247, 2250 (Stefan Grundmann et al. eds., 2010).

166. On this *supra* note 41.

167. Anon., *Bafin-Mitarbeiter dürfen Aktien aus der Finanzbranche nicht mehr privat handeln*, Handelsblatt (Oct. 10, 2020), https://www.handelsblatt.com/finanzen/maerkte/boerse-inside/finanzaufsicht-bafin-mitarbeiter-duerfen-aktien-aus-der-finanzbranche-nicht-mehr-privat-handeln/26237298.html?ticket=st-2279461-DRNIbAE9g3SbW4CUxjfM-ap3, last accessed Feb. 2, 2021.

168. Likewise, AKBR, *supra* note 119, at I.6. Gross negligence is therefore an objectively gross breach of duty in conjunction with a subjectively non-excuseable breach, which considerably exceeds ordinary negligence, *cf.* Renate Schaub, *in* beck-online.GROSSKOMMENTAR § 276 BGB mn. 92 with further references (Beate Gsell et al. eds., 1.12.2020).

169. Möllers, *supra* note 160, *in* Festschrift 25 Jahre WpHG at 24.

170. Extensively *supra* notes 106 et seqq.

whether the time is ripe for a European capital market code[171] is open to debate. The legislative technique is simply too elaborate for this[172] and the quality of the law is still too low.[173]

It makes sense and is necessary for the Court of Justice of the European Union to further substantiate capital markets law in case of doubt. The same applies to the vacuum of taking action against unlawful investment recommendations or substantiating the know-your-product obligation.[174] From a procedural point of view, there is a need for a unified court system - as already exists in antitrust law. It is unfortunate that in Germany the legal pathways are split, because both the Federal Court of Justice (BGH) and the Federal Constitutional Court (BverfG) can have jurisdiction.[175] Here, European procedural law is more advanced, because the Court of Justice of the European Union (CJEU) always decides via the preliminary ruling procedure. Moreover, the authorities cannot know everything, so private enforcement can be more effective because the number of potential monitors is many times greater. Private enforcement is imperative because the supervisory authority is always understaffed.[176] Moreover, private enforcement has an important complementary function because it allows for the filling of loopholes of the legislature and the administration. Private law also fills in the gaps if, as in the Wirecard case, the supervisory authority is looking the other way and does not prosecute evidently unlawful actions. German tort law expressly recognises the supplementary function vis-à-vis public law norms in order to be able to close liability loopholes.[177] It is therefore necessary to combine the enforcement of private law and public law in a meaningful way. This is also the case in European unfair competition law,[178] but also in antitrust law. The CJEU in particular has also called for private law enforcement.[179] In Germany, with respect to

171. On such a code summarizing the European regulation for capital markets, *see* Veil, *supra* note 160, at 573; Rüdiger Veil, *Rechtsquellen des Wertpapierhandelsrechts – vom nationalen Flickenteppich zur europäischen Kodifikation*, *in* FESTSCHRIFT 25 JAHRE WPHG 87, 98 (Lars Klöhn, Sebastian Mock eds., 2019).

172. Möllers, *supra* note 160, *in* FESTSCHRIFT 25 JAHRE WPHG at 24 et seqq.

173. Cornelius Simons, *Gesetzgebungskunst*, AG 651 et seqq. (2016); Rolf Sethe, *25 Jahre Wertpapierhandelsgesetz – Ein Anlass zum Feiern?*, *in* FESTSCHRIFT 25 JAHRE WPHG 1171, 1183 et seq. (Lars Klöhn, Sebastian Mock eds., 2019).

174. *See supra* III.4.a) und b).

175. On this demand already Möllers, *supra* note 92, at 657.

176. Jackson & Roe, *supra* note 153, at 208; Wagner, *supra* note 153, at 673.

177. Federal Court of Justice June 9, 1998, 139 BGHZ 79 (83) - Firecrackers II. Previously already Federal Court of Justice Oct. 23, 1984, NJW 620 (621), 1985 – tow lift operator; Federal Court of Justice Nov. 29, 1983, NJW 801 (802), 1984 - Puck; Federal Court of Justice Oct. 7, 1986, NJW 372 (373 with further references), 1987 - Spray.

178. THOMAS M.J. MÖLLERS & ANDREAS HEINEMANN, THE ENFORCEMENT OF COMPETITION LAW IN EUROPE 363 (2007): An enforcement of unfair competition law soley by private law is the exception in the member states of the European Union.

179. C-453/99, Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others, 2001 ECR I-06297 (mn. 29); C-295/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 ECR I-06619 (mn. 39 et seqq.).

inadequate capital market information, the claims under Sections 97f. of the Securities Trading Act (WpHG) and Section 826 of the German Civil Code (BGB) are regularly limited to the negative interest, because in order for the investor to have transactions overturned, they must prove they would not have bought the shares otherwise.[180] Finally, the Federal Court of Justice fundamentally rejects the ability of capital markets law provisions to be protected by law, and thus the possibility of asserting claims via Section 823(2) of the German Civil Code (BGB), arguing that it is the legislature's task to introduce corresponding claims.[181] The legislature is therefore called upon, not least because it can regulate a matter not only selectively, but comprehensively.

### 2. *Proposals for a European Liability Law, and the Low Likelihood of it Happening*

In the future, further harmonisation efforts in European capital markets law will be needed to create private law liability. Two rather extreme views can be identified. On the one hand, proposals have been made for many years on how private law liability should be formulated.[182] This approach is taken by those authors who already support that there is a *de lege lata* assumption of liability for certain facts under Section 823(2) of the Civil Code (BGB) in conjunction with Article 15 of the Market Abuse Regulation (EU) 596/2014.[183] However, little has happened. Under European law, the rules on private law liability are very straightforward. Liability provisions can only be found in the Transparency Directive,[184] the Annual Accounts

180. Federal Court of Justice July 19, 2004, 160 BGHZ 134 = NJW 2664 (2667), 2004 - Infomatec I; Federal Court of Justice, May 9, 2005, NJW 2450 (2453), 2001 - EM.TV; extensively Möllers & Leisch, *supra* note 69, at §§ 37b, c mn. 360 et seqq.

181. For example, Federal Court of Justice June 22, 2010, 186 BGHZ 58 (68 et seq. mn. 29) - Phoenix (regarding § 34a WpHG old version); Federal Court of Justice Feb. 19, 2008, 175 BGHZ 276 (281 mn. 18) (regarding § 32 WpHG old version); Federal Court of Justice Dec. 13, 2011, 192 BGHZ 90 (98 et seq. mn. 21) - IKB (regarding § 20a WpHG old version). Möllers & Leisch, *supra* note 69, at §§ 37b, c mn. 493 et seqq., 501 et seqq.

182. Möllers & Leisch, *supra* note 69, at §§ 37b, c mn. 70 et seqq.; for example, Klaus J. Hopt & Hans-Christoph Voigt, *Empfehlungen*, *in* PROSPEKT- UND KAPITALMARKTINFORMATION SHAFTUNG 1 et seqq. (Klaus J. Hopt & Hans-Christoph Voigt eds., 2005); ALEXANDER HELLGARDT, KAPITALMARKTDELIKTSRECHT 221 et seqq. (2008); POELZIG, *supra* note 153; JENS-UWE FRANCK, MARKTORDNUNG DURCH HAFTUNG (2016).

183. *See* for example Alexander Hellgardt, *Europarechtliche Vorgaben für die Kapitalmarktinformationshaftung de lege lata und nach Inkrafttreten der Marktmissbrauchsverordnung*, AG 154, 163 et seqq. (2012); Alexander Hellgardt, *in* WERTPAPIERHANDELSRECHT §§ 97, 98 WpHG mn. 58 (Heinz-Dieter Assmann, Uwe H. Schneider & Peter O. Mülbert eds., 7th ed. 2019); Christoph H. Seibt, *Europäische Finanzmarktregulierung zu Insiderrecht und Ad hoc-Publizität*, 177 ZHR 388, 424 et seq. (2013); Poelzig, *supra* note 134, at 808 et seqq.

184. Directive 2004/109, art. 7, 2004 O.J. (L 390) 38 (EC). Critically on the missing implementation Möllers, *supra* note 149, at 29 et seq.; Peter O. Mülbert & Steffen Steup, *Das zweispurige Regime der Regelpublizität nach Inkrafttreten des TUG, Nachbesserungsbedarf aus Sicht von EU- und nationalem Recht*, NZG 761, 766 (2007); Hendrik Brinckmann, *Periodische*

Directive,[185] the Prospectus Regulation,[186] the Rating Regulation[187] and the PRIIPs Regulation.[188] To a large extent, the only thing that is harmonised is the 'whether' of liability, but otherwise it is referred back to national law.[189] This is justified by the fact that requirements for causality, damage and fault differ greatly between the Member States.[190] Because of the different legal traditions, elaborate liability rules with detailed preconditions are not very realistic.[191] The contrary view would therefore dispense with any harmonisation and leave it up to the Member States themselves to impose private law liability rules.[192] This leads to competition between legal systems. Leaving liability law up to the Member States, however, prevents the desired level playing field.[193]

### 3. *Proposals for a Cautious Further Harmonisation of European Liability Law*

A healthy middle course is therefore required: At the European level, the first step would be to discuss which market participants could potentially be liable. For this purpose, the position of duties would have to be substantiated. Corresponding liability standards should be demanded in the case of false information from companies. For the other market participants, the main issue is failure to act. These are, for example, the auditors, but also

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*Publizität*, *in* EUROPÄISCHES KAPITALMARKTRECHT § 18 mn. 77 (Rüdiger Veil eds., 2nd ed. 2014); Alexander Hellgardt, *Kapitalmarktsdeliktsrecht*, *in* FESTSCHRIFT 25 JAHRE WPHG 701, 706 (Lars Klöhn, Sebastian Mock eds., 2019). Differing view MARKUS LENENBACH, KAPITALMARKTRECHT mn. 11.530 (2nd ed. 2010).

185. Directive 2006/46 amending Council Directives 78/660/EEC on the annual accounts of certain types of companies et al., art. 50c, 2006 O.J. (L 224) 1 (EC).

186. Regulation 2017/1129, art. 11, 2017 O.J. (L 168) 12 (EU).

187. *Cf.* Regulation 462/2013 amending Regulation on credit rating agencies, art. 35a, 2013 O.J. (L 146) 1 (EU).

188. *Cf.* Regulation 1286/2014, art. 11, 2014 O.J. (L 352) 1 (EU).

189. *See* for example Directive 2004/109, *supra* note 184, art. 7, Directive 2006/46, *supra* note 185, art. 50c, Regulation 2017/1129, *supra* note 98, art. 11 (1): "Member States shall ensure . . .". Explicitly also Regulation 1286/2014, supra note 188, art. 11 (2), (3) and Regulation 462/2013, *supra* note 187, art. 35a (4).

190. Regulation 462/2013, *supra* note 187, art. 35a (4) sentence 1: "Terms such as 'damage', 'intention', 'gross negligence', 'reasonably relied', 'due care', 'impact', 'reasonable' and 'proportionate' which are referred to in this Article but are not defined, shall be interpreted and applied in accordance with the applicable national law as determined by the relevant rules of private international law."

191. In this way already Möllers & Leisch, *supra* note 69, at §§ 37b, c mn. 82; Veil, *supra* note 160, at 576.

192. As a short-term perspective Malte Wundenberg, *Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht*, ZGR 124, 154 et seqq. (2015); Veil, *supra* note 160, at 576 et seq.

193. On the respective questions of private international law, *see* Matthias Lehmann, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH Internationales Finanzmarktrecht, Art. 519 et seqq., 547 et seqq. (Franz J. Säcker et al. eds., 7th ed. 2018); Frank A Schäfer, *Internationale Kapitalmarktinformationshaftung – responsio*, ZGR 359, 362 et seqq. (2020).

the supervisors, if they obviously ignored their obligations. It is counterproductive to demand limitations of liability here.[194] If the national legislature refrains from accepting state liability claims, the CJEU may have to take action to further develop the law.[195] Finally, other financial intermediaries should also be liable if their research is inadequate, or if they violate the aforementioned prohibitions on publication.

The second step would be to create the basis for liability. However, the requirements must clearly go beyond Article 7 of the Transparency Directive.[196] Perhaps the development in antitrust law can be used for this purpose. After the *Courage* and *Manfredi* cases, the question arose as to whether the legislature or the courts, or the national or the European level, were better suited to regulate the individual questions involved, such as causality and extent of damage.[197] It was decided that the European legislature would be the rule-maker. This can be applied to the open questions outlined above: The European legislature has democratic legitimacy and is much better able to call on the necessary expertise in a legislative process than a collegial court. It can systematically answer a plethora of questions at once, whereas the courts can only clarify individual questions selectively in a chain of decisions.[198] As a result, one could also concretise the substantive considerations for liability claims. There is experience with a more precise liability standard in capital markets law, namely Article 35a of the Rating Regulation. Here, for example, a statement is made on the burden of proof.[199] In addition, a catch-all clause could be introduced, based on Article 17 of the Competition Law Damages Directive 2014/104, whereby "Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively

194. In this way though on a European level the Commission Recommendation 2008/473, 2008 O.J. (L 162) 39. Different however the new liability extension in the planned HGB-draft, Sec. 323, *see* DRAFT BILL FISG, *supra* note 119; concurring AKBR, *supra* note 132, at II.2.

195. On government liability for failure to transpose a directive, *see* C-6/90 u.a., Andrea Francovich and Danila Bonifaci and others v. Italian Republic, 1991 ECR I-05357 (mn. 32 et seqq.); extensively MÖLLERS, *supra* note 3, at § 12 mn. 118 et seqq.

196. On this demand already Möllers & Leisch, *supra* note 69, at §§ 37b, c mn. 84; Möllers, *supra* note 149, at 29 et seq.

197. *See* FERDINAND WOLLENSCHLÄGER, WOLFGANG WURMNEST & THOMAS M.J. MOßLLERS, PRIVATE ENFORCEMENT OF EUROPEAN COMPETITION LAW AND STATE AID LAW (2020).

198. For the respective arguments *see* MÖLLERS, *supra* note 3, at § 13 mn. 83 et seqq.

199. On questions of burden of proof *see* for example Karl-Philipp Wojcik, *Zivilrechtliche Haftung von Ratingagenturen nach europäischem Recht*, NJW 2385, 2387 et seqq. (2013); Thomas M.J. Möllers & Charis Niedorf, *Regulation and Liability of Credit Rating Agencies – A More Efficient European Law?*, EUR. COMPANY & FIN. L. REV. [ECFR] 333, 346 (2014); Margarita Dontogeorgou, *Externes Rating und Anlegerschutz im Spiegel der neuen Verordnung (EU) Nr. 464/2013*, DStR 1397, 1402 et seqq. (2014); Rüdiger Veil & Lars Teigelack, *Ratingagenturen*, *in* EUROPÄISCHES KAPITALMARKTRECHT § 27 mn. 73 (Rüdiger Veil eds., 2nd ed. 2014); Christoph Kumpan & Ronny Grütze, *in* KAPITALMARKTRECHTS-KOMMENTAR § 29 WpHG appendix mn. 158 et seqq. (Eberhard Schwark & Daniel Zimmer eds., 5th ed. 2020).

difficult." In addition, "Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available."[200]

### D. Combining Public and Private Law Enforcement

If modern commercial law makes use of all three areas of law in its enforcement, there must be an improved interlocking of public law, private law and criminal law enforcement in the future. This includes not only a central national jurisdiction of an authority in criminal law or a uniform legal procedure to avoid contradictory judgments, but also the clarification of various individual issues, which competition law already exemplifies: Thus, the limitation period of the private law action is interrupted after the authority has taken action,[201] and information rights exist. Fortunately, the legal concepts are not only found in the Competition Law Damages Directive, but also in the recently adopted Directive 2020/1828 on representative actions.[202] It would now be a bold, but conceivable, step for the European legislature to apply these ideas to European capital markets law.

## V. Summary and Outlook

1. The Wirecard scandal is by no means an unforeseeable isolated incident. Because of the FT's warnings, the allegations of accounting fraud had been known for several years. The company's internal monitoring - consisting of auditing, compliance and the inactivity of the Supervisory Board as part of corporate governance - was inadequate, as was the auditing by third parties, including the auditing firm EY, and also the state monitoring by BaFin. If financial intermediaries such as fund managers, financial analysts, consultants or rating agencies were still recommending Wirecard shares to the investing public until shortly before the insolvency, important control mechanisms were also missing here. The Wirecard scandal illustrates the systemic failure of almost the entire financial industry.

Behavioural finance vividly describes the irrationality of human action on the capital markets, such as herd behaviour, over-optimism, euphoria,

200. Directive 2014/104, art. 17 (1), 2014 O.J. (L 349) 1 (EU); constructively Rüdiger Veil, *Private Enforcement in European Capital Markets Law: Perspectives for a Reform at the Example of the Obligation to Disclose Inside Information, in* Enforcing Consumer and Capital Markets Law. The Diesel Emissions Scandal 405, 419 et seqq., 422 (Beate Gsell & Thomas M.J. Möllers eds., 2020).

201. Directive 2014/104, *supra* note 200, art. 10 (2); Directive 2020/1828, art. 16, 2020 O.J. (L 409) 1 (EU).

202. Directive 2014/104, *supra* note 200, art. 5, 6; Directive 2020/1828, *supra* note 201, art. 18. On this Möllers & Pregler, *supra* note 154, at 146, 151 et seqq.; Gsell & Möllers, *supra* note 156, at 485 et seqq.

selective perception and the financial intermediaries as anchors to guide investors.

2. The likelihood of being able to make a claim for these errors is inadequate under current law. Liability claims against Wirecard AG and its management board are likely to be ineffective due to the company's insolvency, liability claims against the auditor are limited to $4 million, and liability against BaFin is completely ruled out according to the wording of the law. Liability claims against financial intermediaries are also rather unlikely because the conditions for liability are still too vague.

3. The reaction to the Wirecard scandal so far, with the Financial Market Integrity Strengthening Act (FISG), is primarily aimed at stronger enforcement. Because information about companies is valued on the stock exchange, the focus must be increasingly on the validity and correctness of company information. The Wirecard scandal is characterised by the fact that it was unclear for years whether Wirecard's balance sheets were inaccurate. It therefore seems more important to ask who should have reacted to what information and how. How to deal with rumours as uncertain information needs to be further specified in order to provide clear instructions to market participants. The company's research obligations generally include taking note of rumours from short-sellers and whistleblowers if they have a certain degree of plausibility. The publicly listed company must then address such unproven information, checking its accuracy if necessary also by means of a special audit, and then set out its position on the rumour. The supervisory authority must monitor compliance with these obligations.

Conversely, unsubstantiated news from the company published as press releases, Twitter messages or via other channels is not sufficient. Financial intermediaries are subject to the know-your-product obligation and may not make recommendations based on unsubstantiated information if they do not comply with their duty of research.

4. If Germany and the EU do not want to fall further behind in global competition, the first step for German and European legislatures must be to define the obligations of the market players. Then it is necessary to address how the obligations can be better enforced. National and European authorities need stronger powers of intervention. They must be able to review corporate governance in a structured manner or, for example, be able to commission a special audit. Conversely, conflicts of interest should be avoided. In addition, the supervisory authorities should also be liable in the case of gross negligence.

Private law liability at the European level could play an important complementary role. It would also create a level playing field. Article 35a of the Rating Regulation (EU) No. 462/2013 could be used as a guideline. A sensible interlinking of public law and private law could regulate the suspension of the statute of limitations, binding effect, and rights to information. Guidance on this can be found in the Competition Law Damages Directive and in the Lawsuits against Associations Directive 2020/

1828. The Wirecard case shows very clearly that the further development of the law governing publicly listed companies remains an ongoing task.