

Charl Hugo/Thomas M.J. Möllers (eds.)

## Transnational Impacts on Law: Perspectives from South Africa and Germany



Nomos



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# Providing investment advice in light of MiFID I and II

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## I. The regulation of financial intermediaries in the EU

### 1. Evolution of EU and German law

Securities law and the law governing financial intermediaries was harmonised on the European level for the first time by the Securities Investment Services Directive in 1993.<sup>1</sup> It was replaced in 2004 by the Markets in Financial Instruments Directive (MiFID I)<sup>2</sup>. Following the financial crisis in 2008, legislators across the world tightened up rules for financial intermediaries, including the EU and South Africa.<sup>3</sup> In 2014, the second Markets in Financial Instruments Directive (MiFID II) was passed,<sup>4</sup> supplemented by the Markets in Financial Instruments Regulation (MiFIR).<sup>5</sup> The provisions of both are presumably applicable in Member States as of 3 January 2018.<sup>6</sup> MiFID II can be seen as a “Single Rulebook” for all EU member states and is massive in scale.<sup>7</sup> Furthermore, it includes extensive delegations to the Commission and the European Securities and Markets Authority (ESMA). The delegated and implementing acts of ESMA and the Commission are

- 1 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (Securities Investment Services Directive).
- 2 Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments (MiFID I).
- 3 Financial Regulatory Reform Steering Committee, *Implementing a twin peaks model of financial regulation in South Africa* available at <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf> (15-09-2017).
- 4 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (MiFID II); Martin Weber, *Neue Juristische Wochenschrift (NJW)* 2014, 2327 (2328).
- 5 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (MiFIR).
- 6 Art. 1 of the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU on markets in financial instruments as regards certain dates, 10.2.2016, COM(2016) 56 final.
- 7 Niamh Moloney, *EU Securities and Financial Markets Regulation* (3<sup>rd</sup> Edition, 2014), 339.

part of the Lamfalussy-II Process, which is deemed to align the application and interpretation of the legal framework (regulation of directives) in all Member States. The European provisions of MiFID I are implemented in the German Securities and Trading Act (*Wertpapierhandelsgesetzbuch*, WpHG), and changes through MiFID II will be implemented by the end of 2017.<sup>8</sup> Moreover, administrative regulations further substantiate the provisions of the WpHG. This leads to an overwhelming complexity on the European and German level.<sup>9</sup>

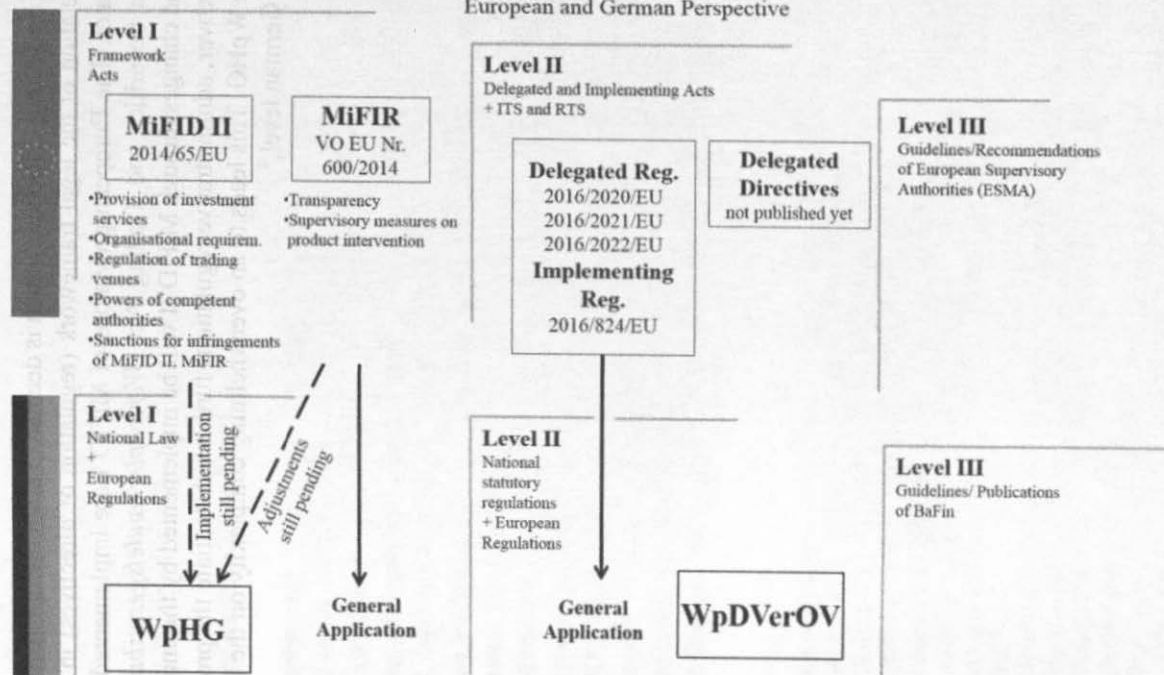
8 MiFID II will be implemented in a "Second Financial Market Amendment Act" (*Second FiMaNoG*). See Draft of the German Federal Government for a Second Financial Market Amendment Act, available at <http://dipbt.bundestag.de/doc/btd/18/109/1810936.pdf> (15-09-2017).

9 Thomas M.J. Möllers, 'Harmonisation of Capital Markets Law – MiFID II and PRIIP' 31 (2015) *Banking and Finance Law Review (B.F.L.R.)* 143–176.



# Regulation of Markets in Financial Instruments under MiFID II and MiFIR as of 2018

European and German Perspective



The Law Governing Investment Advice<sup>10</sup>

10 Authors' own diagram.

## 2. The law governing investment advice provided by investment firms

### a) Scope

The European and German approach to the regulation of investment advice is different to the South African one: in Germany, it depends on the institution giving the advice, and not on the product alone. Moreover, different institutions may only give advice on specific products. In terms of scope, Section 31 et seq. of the WpHG only cover “investment firms”<sup>11</sup> when offering investment services including, inter alia, the provision of advice with respect to investments in “financial instruments”<sup>12</sup>.

The WpHG or MiFID does not cover services in relation to insurance products.<sup>13</sup> Even though an inclusion of insurance firms providing advice or selling insurance products has been discussed in the preliminary negotiations about MiFID II,<sup>14</sup> it was dismissed in the final version.<sup>15</sup> In Germany, investment advice with respect to insurance products is regulated by the German Insurance Contract Act (*Versicherungsvertragsgesetz*, VVG). It uses very similar instruments as the WpHG, including information-based obligations.<sup>16</sup>

11 As defined in sec. 2(4) WpHG.

12 As defined in sec. 2(2b) WpHG.

13 See sec. 31 WpHG; Niamh Moloney, *EU Securities and Financial Markets Regulation* (3<sup>rd</sup> Edition, 2014), 341.

14 See Report on the proposal for a directive of the European Parliament and of the Council on markets in financial instruments, 5.10.2012, A7-0306/2012, Art. 3a, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NO NSGML+REPORT+A7-2012-0306+0+DOC+PDF+V0//EN> (15-09-2017).

15 See Recital 87 of MiFID II: “their different market structures and product characteristics make it more appropriate that detailed requirements are set out in the ongoing review of Directive 2002/92/EC rather than setting them in this Directive”.

16 For an overview of the different obligations, see Christian Armbrüster, *Privatversicherungsrecht* (2013), paras. 614 et seq., 717 et seq.

## b) Obligations according to Section 31 WpHG

### (i) General principle

When providing financial services, an investment firm must comply with the fiduciary-like obligation to act honestly, fairly and professionally in accordance with the best interests of its clients, and avoid conflicts of interest ("fair treatment" principle).<sup>17</sup>

### (ii) Special obligations

The following duties prescribed in Section 31(2)–(11) are addressed to mitigate principal-agent risks associated with the distribution of investment products. Where private ordering by disclosure-based controls fails to reduce conflicts of interests, regulators tend to introduce more interventionist approaches in the form of suitability and appropriateness tests.<sup>18</sup>

First, every product offered to retail clients or demanded by retail clients must be accompanied by a standardised information form, which allows the client to fully understand the associated risks (Section 31(3) WpHG).<sup>19</sup>

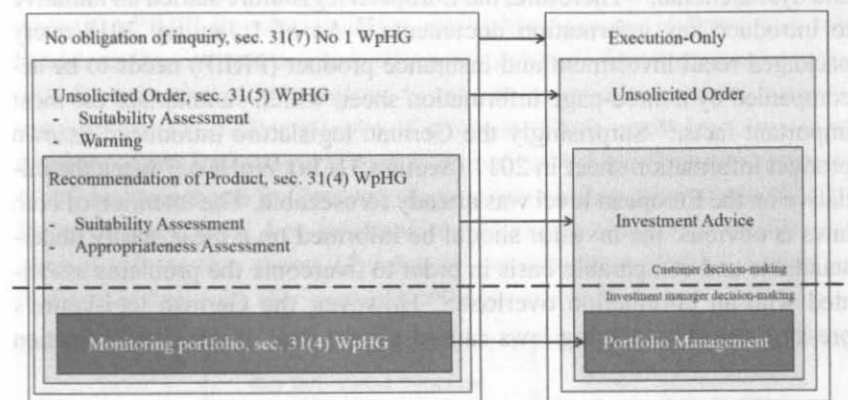
Furthermore, Section 31 WpHG involves different levels of obligations depending on the provided service to the retail client. In case of execution-only transactions, the investment firm does not have to gather or provide more information than the above-mentioned (Section 31(7) WpHG). In case of unsolicited orders, the investment firm needs to inform itself about the client's knowledge and experience with respect to the recommended financial products or investment field, to assess whether the product is suitable for the client and to warn the client if it is not (Section 31(5) WpHG). If the investment firm provides investment advice or portfolio management (Section 31(4) WpHG), it has to inquire from the client about his knowledge and

17 Sec. 31(1) WpHG, Art. 24(1) MiFID I; see Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 31 paras. 82 et seqq.

18 Niamh Moloney, 'Regulating the Retail Markets' in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 736 (758).

19 Similar to the South African regulation in sec. 7(1)(a) of the GCC (General Code of Conduct for Authorised FSPs and Representatives); see Darleen Millard, p. 198 in this publication.

experience, his financial situation and his investment objectives including his risk tolerance (“know your customer”). This should enable the investment firm to recommend only products (“know your product”) which are appropriate for the client’s objectives.<sup>20</sup> If the product is not appropriate for the client, the investment firm may not recommend the product.



Different obligations depending on the provided service<sup>21</sup>

Most of these obligations are information-based.<sup>22</sup> The legislature abandons the principle that it rests solely on each contractor’s responsibility to collect the necessary information.<sup>23</sup> It reduces informational asymmetries and is supposed to enable an investment decision on an informed basis.<sup>24</sup> So far, the European and national legislature has considered the investor to be able

20 Both principles were also developed by the Federal Court of Justice (BGH), BGH 6.7.1993 – XI ZR 12/93 – BGHZ 123, 126, 128 et seqq. – Bond; see Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 31 para. 338.

21 Authors’ own diagram.

22 See Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (448 et seqq.).

23 Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (448).

24 Ingo Koller in Heinz-Dieter Assmann and Uwe H. Schneider (eds), *WpHG* (6<sup>th</sup> Edition, 2012), § 3, paras. 1–12; Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 31 para. 4.

to understand and process the provided information.<sup>25</sup> But behavioural scientists have shown significant evidence that there are limits to the ability of human beings to process and understand a certain quantity and complexity of information (bounded rationality theory). When surpassing this limit (information overload), human beings' behaviour tends to become confused and dysfunctional.<sup>26</sup> Therefore, the European legislature started an initiative to introduce key information documents.<sup>27</sup> As of 1 January 2018 every packaged retail investment and insurance product (PRIIP) needs to be accompanied by a three-page information sheet, which summarises the most important facts.<sup>28</sup> Surprisingly the German legislature introduced its own product information sheet in 2011 (Section 31(3a) WpHG),<sup>29</sup> when the initiative on the European level was already foreseeable. The intention of both laws is obvious: the investor should be informed on a clear, easily understandable and comparable basis in order to overcome the problems associated with an information overload.<sup>30</sup> However, the German legislature's pressing ahead by passing laws caused a great deal of criticism.<sup>31</sup> Section

25 Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (456 et seq.).

26 Jacob Jacoby, Donald E. Speller and Carol Kohn Berning, 'Brand Choice Behavior as a Function of Information Load: Replication and Extension' 1 (1974) *Journal of Consumer Research (JCR)*, 33 et seq.; Thomas M.J. Möllers and Eva Kernchen, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2011, 1 (10 et seq. with further references).

27 Thomas M.J. Möllers, 'Harmonisation of Capital Markets Law – MiFID II and PRIIP' 31 (2015) *Banking and Finance Law Review (B.F.L.R.)* 143 (150).

28 Such as: How does risk arise? What costs will be incurred? How long should I hold the investment? How can I make a complaint? See Art. 8(3)(d) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (PRIIP Regulation).

29 Introduced by Art. 1(6) of the Investor Protection and Capital Markets Improvement Act (AnsFuG) from 5 April 2011. Substantiated by Section 5a of the Regulation Specifying Rules of Conduct and Organisational Requirements for Investment Services Enterprises (WpDVerOV) from 20 July 2007; see Thomas M.J. Möllers and Thomas G. Wenninger, *Neue Juristische Wochenschrift (NJW)* 2011, 1697 (1698).

30 Recital 13 of the PRIIP Regulation.

31 Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (459 et seq.); Thomas M.J. Möllers, 'Harmonisation of Capital Markets Law – MiFID II and PRIIP' 31 (2015) *Banking and Finance Law Review (B.F.L.R.)* 143 (150 et seq.).

31(3a) WpHG differs in several aspects from the European PRIIP-Regulation.<sup>32</sup> Therefore, the German investment law and the whole industry must adapt to the new European rules again. As the scope of the German product information sheet is wider than the European scope, a combination of both laws will be relevant from 1 January 2018. The new Section 31(3a) WpHG, as introduced by the "First Financial Market Amendment Act"<sup>33</sup>, states that where the PRIIP Regulation is not applicable, investment firms must still hand over the German product information sheet.<sup>34</sup> This "solution" contradicts the objective of information documents to provide a comparable summary among the different types of products. From next year, investment firms rendering investment advice must deal with three different categories of information sheets in Germany: key investor information sheets (KIIDs) for investment funds, key information documents (KIDs) for PRIIPs, and product information sheets (*Produktinformationsblatt*, PIBs) for all other financial instruments (for example, a simple share).<sup>35</sup>

	Key Information Document, PRIIP Regulation	Product Information Sheet, sec. 31(3a) WpHG
Material Scope of Application	<ul style="list-style-type: none"> <li>only PRIIPs</li> </ul>	<ul style="list-style-type: none"> <li>until 31.12.2017: all financial instruments (e.g. shares)</li> <li>as of 1.1.2018: all financial instruments except PRIIPs</li> <li>only for investment advice</li> </ul>
Personal Scope of Application	<ul style="list-style-type: none"> <li>PRIIP product manufacturers have to compile key information document</li> <li>Provided to client by advisor or seller</li> </ul>	<ul style="list-style-type: none"> <li>Provided to client by investment firm</li> </ul>
Formal Requirements	<ul style="list-style-type: none"> <li>standardised</li> </ul>	<ul style="list-style-type: none"> <li>Specified in Sec. 5a WpDVerOV</li> </ul>

#### Key Information Document (PRIIP) v. Product Information Sheet (WpHG)<sup>36</sup>

32 See Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (459 et seq.).

33 First Financial Market Amendment Act (*First FiMaNoG*) from 30 June 2016.

34 See Art. 2 No 5 of the First FiMaNoG (n 33).

35 For an overview over the different categories, see Jochen Seitz, Adrian Juhnke and Sven Seibold, *Zeitschrift für Bank- und Kapitalmarktrecht (BKR)* 2013, 1 et seqq.

36 Authors' own Diagram.



### c) Conflict of interest: fee-based vs. commission-based advice

Giving investment advice is time- and cost-intensive, and investment advisors are subject to considerable commission pressure. It is not surprising that clients are often given recommendations for the product that generates the highest commission, even though it is not necessarily the one most suitable for their needs.<sup>37</sup>

Inducements<sup>38</sup> are therefore only permissible if they allow or are necessary for the provision of investment services (Section 31d(5) WpHG), if the inducement is from a third party commissioned by the client, or if the investment services enterprise grants such an inducement to such a third party (Section 31d(1) sentence 2 WpHG). Inducements are also permissible if they enhance the quality of the service to the client ("quality enhancement test"), if they do not impair the proper provision of the service in the interest of the client, and if the existence of the inducement is disclosed (Section 31d(1) sentence 1 Nos. 1–2 WpHG).<sup>39</sup>

In addition to regulatory rules, the Federal Court of Justice (BGH) has interpreted a civil law advisory contract to include a duty to disclose any kickbacks. This interpretation has been heavily criticised, as it is clear to business partners that a commercial service will only be provided for a fee.<sup>40</sup>

### (i) Introduction of fee-based advice in Germany and the EU

MiFID II was the first law on the European level to distinguish between independent and non-independent investment advice. Fee-based advice can be found in the United Kingdom,<sup>41</sup> the Netherlands and the USA.<sup>42</sup> In Germany, traditional advice is usually given free of charge. MiFID II requires

37 Katharina Uffmann, *Juristenzeitung (JZ)* 2015, 282 et seqq.

38 Includes commissions, other fees or other cash, and any non-cash benefits: sec. 31d(2) WpHG.

39 See Ingo Koller in Heinz-Dieter Assmann and Uwe H. Schneider (eds), *WpHG* (6<sup>th</sup> Edition, 2012), § 31d para. 27 et seqq.

40 Hans Christoph Grigoleit, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 264 (291); previously, Matthias Habersack, *Wertpapier-Mitteilungen (WM)* 2010, 1245 (1251); Peter O. Mülberr, *Wertpapier-Mitteilungen (WM)* 2007, 1149 (1160).

41 Rules 6.2A.3, 6.2A.4A COBS, available at <https://www.handbook.fca.org.uk/handbook/COBS/6/2A.html> (15-09-2017).

42 Daniela Manzei, *Wertpapier-Mitteilungen (WM)* 2009, 393 (396).

advisors to disclose whether or not the advice is given on an independent basis.<sup>43</sup> Fee-based advice prohibits payment of fees by third parties<sup>44</sup> and requires a comprehensive market analysis. The fee-based advice may not be limited to financial instruments issued or provided by the investment firm itself.<sup>45</sup> Although MiFID II does not have to be implemented until 3 January 2018, the German legislature has already passed the Fee-Based Investment Advice Act (*Honoraranlageberatungsgesetz*)<sup>46</sup> in advance of the MiFID provisions. The new rules already take account of the MiFID II provisions, including the general prohibition of third-party fees (Section 31(4c) No 2 sentence 3 WpHG), and introduce a duty to disclose financial instruments issued or provided by the investment firm itself or by entities having direct links with the investment firm (Section 31(4d) sentence 1 WpHG).<sup>47</sup>

43 Art. 24(4) sentence 2(a)(ii) MiFID II (n 4).

44 Art. 24(7)(b) MiFID II (n 4).

45 Art. 24(7)(a) MiFID II (n 4).

46 Fee-Based Investment Advice Act (*Honoraranlageberatungsgesetz*) from 15 July 2013; re Sections 31(4b), (4c), Sections 33(1) paras. 3a, 36c, 36d WpHG; see Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2nd Edition, 2014), §§ 36c, 36d paras. 1 et seqq.

47 For another view on civil law duty, BGH 19.12.2006 – XI ZR 56/05 – BGHZ 170, 226, 233 para. 21 with comment, Thomas M.J. Möllers and Thomas G. Wenninger, *Lindenmaier-Möhring, Kommentierte BGH-Rechtsprechungen (LMK)* 2007, 220857.



Pre-contractual Information Requirement, whether Fee-based or Commission-based Advice, sec. 31(4b) Sentence 1	
Fee-based Advice	Commission-based Advice
Duty of objectivity relating to recommended products, sec. 31(4c) Sentence 1 No 1	Disclosure of inducements received by third parties, sec. 31(4b) Sentence 2
Prohibition of third-party fees, sec. 31(4c) Sentence 1 No 2	
Disclosure of financial instruments issued by the investment firm itself or linked investment firms, sec. 31(4d) Sentence 1	
Prohibition of fixed-price transactions, sec. 31(4d) Sentence 2	

*Fee-based Advice: Disclosure and Organisational Requirements*<sup>48</sup>

## (ii) Commission's delegated directive

During the legislative process, the EU Parliament had proposed to make it possible for Member States to entirely prohibit kickbacks for commission-based advice.<sup>49</sup> However, this rule was thrown out by the Economic and Monetary Affairs Committee of the European Parliament. Political discussions now turn on the issue of whether only fee-based advice should be permitted in the future. ESMA's Consultation Paper dated 22 May 2014 included a formulation of a prohibition on commissions.<sup>50</sup> After protests from

48 Authors' own Diagram.

49 Art. 24(5) of Amendments adopted by the European Parliament on 26 October 2012 on the proposal for a directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (recast), P7\_TA-PROV(2012), 0406; see Thomas M.J. Möllers and Mauritz Poppele, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2013, 437 (465, 471 et seq.).

50 Commissions should not be permissible when they are only used to pay for or provide goods or services that are essential for the recipient firm in its ordinary course of business; see Consultation Paper ESMA/2014/549 dated 22.5.2014,

businesses, this prohibition was significantly watered down in the Final Report dated 19 December 2014.<sup>51</sup> The final draft for a delegated directive<sup>52</sup> was passed on 7 April 2016 by the Commission: Article 11 introduces several conditions which need to be met if the investment firm wishes to enhance the quality of the relevant service by receiving inducements ("quality enhancement test"<sup>53</sup>). Commission-based advice is therefore still permitted, but the standard of quality must be significantly higher than before.

d) The search for a suitable third way: robo advice

German influence to retain the present forms of commission-based advice was impossible to ignore. As long as commission-based advice remains free of charge, there is no protection against the investment firm recommending its own financial products instead of objectively searching the market for the most suitable products for the client. Therefore, fee-based advice is an important complement to commission-based advice. The positive aspect about fee-based advice is that the classic conflict of interest is no longer present. However, at EUR 150–350 per hour, fee-based advice does not come cheap. It normally does not make sense unless the investor has an investment sum of at least EUR 50,000. Fee-based advice is effectively excluded for large sections of the population. Although fee-based advice has

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available at [https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-549\\_-\\_consultation\\_paper\\_mifid\\_ii\\_-\\_mifir.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-549_-_consultation_paper_mifid_ii_-_mifir.pdf) (15-09-2017).

51 Commissions should be allowed if a client receives one of the following services: investment advice and access to a wide range of products, including third-party products, investment advice and regular appropriateness assessments, or other regular services, or access to a wide range of products, including third-party products, and regular reports about value increases and costs or other information tools; see Final Report ESMA/2014/1569, 19.12.2014, p. 127 ff., available at [https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1569\\_final\\_report\\_-\\_esmas\\_technical\\_advice\\_to\\_the\\_commission\\_on\\_mifid\\_ii\\_and\\_mifir.pdf](https://www.esma.europa.eu/sites/default/files/library/2015/11/2014-1569_final_report_-_esmas_technical_advice_to_the_commission_on_mifid_ii_and_mifir.pdf) (15-09-2017).

52 Commission Delegated Directive (EU) of 7.4.2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits, C(2016) 2031 final, available at <http://ec.europa.eu/finance/docs/level-2-measures/mifid-delegated-regulation-2016-2031.pdf> (15-09-2017).

53 Art. 24(9) MiFID II.

already been available in Germany for many years, it is not used much by investors.<sup>54</sup> Moreover, it would be overly paternalistic to allow for only one form of advice – each has its own advantages and disadvantages.

A third way is already being developed in the US – for example, robo advice, or computer algorithms that replace traditional investment advice.<sup>55</sup> Also in Germany, investment firms are starting to offer automated “assistants” via the Internet to support individuals in their investment decision.<sup>56</sup> Some banks offer automated advice as a cheaper alternative to a fee-based face-to-face advice.<sup>57</sup> Others do not regard this “assistance” or “guidance” as advice, but only as a provision of information to support the individual client in its own investment decision.<sup>58</sup> The referral to the “client’s own investment decision” does not move “assistance” outside the scope of investment advice and its associated public law obligations in Section 31 et seqq. WpHG. In the case of investment advice, the final investment decision is also made by the client and not by the investment firm. Only in the case of portfolio management is the decision made by the investment firm and not by the individual client.<sup>59</sup> According to the German definition in Section 2(3)1 No 9 WpHG, investment advice “means the provision of personal

54 For arguments in favour and against, see Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), §§ 36c, 36d, paras. 9 et seqq.; Hans Christoph Grigoleit, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 264 (297); Mauritz Poppele, *Kapitalmarktinvestmentsprodukte* (2015), 452.

55 On “robo advice” (offered in the US by Betterment, Wealthfront, Jemstep, and Personal Capital) see Gerald Braunberger, *Der Roboter als Anlageberater*, FAZ, 12.6.2014, available at <http://www.faz.net/aktuell/finanzen/meine-finanzen/sparen-und-geld-anlegen/robo-advice-der-roboter-als-anlageberater-12969006.html> (15-09-2017); Kim Bode, *Empfohlen vom Computer*, Die Zeit, 8.1.2015, 26 (13-02-2017).

56 See, for example, in Germany by comdirect, available at <https://jetzt-besser-geld-anlegen.comdirect.de/start> (15-09-2017).

57 Emma Dunkley, *RBS cuts face-to-face service and brings in ‘robo-advisors’*, Financial Times, 13.3.2016, available at <http://www.ft.com/cms/s/0/10df9f22-e90f-11e5-bb79-2303682345c8.html#axzz48KdWSNAp> (13-02-2017).

58 Emma Dunkley, *RBS cuts face-to-face service and brings in ‘robo-advisors’*, Financial Times, 13.3.2016; for an example, see the “disclaimer” provided by comdirect, available at <https://jetzt-besser-geld-anlegen.comdirect.de/start>. (15-09-2017).

59 For the distinction, see the definitions in sec. 2(3) No 9 WpHG (= investment advice) and sec. 2(3) No 7 WpHG (portfolio management); see Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 31, paras. 330 et seqq.

recommendations to a client [...] in respect of one or more transactions relating to financial instruments [...]” The definition is activity-based.<sup>60</sup> Therefore, a reference by the investment firm that the provided service is not deemed to be investment advice does not influence the legal qualification of the activity under the WpHG. As long as the service provided via the Internet leads to a recommendation relating to specific financial instruments which take into account the client’s personal circumstances, or at least are presented as suitable for the person, the activity falls under the definition of investment advice.<sup>61</sup> Thus it depends on the specific questions asked on the “robo” homepage for the qualification as financial advice. Finally, as the investment advice needs to be made to “a client”, there must be some contractual relationship.<sup>62</sup> But the protection provided by the WpHG already starts earlier: it also covers “potential investors”.<sup>63</sup> Investment firms can in fact stray into an implicit personal recommendation even though there is no registration process and no contractual relationship.

It would be helpful to include such alternative forms of advice in the laws by way of example. Doing so would, on the one hand, encourage the development of alternative forms of advice; on the other hand, a legal qualification of “robo advice” by the legislator should help to navigate the boundary between providing guidance based on the customer’s situation and to avoid inadvertently straying into an implicit personal recommendation without fulfilling all legal requirements. Banks remain reluctant to use such form of information provision because of these legal uncertainties.<sup>64</sup> A clarification may also prevent market participants from trying to circumvent obligations when providing “automated assistance” which looks like advice to the client but is not regarded as such by the investment firm.

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60 See Petra Buck-Heeb, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2013, 1401 (1409).

61 Sec. 2(3) sentence 1 No 9 WpHG; see also Art. 52 of the Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EG of the European Parliament and of the Council (MiFID I) as regards organizational requirements and operating conditions for investment firms and defined terms for the purpose of that Directive.

62 Petra Buck-Heeb, *Zeitschrift für Wirtschaftsrecht (ZIP)* 2013, 1401 (1409).

63 See Art. 52 of the Implementing Directive 2006/73/EC (n 61); Harald Baum in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 2, para. 189; Heinz-Dieter Assmann in Heinz-Dieter Assmann and Uwe H. Schneider (eds), *WpHG* (6<sup>th</sup> Edition, 2012), § 2, para. 114.

64 Financial Conduct Authority (FCA), *Financial Advice Market Review, Final Report* (March 2016), p. 28 et seq., available at <https://www.fca.org.uk/static/fca/documents/famr-final-report.pdf> (15-09-2017).

To foster this third way for investment advice or guidance, a joint committee on the European level published a discussion paper on automation in financial advice last year.<sup>65</sup> The Financial Conduct Authority and the Treasury in Great Britain already started a consultation<sup>66</sup> on possible benefits of robo advice, especially to those with small sums to invest. The results were published in a final report as part of the “Financial Advice Market Review”. It recommended a clarification of the legal framework for robo advice by suggesting two different categories: one which is only “guidance” to the client without a personal recommendation,<sup>67</sup> and the other called “streamlined advice” for a limited range on simple customer needs.<sup>68</sup> All other forms of advice need to be personal and may not only use an automated process.<sup>69</sup> This should help market participants to avoid slipping unintentionally into advice and its associated liability risks.

It seems worthwhile to keep an eye on this new promising development, as “guidance” could help customers to choose a third way for investment decisions: an independent but, most importantly, nevertheless informed investment decision. This development fits also into today’s changes: increasing use of technology, greater awareness of the cost of advice and a huge distrust in financial advisors.<sup>70</sup>

## II. Law enforcement: principles vs. rules

### 1. Recent development: a shift from principles to rules

In the aftermath of the financial crisis, the European Union and legislators all over the world passed a “tsunami” of new provisions to eliminate conflicts of interest and unsound market behaviour which were key factors of the financial crisis. The subordinate goal was to “strengthen [...] regulatory

65 Joint Committee of the European Supervisory Authorities, *Joint Committee Discussion Paper on automation in financial advice* (4.12.2015), available at <https://www.eba.europa.eu/documents/10180/1299866/JC+2015+080+Discussion+Paper+on+automation+in+financial+advice.pdf> (15-09-2017).

66 Financial Advice Market Review (n 64).

67 Financial Advice Market Review (n 64), 33 (Recommendation 3).

68 Financial Advice Market Review (n 64), 35 (Recommendation 4).

69 Financial Advice Market Review (n 64), 29.

70 Financial Advice Market Review (n 64), 3.

regimes, prudential oversight, and risk management, and ensure that all financial markets, products and participants are regulated or subject to oversight<sup>71</sup>. It seems questionable whether a flood of detailed rules is the appropriate instrument to close all existing gaps and at the same time to constitute a legal framework anticipating also potential future developments in the financial industry. This development may also be observed in the law regulating investment advice. The German regulation in Section 31 WpHG originally consisted of two principles-based subsections in 1994.<sup>72</sup> More than 20 years later, it has increased to 16 subsections as of 3 July 2016;<sup>73</sup> and the implementation of the MiFID II is still pending!<sup>74</sup> Closing every kind of legal loophole and regulating every imaginable situation has already failed in history: an illustrative example was the “Preußisches Landrecht” of 1794 with its 19,000 sections. A higher level of abstraction combined with the court’s ability to interpret and develop the law is a more effective way to provide legal certainty and flexibility.

While rules are quite inflexible in their application, principles might serve this flexibility. Great Britain’s financial system has traditionally been principles-based regulated (PBR) for a long time.<sup>75</sup> The Financial Conduct Authority’s (FCA) Handbook of Rules and Guidelines is a plain-vanilla piece of PBR setting out the most important standards for firms in the financial industry. During its “Treating Customers Fairly” (TCF) initiative based on Principle 6 of the Handbook, the Financial Services Authority (FSA, predecessor of the FCA) published six approach-based requirements to a “product life cycle”. In 2006, the FSA declared the initiative a “core

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71 G20, Declaration of the Summit on Financial Markets and the World Economy, Washington 2008, 3, available at <http://www.un.org/ga/president/63/commision/declarationG20.pdf> (15-09-2017).

72 The third subsection prescribed the scope for foreign investment firms. See the old version of sec. 31 WpHG of the Securities Trading Act (*Wertpapierhandelsgesetz*) introduced by Art. 1 of the Second Act for the Promotion of Financial Markets (*Zweites Finanzmarktförderungsgesetz*) from 26 July 1994.

73 As implemented by the *First FiMaNoG* (n 33).

74 MiFID II will be implemented by the *Second FiMaNoG* by the end of 2017 (n 8).

75 Julia Black, Martyn Hopper and Christa Band, ‘Making a success of Principles-based regulation’ 1 (2007) *Law and Financial Markets Review (LFMR)*, 192; Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 217 (228); Financial Services Authority (FSA), *Principles-based regulation, Focusing on the outcomes that matter* (April 2007), available at <http://www.fsa.gov.uk/pubs/other/principles.pdf> (15-09-2017).



part of our move to a more principles-based approach to regulation”<sup>76</sup>; later the development was interpreted as a shift from “principles-based” to “outcome-focused” regulation.<sup>77</sup> But times changed the trust in the success of the PBR. The experiences of regulators during the financial crisis led to the conclusion that a “principles-based approach does not work with individuals who have no principles”<sup>78</sup>. The FCA started to work on more prescriptive rules on how to achieve the intended outcome of the regulation. Pressure to abandon a predominantly purposive and principles-based system came also from the EU by introducing a “Single Rulebook” for capital requirements with its detailed rules.<sup>79</sup> One might describe the new system as a “principles-based regulation in rule design and operation”<sup>80</sup>. The South African regulation has gone through the same stages as Great Britain.<sup>81</sup>

## 2. Regulation

The Concept of PBR has several advantages but is still one of the most complex and controversial aspects of regulation.<sup>82</sup> Instead of using detailed,

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- 76 Financial Services Authority (FSA), *Treating customers fairly – towards fair outcomes for consumers* (July 2006), 5, available at <http://www.fca.org.uk/static/fca/documents/fsa-tcf-towards.pdf> (15-09-2017).
  - 77 Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 217 (232).
  - 78 Hector Sants, *Delivering Intensive Regulation and Credible Deterrence*, Speech delivered to the Reuters Newsmakers Event on 12.3.2009, available at [http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312\\_hs.shtml](http://www.fsa.gov.uk/pages/Library/Communication/Speeches/2009/0312_hs.shtml) (15-09-2017).
  - 79 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms; Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms.
  - 80 See Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 217 (238).
  - 81 For a detailed description see Darleen Millard, p. 186 above.
  - 82 Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilís Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 217 (228).

prescriptive rules, principles are drafted with a high level of generality, being purposive and expressing the reason behind the regulation.<sup>83</sup> It enables the regulator to react flexibly to new developments or market circumstances in the financial sector, whereas detailed rules might not reflect or suit these new conditions. Moreover, it prohibits “creative compliance”<sup>84</sup>, where market participants fulfil the detailed provision but the underlying objective might still be undermined. But principles also provide flexibility to market participants: by stating only the objective of the regulation, it is on the firm which processes and actions they want to implement to achieve the given outcome (“outcomes-based regulation”). It is based on the assumption that market participants have the expertise and best insight to find the most efficient steps to comply with the regulation.<sup>85</sup>

The most important concern is the principles’ lack of transparency and the uncertainty they produce for market participants. Therefore, regulated entities and public authorities are in regular exchange about the application of the principles. This “informal communication” may lead to a non-transparent administration. Others raise the concern of “agency capture”, where market participants attempt to influence illegitimately the regulatory agency’s understanding of the principles.<sup>86</sup> A lack of transparency may even raise constitutional concerns: it might violate the principle of normative clarity (*Normklarheit*) which is applicable in all EU Member States via their constitutional traditions.<sup>87</sup>

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83 Julia Black, Martyn Hopper and Christa Band, ‘Making a success of Principles-based regulation’ 1 (2007) *Law and Financial Markets Review (LFMR)*, 192 et seq.; Fabian Walla, ‘Rechtssetzungsverfahren und Regulierungsstrategien’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (54 et seq.).

84 See the wording in Julia Black, Martyn Hopper and Christa Band, ‘Making a success of Principles-based regulation’ 1 (2007) *Law and Financial Markets Review (LFMR)*, 192, 204 n 7.

85 Julia Black, Martyn Hopper and Christa Band, ‘Making a success of Principles-based regulation’ 1 (2007) *Law and Financial Markets Review (LFMR)*, 192 et seq.; Fabian Walla, ‘Rechtssetzungsverfahren und Regulierungsstrategien’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (54 et seq.).

86 Fabian Walla, ‘Rechtssetzungsverfahren und Regulierungsstrategien’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (56 et seq.).

87 Originally developed by the European Court of Justice, Case 4/73, 14.5.1974 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities*, ECLI:EU:C:1974:51, para. 13; today enacted in Art. 6 of the Treaty on the European Union (TEU); see Meinhard Hilf and Frank Schorkopf in Eberhard



Moreover, regulators tend to issue guidelines which represent their understanding of the principle at issue. But guidelines themselves produce further problems: they lead to a fragmented regulation depending on "special cases".<sup>88</sup> They may also raise constitutional concerns: it is the legislator's power to enact and substantiate the essential parts of laws and not the administration's power to do so.<sup>89</sup>

### 3. Public and private enforcement

The effectiveness of principles is dependent on the ability to enforce them. Where principles provide flexibility to supervisors by enabling them to react to new developments, flexibility may also weaken enforcement: regulators might develop a very conservative interpretation and practice of principles, especially where there is no political willingness for tough enforcement actions ("paradox of supervision and enforcement")<sup>90</sup>.

Most principles in the FSA's Handbook constitute only public obligations and no private rights.<sup>91</sup> Consequently, pressure to comply with the underlying principles can only come from public and not from private law enforcement. But this is a well-known problem not only with principles: jurisdictions in all of Europe are struggling whether rules and principles for market conduct only constitute public obligations or whether they may generate private liability.<sup>92</sup> In Germany, an investor may not automatically receive damages within the meaning of Section 823 (2) of the Civil Code (BGB) for losses he suffered due to the investment firm's violation of an

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Grabitz, Meinhard Hilf and Martin Nettesheim (eds), *Das Recht der Europäischen Union* (40<sup>th</sup> Edition 2010), Art. 6 EUV, paras. 6 et seqq.; Fabian Walla, 'Rechtssetzungsverfahren und Regulierungsstrategien' in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (56 et seq.).

88 Julia Black, Martyn Hopper and Christa Band, 'Making a success of Principles-based regulation' 1 (2007) *Law and Financial Markets Review (LFMR)*, 197.

89 According to the Principles of Materiality (*Wesentlichkeitsgrundsatz*) in Germany, Art. 80(1) sentence 2 of the German Constitution.

90 Julia Black, 'Forms and paradoxes of principles-based regulation' 3 (2008) *Common Markets Law Journal (CMLJ)*, 427, 450.

91 Julia Black, Martyn Hopper and Christa Band, 'Making a success of Principles-based regulation' 1 (2007) *Law and Financial Markets Review (LFMR)*, 192, 204 n 4.

92 See for a discussion of private liability under MiFID I and II: Thomas M.J. Möllers, 'Harmonisation of Capital Markets Law – MiFID II and PRIIP' 31 (2015) *Banking and Finance Law Review (B.F.L.R.)* 143 (163 et seqq.).

obligation under the WpHG.<sup>93</sup> The results even differ between EU Member States: whereas there is no civil law enforcement of Section 20a WpHG (market manipulation) in Germany,<sup>94</sup> courts in Austria do award damages in this respect.<sup>95</sup>

However, the Market Abuse Regulation (MAR)<sup>96</sup> has imparted new impetus to the debate regarding the granting of damages according to Section 823(2) BGB for a violation of obligations under the European regulation in Germany.<sup>97</sup> The prohibition of market manipulation (Articles 12 and 15 MAR) as well as the obligation of public disclosure of inside information (Article 17 MAR) are now regulated on the European level. For the first time European market abuse law explicitly mentions the goal to “enhance investor protection and confidence in those markets” in Article 1 MAR, which is a strong point for the obligation of the German legislature to implement private enforcement of the above-mentioned two European rules via Section 823(2) BGB.<sup>98</sup> Others argue that a private liability needs to be

93 BGH 22.6.2010 – VI ZR 212/09 – BGHZ 186, 58 paras. 26 et seqq. re sec. 34a(1) sentence 1 WpHG; BGH 19.2.2008 – XI ZR 170/07 – BGHZ 175, 276 para. 18 with further evidence to sec. 32 (1) sentence 1 WpHG; BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 91 paras. 20 et seqq. – IKB on sec. 20a WpHG.

94 BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 91, 97 et seqq. – IKB; Sebastian Mock in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 20a, paras. 474 et seqq.; for private enforcement see Rüdiger Veil, ‘Sanktionen’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 163 (182 et seq.).

95 Susanne Kalss, Martin Oppitz and Johannes Zollner, *Kapitalmarktrecht – System* (2<sup>nd</sup> Edition, 2015), § 22, paras. 72 et. seqq.; see also OGH, 15.3.2012 – 6 Ob 28/12d – GES 2012, 230, 5.2 et seqq.

96 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (MAR).

97 For an overview over the debate regarding private enforcement under MAR, see Alexander Hellgardt, *Die Aktiengesellschaft (AG)* 2012, 154 (163 et seqq.); Christoph H. Seibt, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 388 (424 et seqq.); Lars Klöhn, ‘Die private Durchsetzung des Marktmanipulationsverbots’ in Susanne Kalss, Holger Fleischer and Hans-Ueli Vogt (eds), *Gesellschafts- und Kapitalmarktrecht in Deutschland, Österreich und der Schweiz* 2013 (2013), 227–249; Hartmut Krause, *Corporate Compliance Zeitschrift (CCZ)* 2014, 248 (260).

98 Alexander Hellgardt, *Die Aktiengesellschaft (AG)* 2012, 154 (164 et seqq.); Dörte Poelzig, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2015, 801 (815).

granted as a matter of effectiveness and equivalence.<sup>99</sup> A specific argument for private enforcement in case of information-based market manipulation (Art. 12 (1) c) MAR) could be found in Recital 47 phrase 4 of the MAR, as this form of manipulation “is particularly harmful to investors because it causes them to base their investment decisions on incorrect or distorted information”.<sup>100</sup> For liability under Art. 17 MAR, Recital 49 states that “the public disclosure of inside information [...] is essential [...] to ensure that investors are not misled”.<sup>101</sup> Besides Section 37b, c WpHG, which already explicitly grants damages to investors who were misled by false or deferred ad-hoc disclosures in Germany, there would still be scope for Section 823 (2) BGB in connection with Art. 17 MAR, as slight and average negligence of the disclosing firm is sufficient for a liability under Section 823 (2) BGB. On the other hand, there would still be room for Section 37b, c WpHG besides Section 823 (2) BGB because it reverses the burden of proof for absence of negligence on the disclosing firm.<sup>102</sup> It will be interesting how German courts will deal with these new arguments in future decisions.

The same discussion can be expanded to the liability of investment firms in case of violating obligations under Section 31 WpHG. The German Federal Supreme Court (BGH) has rejected claims for damages under Section 823 (2) BGB so far.<sup>103</sup> According to the European Court of Justice, MiFID

99 Alexander Hellgardt, *Die Aktiengesellschaft (AG)* 2012, 154 (165); Christoph H. Seibt, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 388 (424); Christoph H. Seibt and Berward Wollenschläger, *Die Aktiengesellschaft (AG)* 2014, 593 (607); Dörte Poelzig, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2015, 801 (816); for arguments against liability for market-based manipulation see Lars Klöhn, ‘Die private Durchsetzung des Marktmanipulationsverbots’ in Susanne Kalss, Holger Fleischer and Hans-Ueli Vogt (eds), *Gesellschafts- und Kapitalmarktrecht in Deutschland, Österreich und der Schweiz* 2013 (2013), 227 (248 et seq.).

100 Alexander Hellgardt, *Die Aktiengesellschaft (AG)* 2012, 154 (165); Dörte Poelzig, *Zeitschrift für Unternehmens- und Gesellschaftsrecht (ZGR)* 2015, 801 (815).

101 Alexander Hellgardt, *Die Aktiengesellschaft (AG)* 2012, 154 (164); Christoph H. Seibt, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 388 (424); Christoph H. Seibt and Berward Wollenschläger, *Die Aktiengesellschaft (AG)* 2014, 593 (607).

102 Christoph H. Seibt, 177 (2013) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (ZHR)*, 388 (425 et seq.).

103 BGH 19.12.2006 – XI ZR 56/05 – BGHZ 170, 226 paras. 17 et seqq. re Section 31(1) No 2 WpHG; BGH 13.12.2011 – XI ZR 51/10 – BGHZ 192, 91, para. 26 – IKB: WpHG only public law and therefore no qualification under sec. 823(2) BGB.

I does not oblige member states to implement civil law liability in case of a violation of Art. 19 MiFID I, which is the European background to Section 31 WpHG. It is up to the internal legal order of each Member State to determine the contractual consequences of non-compliance subject to observance of the principles of equivalence and effectiveness.<sup>104</sup> It is questionable whether this ruling under MiFID I is transferrable to MiFID II: Recital 70 of MiFID II states that “[t]he continuous relevance of personal recommendations for clients and the increasing complexity of services and instruments require enhancing the conduct of business obligations in order to strengthen the protection of investors”. Recital 74 provides significant evidence that further restriction of inducements under Article 24(9) MiFID II was implemented to protect investors. Finally, one of the overall objectives of the directive is explicitly “to protect investors”<sup>105</sup>. Further, Recital 86 sentence 2 states: “in order to enhance the regulatory framework applicable to the provision of services [...] principles to act honestly, fairly and professionally and the obligation to be fair, clear and not misleading apply to the relationship with any clients”. MiFID II is clearly referring to a contractual obligation which the investment firm owes to its client,<sup>106</sup> which is a strong argument for a “double nature” of Section 31 et seqq. WpHG: On the one hand, the national regulator enforces the obligation and on the other hand, the investment firm owes all obligations to the client.<sup>107</sup> These arguments, which indicate that the focus of the directive is increasingly shifting towards investor protection<sup>108</sup>, might increase the pressure on national courts to enforce Section 31 et seqq. WpHG via civil law. Up until now, the

104 European Court of Justice Case 604/11, 30.5.2013, *Genil 48 SL, Comercial Hostelería de Grandes Vinos SL v Bankinter SA, Banco Bilbao Vizcaya Argentaria SA*, ECLI:EU:C:2013:344, para. 57 re Art. 19 MiFID I.

105 See Recital 86 sentence 1 MiFID II; see Dorothee Einsele, 180 (2016) *Zeitschrift für das gesamt Handels- und Wirtschaftsrecht (ZHR)*, 233 (241, 244).

106 Dorothee Einsele, 180 (2016) *Zeitschrift für das gesamt Handels- und Wirtschaftsrecht (ZHR)*, 233 (241).

107 Franz Clemens Leisch, *Informationspflichten nach § 31 WpHG* (2004), 44 et seqq.; Thomas M.J. Möllers in Heribert Hirte and Thomas M.J. Möllers (eds), *KK-WpHG* (2<sup>nd</sup> Edition, 2014), § 31 para. 15; Christoph Benicke, *Wertpapiervermögensverwaltung* (2006), 457 et seqq.; Tilman Weichert and Thomas G. Wenninger, *Wertpapier-Mitteilungen (WM)* 2007, 627 (635); for a different view see Andreas Fuchs in Andreas Fuchs (ed), *WpHG Kommentar* (2<sup>nd</sup> Edition, 2016), Vorbem §§ 31 ff. paras. 78 et seqq.; Dorothee Einsele, 180 (2016) *Zeitschrift für das gesamt Handels- und Wirtschaftsrecht (ZHR)*, 233 (247 et seqq.).

108 Recitals under MiFID I stated “investor protection” only twice, whereas under MiFID II it can be found 22 times.

BGH has been reluctant to do so, but the principles of equivalence and effectiveness might call for private enforcement in the future.<sup>109</sup>

European Competition Law is already one step ahead: The directive on actions for damages for infringements of national and EU competition adopted in 2014<sup>110</sup> will harmonise national private law enforcement from 27 December 2016 when member states shall have adopted measures to comply with the directive.<sup>111</sup>

#### 4. Principles as a second layer of regulation and enforcement

Whereas there are several concerns regarding the regulation and enforcement via principles, a combination of rules and principles could be an adequate regulatory framework for markets with a high degree of innovation. These markets give rise to risks of circumvention and market abuse.<sup>112</sup> In particular the above-mentioned automation of investment advice could be regulated by principles as long as the legislature has not reacted to this new market development. A regulation via principles as a second layer has proven effective in cases in Great Britain, where supervisors were not able to sanction a specific behaviour under the Financial Services and Markets Act 2000 (FSMA), which implements the European rules, but under Principles of the FSA Handbook.<sup>113</sup> However, when drafting principles, the leg-

109 Dorothee Einsele, 180 (2016) *Zeitschrift für das gesamt Handels- und Wirtschaftsrecht (ZHR)*, 233 (242 et seq.).

110 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States of the European Union; see Josef Drexel, 'The Interaction Between Private and Public Enforcement in European Competition Law' in Hans-Wolfgang Micklitz and Andrea Wechsler (eds), *The Transformation of Enforcement* (2016), 135–159.

111 For a comparison of civil law enforcement between competition, antitrust, company and capital markets law in Germany and Europe, see Thomas M.J. Möllers and Bernhard Pregler, 'Civil Law Enforcement and Collective Redress in Economic Law', 2013 *Diritti Nazionali e Comparazione*, 27–74.

112 Fabian Walla, 'Rechtssetzungsverfahren und Regulierungsstrategien' in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (57 et seq.).

113 For an example, see Financial Services Authority (FSA), *Final Notice*, 20.11.2006, available at <http://www.fca.org.uk/static/pubs/final/pignatelli.pdf> (15-09-2017).

islature and the regulators should keep in mind the above-mentioned constitutional concerns.<sup>114</sup> In the end, “neither principles nor rules usually function particularly successfully without the other”<sup>115, 116</sup>

### III. Concluding remarks

The period of deregulation in the 1980s and 1990s was blamed as one of the key factors of the last financial crisis. The activism and political willingness to draft new rules and ensure a gapless regulation is tremendous. Not only Britain<sup>117</sup> and South Africa<sup>118</sup>, which have traditionally been principles-based regulated, but also Germany<sup>119</sup> and the whole European Union are currently shifting to a regulatory system which is characterised by an overwhelming complexity and amount of meticulously detailed rules. The intention of the European legislature to draft a Single Rulebook for a Capital Markets Union<sup>120</sup> is worthy of support. A uniform and strong framework to foster market integrity and decrease regulatory arbitrage and legal complexity arising from differing national rules are often cited goals of new European laws.<sup>121</sup>

Three notes on complexity: First, harmonisation of national laws via European directives and regulations may in fact reduce divergences among national laws. But seen from a national perspective, it adds three more layers of European law and guidelines via the Lamfalussy-Process to the existing national laws. In Germany, market participants now have to comply

114 Fabian Walla, ‘Rechtssetzungsverfahren und Regulierungsstrategien’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 38 (58).

115 Julia Black, ‘The rise, fall and fate of principles-based regulation’ in Kern Alexander and Niamh Moloney (eds), *Law Reform and Financial Markets* (2011), 3 (33).

116 John Braightwaite, ‘Rules and Principles: A Theory of Legal Certainty’ 27 (2002) *Australian Journal of Legal Philosophy* (Aust. J. Leg. Phil.), 47.

117 Julia Black, ‘Regulatory Styles and Supervisory Strategies’ in Niamh Moloney, Eilis Ferran and Jennifer Payne (eds), *The Oxford Handbook of Financial Regulation* (2015), 217–253.

118 See Darleen Millard, p. 186 above.

119 Thomas M.J. Möllers, ‘Harmonisation of Capital Markets Law – MiFID II and PRIIP’ 31 (2015) *Banking and Finance Law Review* (B.F.L.R.) 143 (148 et seq.).

120 European Commission, *Building a Capital Markets Union*, Green Paper COM(2015) 63 final, 18.2.2015.

121 See recital 4 of the MAR (n 96); similarly in recital 3 and 4 of the PRIIP Regulation (n 28).



with six relevant legal levels.<sup>122</sup> Second, the European laws tend to be excessive in size and fast-paced. Today it seems more important to find every applicable law than interpreting the law. Databases<sup>123</sup> which structure this complexity are becoming more and more important, whereas literature as German commentaries which try to interpret the law are already outdated on the day they are published.<sup>124</sup> Third, as the level of detail is impressive, the overall objectives and essential regulations get lost in the flood of applicable laws. For a long time, the US-American Capital Markets Law has served as a role model for legislators in continental Europe.<sup>125</sup> But the flood of European legislative initiatives after the financial crisis even overshadowed US-American initiatives. A way back to a more outcomes-based regulation seems desirable. Great Britain might have taken one step closer to this “way back” since 23 June 2016.

122 Thomas M.J. Möllers, ‘Harmonisation of Capital Markets Law – MiFID II and PRIIP’ 31 (2015) *Banking and Finance Law Review (B.F.L.R.)* 143 (163 et seq.).

123 See the author’s database, available at [kapitalmarktrecht-im-internt.eu](http://kapitalmarktrecht-im-internt.eu) or [caplaw.eu](http://caplaw.eu).

124 See for example the preface of Andreas Fuchs (ed), *WpHG Kommentar* (2<sup>nd</sup> Edition, 2016), V; Ulrich Noack and Dirk Zetzsche, ‘Kommentieren und Kommentare im europäisch-deutschen Wirtschaftsrecht’ in Bettina Limperg, Jens Bormann, Axel C. Filges, Marie Luise Graf-Schlicker and Hanns Prütting, *Recht im Wandel europäischer und deutscher Rechtspolitik: Festschrift 200 Jahre Carl Heymanns Verlag* (2015), 213 (226).

125 For the development of European Capital Markets Law see Rüdiger Veil, ‘Kapitalmarktrecht in Forschung und Lehre’ in Rüdiger Veil (ed), *Europäisches Kapitalmarktrecht* (2<sup>nd</sup> Edition, 2014), 83 (84 et seq.).

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