

# European Legislative Practice 2.0: Dynamic Harmonisation of Capital Markets Law — MiFID II and PRIIP

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*European and national capital markets law is fast-paced and now being structured by Lamfalussy and de Larosière Processes to three relevant legal European levels and three relevant national levels. This double complexity is extended by four special features that result from the relationship between European and national laws: the problem of minimum and maximum harmonisation; national legislatures pressing ahead with passing laws; the relationship between directives and directly applicable regulations; and the influence of European law on non-harmonised areas of law. Based on recent legislation (MiFID II and PRIIP) these four theoretical legal questions are discussed in the context of three general principles of capital markets law: information requirements, dealing with conflicts of interest and questions concerning enforcement of the law.*

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*En pleine effervescence, la législation régissant les marchés financiers européens et nationaux fait l'objet d'une réorganisation effectuée en fonction des processus de Lamfalussy et de Larosière, laquelle vise trois niveaux juridiques européens pertinents et trois niveaux nationaux pertinents. Cette double complexité est amplifiée par quatre aspects spéciaux qui découlent du lien entre les lois européennes et les lois nationales : les problèmes liés à une harmonisation minimale et maximale; le fait que les assemblées législatives nationales aillent de l'avant avec l'adoption de lois; le rapport entre les directives et les règlements directement applicables et, enfin, l'influence de la loi européenne dans des domaines du droit non harmonisés. En se fondant sur la législation récente (la Directive sur les marchés d'instruments financiers (MiFID 2) et le Règlement sur les documents d'informations clés relatifs aux produits d'investissement packagés de détail et fondés sur l'assurance (PRIIP)), l'auteur analyse ces quatre questions légales théoriques selon trois principes généraux de la loi régissant les marchés financiers : les exigences en matière d'information, le traitement des conflits d'intérêts et les questions concernant le respect de la loi.*

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## 1. INTRODUCTION: EUROPEAN CAPITAL MARKETS LAW

### (a) FSAP and the Financial Crisis

Since the 2008 financial crisis, legislators across the world have tightened up rules for banks, insurance companies, and other capital market participants, including in the USA,<sup>1</sup> the United Kingdom,<sup>2</sup> and South Africa.<sup>3</sup>

European capital markets law was originally derived from the Segré report in 1966,<sup>4</sup> but current European rules are based on the Financial Services Action Plan (FSAP) from 1999.<sup>5</sup> Most of today's directives and regulations are based on the FSAP, including the Prospectus Directive,<sup>6</sup> MiFID I,<sup>7</sup> the Market Abuse Directive,<sup>8</sup> the Transparency Directive,<sup>9</sup> and the Takeover Directive.<sup>10</sup>

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<sup>1</sup> *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, 21.7.2010, 124 Stat. 1376 (2010).

<sup>2</sup> *Financial Services Act 2012, An Act to amend the Bank of England Act 1998, the Financial Services and Markets Act 2000 and the Banking Act 2009*; to make other provision about financial services and markets; to make provision about the exercise of certain statutory functions relating to building societies, friendly societies and other mutual societies; to amend section 785 of the *Companies Act 2006*; to make provision enabling the Director of Savings to provide services to other public bodies; and for connected purposes, 19.12.2012, 2012 c. 21.

<sup>3</sup> *Implementing a twin peaks model of financial regulation in South Africa*, 1.2.2013, online: < <http://www.treasury.gov.za/twinpeaks/20131211%20-%20Item%203%20Roadmap.pdf> > .

<sup>4</sup> EEC Commission, *The development of a European capital market: Report of a Group of Experts appointed by the EEC Commission*, 1966.

<sup>5</sup> Commission communication on implementing the framework for financial markets: Action Plan, 11.5.1999, COM (1999), 232 final.

<sup>6</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, OJ. L. 345, 31.12.2003, pp. 64-89 (Prospectus Directive).

<sup>7</sup> Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and Directive of the European Parliament and of the Council and repealing Council Directive 92/22/EEC OJ. L. 145, 30.4.2004, pp. 1-44 (MiFID I).

<sup>8</sup> Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ. L. 96, 12.4.2003, pp. 16-25 (Market Abuse Directive).

<sup>9</sup> Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ. L. 390, 31.12.2004, pp. 38-57 (Transparency Directive).

<sup>10</sup> Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, OJ. L. 142, 30.4.2004, pp. 12-23 (Takeover Directive).

A special legislative procedure to implement the FSAP was proposed by a Committee of Wise Men headed by Baron von Lamfalussy — the Lamfalussy Process. It comprised three legislative levels and a regulatory level, thus totalling four levels.<sup>11</sup> This approach resulted in a rush of framework directives, implementation directives, and guidelines from the European regulatory body, the CESR (Committee of European Securities Regulators).<sup>12</sup>

The 2008 financial crisis led to reform of the European regulatory structures and more than thirty individual measures in the area of banking, capital markets, and insurance law, as proposed by the de Larosière Group.<sup>13</sup> The European regulatory authorities are now ESMA (European Securities and Markets Authority) for the securities sector (institutional successor to the CESR), the EBA (European Banking Agency) for the banking sector, and EIOPA (European Insurance and Occupational Pensions Agency) for the insurance sector. The Lamfalussy Process was also revised, and the directives listed above were revised and strengthened. Under the reformed Lamfalussy Process (the so-called Lamfalussy II Process),<sup>14</sup> at the first level, the European Commission, Council, and Parliament adopt framework legislative acts, such as directives or regulations. These are then substantiated at the second level by delegated acts (Article 290 Treaty on the Functioning of the European Union, TFEU) and implementing acts (Article 291 TFEU) from the Commission. The European regulatory authorities may also issue regulatory technical standards (RTS) or implementing technical standards (ITS) if these are envisaged by the framework act. At the third level, the regulatory authorities issue guidelines and recommendations.<sup>15</sup> They have the status of secondary legislation and a greater than de facto binding effect, since they create a presumption of

<sup>11</sup> On the Lamfalussy Process, see *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets*, 15.2.2001, online: <[http://ec.europa.eu/internal\\_market/securities/docs/lamfalussy/wisemen/final-report-wise-men\\_en.pdf](http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf)>.

<sup>12</sup> See *K. Langenbucher*, Zur Zulässigkeit parlamentsersetzender Normgebungsverfahren im Europarecht, ZEuP 2002, 265 ff.; *T. Möllers*, Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht, ZEuP 2008, 480 ff.; *K. Schmolke*, Der Lamfalussy-Prozess im Europäischen Kapitalmarktrecht — eine Zwischenbilanz, NZG 2005, 912 ff.

<sup>13</sup> *De Larosière*, The High-Level Group on Financial Supervision in the EU, Report, 25.2.2009.

<sup>14</sup> Academic texts sometimes refer to the Lamfalussy II Process; see *M. Lutter/W. Bayer/J. Schmidt*, Europäisches Unternehmens- und Kapitalmarktrecht, 5th ed. 2012, § 17 marginal note 47; *F. Walla*, Die Europäische Wertpapier- und Marktaufsichtsbehörde (ESMA) als Akteur bei der Regulierung der Kapitalmärkte Europas — Grundlagen, erste Erfahrungen und Ausblick, BKR 2012, 265, 267; *L. Klöhn*, in *K. Langenbucher*, Europäisches Privat- und Wirtschaftsrecht, 3d ed. 2013, § 6 marginal note 20.

<sup>15</sup> ESMA Framework Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ. L. 331, pp. 84-119 (ESMA Regulation).

correctness, and a Member State must state and explain its reasons if it does not intend to follow the prescription of such guidelines.<sup>16</sup>

The Prospectus Directive<sup>17</sup> and Prospectus Regulation,<sup>18</sup> the Market Abuse Regulation,<sup>19</sup> the Market Abuse Directive,<sup>20</sup> the Transparency Directive,<sup>21</sup> and MiFID were revised. In order to close gaps, the UCITS Directives IV<sup>22</sup> and V,<sup>23</sup> the AIFM Directive,<sup>24</sup> the Short-selling Regulation,<sup>25</sup> EMiR,<sup>26</sup> and the Rating Regulation<sup>27</sup> were passed.

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<sup>16</sup> T. Möllers, *Auf dem Weg zu einer neuen europäischen Finanzmarktaufsichtsstruktur — Ein systematischer Vergleich der Rating-VO (EG) No. 1060/2009 mit der geplanten ESMA-VO, NZG 2010, 285, 286; followed in BVerwG, judgement of 24.5.2011, Az. 7 C 6/10, ZIP 2011, 1313 marginal note 26.*

<sup>17</sup> Prospectus Directive (*supra* note 6), last amended by Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014, OJ. L. 153, 22.5.2014, pp. 1-61 (Omnibus II). The Prospectus Directive is currently being revised; see the Consultation on the Review of the Prospectus Directive, 18.2.2015, online: < [http://ec.europa.eu/finance/consultations/2015/prospectus-directive/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/prospectus-directive/index_en.htm) > .

<sup>18</sup> Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website, OJ. L. 176, 10.7.2010, pp. 1-15.

<sup>19</sup> 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, OJ. L. 173, 12.6.2014, pp. 1-61.

<sup>20</sup> Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (Market Abuse Directive), OJ. L. 173, 12.6.2014, pp. 179-189.

<sup>21</sup> Transparency Directive (*supra* note 9), last amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013, OJ. L. 294, 6.11.2013, pp. 13-27.

<sup>22</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), OJ. L. 302, 17.11.2009, pp. 32-96 (UCITS IV).

<sup>23</sup> Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions, OJ. L. 257, 28.8.2014, pp. 186-213 (UCITS V).

<sup>24</sup> Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ. L. 174, 1.7.2011, pp. 1-73 (AIFM Directive).

<sup>25</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ. L. 86, 24.3.2012, pp. 1-24 (Short-selling Regulation).

<sup>26</sup> Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July

**(b) Rules Governing Financial Instruments — MiFID II**

Securities law was harmonised by the Securities Investment Services Directive.<sup>28</sup> This was then replaced in 2004 by the Markets in Financial Instruments Directive (MiFID I)<sup>29</sup> and its many implementation provisions.<sup>30</sup>

After the publication of a draft Proposal,<sup>31</sup> which was then amended by Parliament,<sup>32</sup> the second Markets in Financial Instruments Directive (MiFID II) was passed on 16 April 2014.<sup>33</sup> It is supplemented by the Markets in Financial Instruments Regulation (MiFIR).<sup>34</sup> The provisions of both are applicable in Member States as of 3 January 2017.<sup>35</sup>

2012 on OTC derivatives, central counterparties and trade repositories, OJ. L. 201, 27.7.2012, pp. 1-59 (EMiR).

<sup>27</sup> Regulation (EG) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ. L. 302, 17.11.2009, pp. 1-31 (Rating Regulation); amended by Regulation (EU) No 513/2011 of the European Parliament and of the Council of 15 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ. L. 145, 31.5.2011, pp. 30-56 and Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013, OJ. L. 146, 31.5.2013, pp. 1-33; see *T. Möllers/C. Niedorf*, Regulation and Liability of Credit Rating Agencies, 11 ECFR 333, 346 (2014).

<sup>28</sup> Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, OJ. L. 141, 11.6.1993, pp. 27-46 (Securities Investment Services Directive).

<sup>29</sup> See *supra* note 7.

<sup>30</sup> Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ. L. 241, 2.9.2006, pp. 26-58; and Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive, OJ. L. 241, 2.9.2006, pp. 1-25.

<sup>31</sup> European Commission, 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 of 20.01.2011, COM(2011) 656 final.

<sup>32</sup> Amendments of 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.

<sup>33</sup> 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, OJ. L. 173, 12.6.2014, pp. 349-496 (MiFID II); *M. Weber*, Die Entwicklung des Kapitalmarktrechts im ersten Halbjahr 2014, NJW 2014, 2327, 2328.

<sup>34</sup> 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, OJ. L. 173, 12.6.2014, pp. 84-148. (MiFIR).

<sup>35</sup> See Art. 93 (1)(1) MiFID II (*supra* note 33).

The European Securities and Markets Authority (ESMA) also adopts rules and regulations. An ESMA consultation paper from 22 May 2014<sup>36</sup> proposed technical regulatory and implementing standards as from 19 December 2014 that must be implemented by the middle of May 2015.<sup>37</sup>

### (c) Evaluation

The level of activism at the European and national levels is impressive. The attempt to make European law more effective by making ESMA much more effective at a European level than the CESR is also significant.

It should be noted that European and national banking and capital markets laws are becoming increasingly overwhelming for those who have to apply the laws. In the past, this was due to the speed at which laws were issued, with revisions appearing or new provisions being passed several times a year — “law in permanence.”<sup>38</sup> Capital markets laws have already overshadowed German tax laws, which generated a certain amount of horror worldwide. In addition, capital markets law is now so complicated because the Lamfalussy Process means that rules are being created and substantiated at three European levels and at three national levels.<sup>39</sup> There is talk of “hyperactive legislatures”<sup>40</sup> and a “tsunami of regulations.”<sup>41</sup> This legislative activism is having an impact on legal certainty, as many provisions have only a short “life cycle” and it is difficult for cases to be decided on the basis of these provisions. All of this is so confusing that it needs to be structured, such as via a databank on capital markets law.<sup>42</sup>

Harmonisation in European civil law has made great progress over the past 30 years. Regarding the intensity of regulation within the three legislative levels, European capital markets law is spearheading the level of harmonisation in European commercial law. The Lamfalussy Process as a means of vertical harmonisation has already been discussed elsewhere.<sup>43</sup> Now, there is an additional intensity of harmonisation: European legislative practice 2.0. An

<sup>36</sup> Consultation Paper on MiFID II/MiFIR of 22 May 2014, ESMA/2014/549, online: <[http://www.esma.europa.eu/system/files/2014-549\\_-\\_consultation\\_paper\\_mifid\\_ii\\_mifir.pdf](http://www.esma.europa.eu/system/files/2014-549_-_consultation_paper_mifid_ii_mifir.pdf)> .

<sup>37</sup> Consultation Paper MiFID II/MiFIR of 19 December 2014, ESMA/2014/1570, online: <[http://www.esma.europa.eu/system/files/2014-1570\\_cp\\_mifid\\_ii.pdf](http://www.esma.europa.eu/system/files/2014-1570_cp_mifid_ii.pdf)> .

<sup>38</sup> G. Spindler, *Kapitalmarktreform in Permanenz — Das Anlegerschutzverbesserungsgesetz*, NJW 2004, 3449 ff.; H. Hirte/T. Möllers, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, preface.

<sup>39</sup> Laws, regulations and guidelines of the BaFin; see R. Veil, in R. Veil, *Europäisches Kapitalmarktrecht*, 2d ed. 2014, § 5 marginal note 13 ff.

<sup>40</sup> H.-D. Assmann/U. Schneider, in H.-D. Assmann/U. Schneider, eds., *WpHG*, 4th ed. 2006, preface.

<sup>41</sup> P. Mülbert, *Regulierungstsunami im europäischen Kapitalmarktrecht*, ZHR 186 (2012), 369 ff.

<sup>42</sup> See the author’s databank on European economic law (which receives one and a half million hits each year), online: <[www.kapitalmarktrecht-im-internet.eu](http://www.kapitalmarktrecht-im-internet.eu)> .

intensive creation of regulations is designed to avoid a race to the bottom, for both the private market participants and the regulatory authorities. The stated aim is to achieve a harmonised law (level playing field),<sup>44</sup> thus reducing phenomena such as gold plating or cherry picking,<sup>45</sup> as well as transaction costs across various markets.<sup>46</sup> But will these aims be fulfilled?

The complexity comes from the necessary standardisation of European and national laws. Do we need to reduce their complexity? Four points are discussed below. Firstly, over the past thirty years, harmonisation of legislation in the private law field has been characterised by the principle of minimum harmonisation, which allows Member States the discretion to pass or keep stricter national provisions in favour of consumers or investors. Directives were the form of regulatory instrument often chosen, as they leave it to the discretion of Member States as to how they wish to implement the codification under European law. There has now been some change in this area. First of all, there is a quite clear shift from minimum harmonisation towards the idea of maximum harmonisation. Secondly, there is a lack of clarity about national legislatures pressing ahead with changes, which forces the Member State to amend the national laws passed prior to the European law as soon as the European law comes into force.<sup>47</sup> Choosing a regulation instead of a directive as the legislative framework has become more and more popular for the European legislator; there is, thirdly, a lack of clarity of which criteria determine this choice. And, lastly, the extent of non-harmonised areas of law is unclear — including parts of national civil law. Do the European legal norms only apply with respect to public law, or also to civil law?

These four doctrinal legal questions should be looked at in the context of three general principles of capital markets law.<sup>48</sup> Discussed first are information requirements, particularly the Key Information Sheet (Part 2), followed by

<sup>43</sup> T. Möllers, *Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht*, ZEuP 2008, 480 ff.

<sup>44</sup> See K. Hopt/H.-C. Voigt, *Prospekt- und Kapitalmarktinformatiionshaftung*, 2005, at 2 ff.

<sup>45</sup> Reporter *Edgardo Maria Iozia* in a statement of the European Economic and Social Committee on the “Proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products”, 14./15.11.2012, COM(2012) 352 final — 2012/0169 (COD) (2013/C 11/13) under 3.4.

<sup>46</sup> *De Larosière*, *supra* note 13, marginal note 101; H. Fleischer/K. Schmolke, *Die Reform der Transparenzrichtlinie: Mindest- oder Vollharmonisierung der kapitalmarktrechtlichen Beteiligungspublizität?*, NZG 2010, 1241, 1245 f.

<sup>47</sup> T. Möllers, *Vollharmonisierung im Kapitalmarktrecht — Zur Regelungskompetenz nationaler Gerichte und Parlamente*, in B. Gsell/C. Herresthal, eds., *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, 2009, at 247 ff.; C. Gerner-Beuerle, *United in diversity: maximum versus minimum harmonization in EU securities regulation*, 7 CMLJ 317 ff. (2012).

<sup>48</sup> T. Möllers, *Anlegerschutz im System des Kapitalmarktrechts, Rechtsgrundlagen und Ausblicke*, in *Festschrift K. Hopt*, 2010, at 2247 ff.

dealing with conflicts of interest for commission-based advice in comparison with the newly introduced fee-based advice (Part 3). Questions concerning enforcement of the law are addressed in conjunction with the individual issues, and subsequently considered in terms of liability under civil law (Part 4).

## 2. INFORMATION OBLIGATIONS DURING INFORMATION SESSIONS: KEY INFORMATION AND THE KEY INFORMATION DOCUMENT

### (a) Providing Comprehensive Standardised Information, and Information Overload

One positive aspect for investors is that, under the Securities Investment Services Directive, investment firms were required to look intensively into the wishes and financial situation of the investor (“know your customer”) before giving investment advice. It also introduced the principle that investment firms needed to know about the products they were selling (“know your product”).<sup>49</sup>

The practice of giving information and advice is designed to allow the investor to make a rational decision about the investment. This concept can be found in the wording of MiFID II<sup>50</sup> and Section 31 (3) sentence 1 of the *Securities Trading Act* (WpHG).<sup>51</sup>

After the Securities Investment Services Directive was adopted, there was debate about whether investment firms could fulfil their information obligations (Section 31 (2) No. 2 WpHG old version) by providing abstract, standardised information, or whether in each case they were required to provide substantive, customised information. After the implementation of MiFID I,<sup>52</sup> the provision of standardised information was permissible for information purposes (Section 31 (3) sentence 2 of the *Securities Trading Act* (WpHG)). Customised information only had to be provided for investment advice.<sup>53</sup>

In Germany, it is normal for the key information for securities and other investments to run to about 170 pages.<sup>54</sup> The complexity of the key information

<sup>49</sup> Applies to the “know your customer” and “know your product” principle derived from Art. 11 (1), (4), and (5) of the Securities Investment Services Directive (*supra* note 28) and also developed by the Federal Court of Justice (BGH), BGH, judgement of 6.7.1993, Az. XI ZR 12/93, BGHZ 123, 126, 128 ff. — Bond; see T. Möllers, in H. Hirte/T. Möllers, eds., *Kölnener Kommentar zum WpHG*, 2d ed. 2014, § 31 marginal note 338.

<sup>50</sup> Art. 24 (5) sentence 1 MiFID II (*supra* note 33): “so that clients . . . are reasonably able . . . to take investment decisions on an informed basis.” Previously, see Art. 19 (3) MiFID I (*supra* note 7).

<sup>51</sup> Section 31 (3) sentence 1 WpHG (translated from German): “. . . and to take investment decisions on this basis”; see T. Möllers/M. Poppele, *Paradigmenwechsel durch MiFID II: divergierende Anlegerleitbilder und neue Instrumentarien wie Qualitätskontrolle und Verbote*, ZGR 2013, 437, 448, 465.

<sup>52</sup> Art. 19 (3) sentence 2 MiFID I (*supra* note 7).

<sup>53</sup> See under Part 3(a); A. Fuchs, *WpHG*, 2009, § 31 marginal note 242, 250.

seems to constitute an information overload for many investors.<sup>55</sup> The term “information overload” implies a cognitive threshold in excess of which no more information can be taken on or processed.<sup>56</sup> In practice, it is accepted that investors with below-average abilities to understand the products will not be protected.<sup>57</sup> Yet these are exactly the investors who need to be protected and are in most urgent need of clear and understandable information.<sup>58</sup>

## (b) The German Product Information Sheet from 2011

The German legislature took a pioneering stance in Europe when, in 2011 — pursuant to the newly introduced Section 31 (3a) of the *Securities Trading Act* (WpHG)<sup>59</sup> — it required investment services enterprises to give their clients a Product Information Sheet when they were providing investment advice.

This Product Information Sheet is intended to summarise the main risks and opportunities of an investment product,<sup>60</sup> similar to the information leaflet included with medicines packaging<sup>61</sup> or the product information sheets provided under insurance<sup>62</sup> and consumer credit law.<sup>63</sup> Similar obligations concerning

<sup>54</sup> Compare *Basisinformationen über Wertpapiere und weitere Kapitalanlagen*, 2014.

<sup>55</sup> Applicable to *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31 marginal note 93c.

<sup>56</sup> *J. Jacoby/D. Speller/C. Kohn-Berning*, Brand Choice Behavior as a Function of Information Load, 1 JcR 33 ff. (1974); *N. Malhotra*, Information Load and Consumer Decision Making, 8 JcR 419 ff. (1982); *H. Berndt*, Konsumentenentscheidung und Informationsüberlastung, 1983, at 89; *H. Hagemann*, Wahrgenommene Informationsbelastung des Verbrauchers, 1988, at 87.

<sup>57</sup> *K. Rothenhöfer*, in E. Schwark/D. Zimmer, KMRK, 4th ed. 2010, § 31 WpHG marginal note 112; also *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31 marginal note 66; *P. Buck-Heeb*, Verhaltenspflichten beim Vertrieb, ZHR 177 (2013), 310, 338.

<sup>58</sup> *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31 marginal note 93c and refers for the deficits in general financial knowledge to *M. Habschick/J. Evers*, Anforderungen an Finanzvermittler — mehr Qualität, bessere Entscheidungen, Studie im Auftrag des BMELV, 2008, at 17, 125; *D. Leuring/D. Zetzsche*, Die Reform des Schuldverschreibungs- und Anlageberatungsrechts — (Mehr) Verbraucherschutz im Finanzmarktrecht?, NJW 2009, 2856, 2861.

<sup>59</sup> Introduced by Art. 1 (6) of the *Investor Protection and Capital Markets Improvement Act* (AnsFuG), 5.4.2011, BGBl. I, at 538. Substantiated by Section 5a of the *Regulation Specifying Rules of Conduct and Organisational Requirements for Investment Services Enterprises* (WpDVerOV), 20.7.2007, BGBl. I 2007, at 1432; see *T. Möllers/T. Wenninger*, Das Anlegerschutz- und Funktionsverbesserungsgesetz, NJW 2011, 1697, 1698.

<sup>60</sup> On Section 31 (3a) WpHG, *T. Möllers/T. Wenninger*, Das Anlegerschutz- und Funktionsverbesserungsgesetz, NJW 2011, 1697 f; *T. Möllers*, in H. Hirte/T. Möllers, eds., Kölner Kommentar zum WpHG, 2d ed. 2014, § 31 marginal note 299 ff.

<sup>61</sup> Section 11 of the *Medicines Products Act* (AMG); see *K. Nink/H. Schröder*, Zu Risiken und Nebenwirkungen: Lesen Sie die Packungsbeilage?, PharmR 2006, 118.

<sup>62</sup> Information required pursuant to Section 7 (1) sentence 1 of the *Insurance Contract Act*

investor information can also be found outside the *Securities Trading Act* (WpHG), in the *Capital Investment Act* (VermAnlG) and the *Investment Code* (KAGB).<sup>64</sup>

To its credit, the German legislature has also sought to use the Product Information Sheet pursuant to Section 31 (3a) of the *Securities Trading Act* (WpHG) to counter information overload. However, the aim of improving information efficiency is lost if the information sheets are handed over with a flood of other information, such as the product prospectus, and thus get swamped in a sea of paper.<sup>65</sup> There has also been criticism that the Product Information Sheet does not permit the desired level of comparability between products.<sup>66</sup>

**(c) Key Information Documents for Packaged Financial Products under the European PRIIP Regulation**

The European legislature had already required UCITS fund managers to provide “key” information for investors in a form that was less voluminous and complex (Key Investor Information Document — KIID).<sup>67</sup> Before the German Product Information Sheets were introduced, it was already clear that the European legislature planned to transfer the KIID concept to all packaged retail investment products (PRIIPs).<sup>68</sup> In July 2012, the Commission presented a set of measures that included a Proposal for a Regulation on key information documents for investment products (Key Information Documents Regulation).<sup>69</sup> The requirement was now extended to packaged retail and insurance-based

(VVG) in conjunction with Section 1 (1) of the *Regulation on Information Obligations concerning Insurance Contracts* (VVG-InfoV) must be presented in a summarised form in a Product Information Sheet — see Section 4 VVG-InfoV.

<sup>63</sup> Section 491a (1) of the *Civil Code* (BGB), Art. 247 (2) *Introductory Act to the Civil Code* (EGBGB).

<sup>64</sup> T. Möllers, NJW Editorial: *Alleingang beim Anlegerschutz — das KAGB*, NJW 2012, volume 52, I; T. Möllers, *Das Haftungssystem nach dem KAGB*, in T. Möllers/A. Kloyer, eds., *Kapitalanlagegesetzbuch*, 2013, marginal note 639 ff.

<sup>65</sup> B. Müller-Christmann, *Das Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarktes*, DB 2011, 749, 751; J. Koch, *Grenzen des informationsbasierten Anlegerschutzes — Die Gratwanderung zwischen angemessener Aufklärung und information overload*, BKR 2012, 485, 487.

<sup>66</sup> Federation of German Consumer Organisations (VZBV), 14.6.2010, online: < [www.vzbv.de/sites/default/files/mediapics/produktinformationsblaetter\\_untersuchung\\_14\\_06\\_2010.pdf](http://www.vzbv.de/sites/default/files/mediapics/produktinformationsblaetter_untersuchung_14_06_2010.pdf) >.

<sup>67</sup> Art. 78 UCITS IV (*supra* note 22).

<sup>68</sup> See Commission, *Update on Commission Work on Packaged Retail Investment Products*, 16.12.2009, at 3, online: < [http://ec.europa.eu/finance/finservices-retail/docs/investment\\_products/20091215\\_prips\\_en.pdf](http://ec.europa.eu/finance/finservices-retail/docs/investment_products/20091215_prips_en.pdf) >.

<sup>69</sup> See Commission, *Press release dated 3.7.2012, IP/12/736; Proposal for a Regulation of the European Parliament and of the Council on key information documents for investment products*, 3.7.2012, COM (2012), 352 final.

investments and products (PRIIP). Products are deemed “packaged” if the surrender values fluctuate due to dependence on reference values or to development of a combination of various assets in which the client does not have a direct holding.<sup>70</sup> The Regulation is aimed at product manufacturers (issuers) and sellers, i.e., fund managers, insurance companies, credit institutions, or investment firms.<sup>71</sup>

Key Information Documents must summarise the product succinctly on three pages, i.e., be formulated in clear, precise, and understandable language<sup>72</sup> and provide answers to many standard questions that might be asked.<sup>73</sup> The provisions are to be further substantiated by regulatory technical standards to be drawn up by European supervisory authorities during the course of 2015;<sup>74</sup> the Regulation comes into force on 31 December 2016.

Sanctions include “shaming” (Art. 29) and fines up to €5 million or 3% of annual turnover (Art. 24 (2)(e)). Finally, EIOPA (Art. 16 (1)) or the responsible national competent authority (Art. 17 (1)) may prohibit certain insurance-based investment products where these raise significant concerns about investor protection or constitute a threat to the orderly functioning and integrity of financial markets.

#### **(d) Evaluation: Pressing Ahead by the German Legislator**

##### *(i) Differences between the German Product Information Sheet and the European Key Information Document*

There are several points where the German Product Information Sheet pursuant to Section 31 (3a) of the *Securities Trading Act (WpHG)* differs from the PRIIP Regulation.

The scope of application of the German Product Information Sheet is much wider than that of the Key Information Document, because it applies to all financial instruments, including equities. By contrast, the PRIIP Regulation applies only to packaged financial products, and expressly excludes equities and bonds from the scope of the obligation to provide a Key Information Document.<sup>75</sup> With equities, the investor invests directly in the financial product; equities are also not complex securities, because the main risk is the insolvency risk of the company. But the loss risks from structured products are

<sup>70</sup> See Recital 1 and Art. 4 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), OJ. L. 352, 9.12.2014, pp. 1-23 (PRIIP Regulation).

<sup>71</sup> Recital 12 and Art. 5 (1) PRIIP Regulation (*ibid.*).

<sup>72</sup> Art. 6 (4) sentence 1 and (4) sentence 2 item (c) PRIIP Regulation (*ibid.*).

<sup>73</sup> Such as: How does risk arise? What costs will be incurred? How long should I hold the investment? How can I make a complaint? etc., see Art. 8 (3) (d) PRIIP Regulation (*ibid.*).

<sup>74</sup> Art. 8 (5) and 10 (2) PRIIP Regulation (*ibid.*).

<sup>75</sup> See Recital 7 and Art. 2 (d) PRIIP Regulation (*ibid.*).

not only much more complex and thus more difficult to understand; losses can even far exceed the purchase cost of the product. Derivatives or leveraged instruments can be acquired for a low purchase price, but they carry a loss risk that is not restricted to the initial purchase price invested (nominal value).<sup>76</sup> Adverse developments can generate a negative market value for these products that cannot be determined in advance.<sup>77</sup> In contrast to an investment in a simple equity, for which the maximum worst-case scenario is total loss of the capital invested, such investments can require the provision of supplementary liquidity.<sup>78</sup> Finally, the information asymmetry is much lower for equities than for complex financial products, as listed companies must regularly provide and publish comprehensive information for the capital markets.<sup>79</sup> In order to avoid over-regulation, the European approach seems to be more appropriate than the German solution.<sup>80</sup>

However, Section 31 (3a) of the *Securities Trading Act* (WpHG) is formulated too narrowly, since the Product Information Sheet must be provided only for investment advice and then only for the recommended product. However, since the recommendation must often be limited to a single product,<sup>81</sup> the improved comparability between different products<sup>82</sup> promulgated by Section 31 (3a) of the *Securities Trading Act* (WpHG) only then applies if the customer inquires about other products and receives further information sheets.<sup>83</sup> In practice, this is an unrealistic scenario. Pursuant to Article 13 (1) of the PRIIP Regulation, the duty to provide the Key Information Document is incumbent on both the adviser and the seller. This wide application seems practical, as it permits investors to compare different products even if they are just seeking information and not advice.

Finally, the German version is too narrow because a Product Information Sheet is only required when giving advice; the duty is incumbent on the seller of

<sup>76</sup> S. Rudolf, in S. Kümpel/A. Wittig, *Bank- und Kapitalmarktrecht*, 4th ed. 2011, marginal note 19.56.

<sup>77</sup> S. Rudolf, in S. Kümpel/A. Wittig, *Bank- und Kapitalmarktrecht*, 4th ed. 2011, marginal note 19.53; J. Roberts, *Finanzderivate als Glücksspiel? Aufklärungspflichten des Emittenten*, DStR 2010, 1082, 1083.

<sup>78</sup> J. Roberts, *Risikoangaben beim Verkauf von Derivaten*, DStR 2014, 1116; P. Melzer, *Zum Begriff des Finanztermingeschäfts*, BKR 2003, 366, 369.

<sup>79</sup> On publicity as needed and disclosure in secondary markets, see T. Möllers, in T. Möllers/K. Rotter, eds., *Ad-hoc-Publizität*, 2003, § 2 marginal note 50.

<sup>80</sup> See already T. Möllers, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 31 marginal note 299.

<sup>81</sup> I. Koller, in H.-D. Assmann/S. Schneider, eds., *WpHG*, 6th ed. 2012, § 31 marginal note 132.

<sup>82</sup> Explanation, *AnsFuG v. 8.10.2010*, BT Printed papers 17/3628, at 21.

<sup>83</sup> I. Koller, in H.-D. Assmann/S. Schneider, eds., *WpHG*, 6th ed. 2012, § 31 marginal note 122.

the financial service, whereas the PRIIP Regulation is mainly directed at the PRIIP manufacturer (or issuer).

In contrast to the German Product Information Sheet, Article 8 of the PRIIP Regulation requires a standardised presentation of the Key Information Document.<sup>84</sup> As it supports comparison between different products, this requirement should be welcomed.<sup>85</sup>

*(ii) The Sense of National Governments Implementing Changes Ahead of Others*

The PRIIP Regulation follows a horizontal approach that applies in the same way to structured financial products and to financial products under MiFID II such as options, UCITS, open-end investment funds, and insurance products (such as unit-linked life insurance).

One might ask why the German legislature would introduce certain regulations in banking and capital markets law only a few months before the European legislature. The desire to export national provisions to the European level<sup>86</sup> does not seem really convincing, because the rules would not be in existence long enough to be adopted at the European level. Indeed, it was rather the reverse: the German legislature designed its approach around the European rules, which were in the draft stage. A more convincing argument is a sort of populism: the national legislature wanted to give the impression that it was reacting to the financial crisis and establishing rules to protect investors. In other words, the Bundestag does not just implement European law, but suggests to its citizens that it is independently creating legal solutions to respond to problems. This may be a clever political move, but it is less efficient from an economic perspective. It increases transaction costs for market participants, as within a short period they need to respond and adapt to different parameters.<sup>87</sup> Instead of pressing ahead with Section 31 (3a) of the *Securities Trading Act* (WpHG), the German legislature should have waited for the EU rules, which by that time had already been substantiated. As already demonstrated, the existing WpHG

<sup>84</sup> In contrast to Section 31 (3a) WpHG in conjunction with Section 5a WpDVerOV (*supra* note 59).

<sup>85</sup> For this type of criticism of Section 31 (3a) WpHG, see *J. Koch, Grenzen des informationsbasierten Anlegerschutzes — Die Gratwanderung zwischen angemessener Aufklärung und information overload*, BK R 2012, 485, 487 with further evidence.

<sup>86</sup> The Takeover Directive (*supra* note 10) provides a good example here. It is based on the City Code on Takeovers and Mergers (City Code) from London, see *H. Hirte/T. Heinrich*, in *H. Hirte/C. von Bülow*, eds., *Kölner Kommentar zum WpÜG*, 2d ed. 2010, Intro marginal note 72.

<sup>87</sup> For critical view, *Möllers/Wenninger, Öffentliche Stellungnahme als Sachverständiger vor dem Bundestag zum Regierungsentwurf eines Gesetzes zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung*. BT printed papers, 16/12814; for the *Small Investor Protection Act* (Kleinanlegerschutzgesetz) (*infra* note 190), see *T. Jesch/S. Siemko, Das Kleinanlegerschutzgesetz — Verbraucherschutz, schneller als MiFID II erlaubt?*, BB 2014, 2570.

Product Information Sheets do not comply with the provisions of the Key Information Documents promulgated by the Regulation.<sup>88</sup> As the Regulation is directly applicable, the German legislature needs to repeal the national provisions in the PRIIP area of applicability — namely provisions governing packaged products. It has effectively reduced German capital markets participants to guinea pigs, and caused high transaction costs.<sup>89</sup>

It is possible that the German legislature could restrict German Product Information Sheets to those financial instruments that are not covered by PRIIP in the future. This would be permissible, because the Regulation expressly allows<sup>90</sup> Member States to pass their own national rules for areas outside the scope of the Regulation — such as for simple equities.

### (iii) *Limits of Information Models*

Possibly, there is an editorial error in the final version: in the draft version, ESMA in the area of financial products and EIOPA in the area of insurance investment products, as well as national competent authorities, were able to issue prohibitions and restrictions.<sup>91</sup> In the final version, however, there is no legal basis that would allow ESMA or national competent authorities to issue rules for traditional financial products.<sup>92</sup>

Even EU information sheets cannot hide the fact that information-based investor protection has reached its inherent limits.<sup>93</sup> Simplified information sheets might have their uses for simple structured products like investment fund units.<sup>94</sup> But the regulation concept does not work for complex products: if the risks of such products cannot be explained sufficiently even in extensive advisory sessions, as was made clear in the facts of the *Zinswette* case,<sup>95</sup> then they certainly

<sup>88</sup> See *J. Seitz/A. Juhnke/S. Seibold*, PIBs, KIIDs und nun KIDs — Vorschlag der Europäischen Kommission für eine Verordnung über Basisinformationsblätter für Anlageprodukte im Rahmen der PRIPs-Initiative, BKR 2013, 1, 4, 7; also *P. Buck-Heeb*, Verhaltenspflichten beim Vertrieb, ZHR 177 (2013), 310, 316.

<sup>89</sup> See evidence in *supra* note 87.

<sup>90</sup> Recital 8 PRIIP regulation (*supra* note 70).

<sup>91</sup> Compare Art. 16 (1) and Art. 17 (1) PRIIP Regulation (*supra* note 70).

<sup>92</sup> The legal basis was still in the Proposal (*supra* note 69), but was then deleted. There is a reference to ESMA in Recital 25 of the PRIIP Regulation (*supra* note 70).

<sup>93</sup> See *J. Koch*, Grenzen des informationsbasierten Anlegerschutzes — Die Gratwanderung zwischen angemessener Aufklärung und information overload, BKR 2012, 485 ff.; previously, *J. Köndgen*, Grenzen des informationsbasierten Anlegerschutzes — also comment on BGH, judgement of 22.3.2011 Az. XI ZR 33/10, BKR 2011, 283 ff.; *idem*, Structured Products from the Perspective of Investor Protection: Can the Courts Police the Market or Do We Need More Regulation?, in *Festschrift K. Hopt*, 2010, at 2113, 2138 ff.

<sup>94</sup> See *F. Podewils*, Beipackzettel für Finanzprodukte — Verbesserte Anlegerinformation durch Informationsblätter und Key Investor Information Documents?, ZBB 2011, 169 ff.; *J. Köndgen*, Grenzen des informationsbasierten Anlegerschutzes — also comment on BGH, judgement of 22.3.2011, Az. XI ZR 33/10, BKR 2011, 283, 285.

cannot be summarised effectively on three DIN-A4 pages.<sup>96</sup> It remains to be seen how far the threat of fines and civil law claims for damages will raise the standard of care. It is more likely that investment firms will withdraw from this sector of business.

### 3. DEALING WITH CONFLICTS OF INTEREST: COMMISSION-BASED ADVICE VERSUS FEE-BASED ADVICE

#### (a) Previous Standard from MiFID I

##### (i) *Conflicts of Interests for Commission-Based Advice*

The wording of the Securities Investment Services Directive of 1993 had already stated that investment recommendations must be made in the “best interests” of clients.<sup>97</sup> These investment advice duties were given statutory force in MiFID I and the *MiFID Implementation Act* (FRUG).<sup>98</sup> In terms of a suitability assessment, the regulatory concept of providing investor-oriented advice differs from the simple explanation by way of provision of information in three ways: (1) Instead of abstract, standardised information, clients must be given all the information they need to be able to understand and evaluate the specific investment risks of the recommended financial product.<sup>99</sup> (2) The appropriateness assessment (Section 31 (4) sentence 2 of the *Securities Trading Act* (WpHG)) goes beyond the suitability assessment (Section 31 (3) of the

<sup>95</sup> BGH, judgement of 22.3.2011, Az. XI ZR 33/10, BGHZ 189, 13, 25 marginal note 29 — Zinswette.

<sup>96</sup> As required by Section 5a (1) sentence 1, 2. Alt. WpDVerOV (*supra* note 59); For a critical view see *J. Köndgen*, Grenzen des informationsbasierten Anlegerschutzes — also comment on BGH, judgement of 22.3.2011, Az. XI ZR 33/10, BKR 2011, 283, 285; on similar criticism of important investor information under the Investment Code (KAGB), see *T. Möllers*, NJW Editorial: Alleingang beim Anlegerschutz — das KAGB, NJW 2012, volume 52, I.

<sup>97</sup> See Art. 11 (1) sentence 4 (1) of the Securities Investment Services Directive (*supra* note 28). On this, see *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31 marginal note 172.

<sup>98</sup> *Act Implementing the Markets in Financial Instruments Directive and the Commission's Implementing Directive* (FRUG) of 16.7.2007, BGBl. I, at 1330.

<sup>99</sup> On the substantive duty to provide information under civil law, see *T. Möllers/T. Ganten*, Die Wohlverhaltensrichtlinie des BAWe im Lichte der neuen Fassung des WpHG — Eine kritische Bestandsaufnahme, ZGR 1998, 773, 788 f.; from the supervisory law perspective, the existence of a substantive duty to provide information is contested. In favour of this, see *A. Fuchs*, in A. Fuchs, ed., WpHG, 2009, § 31 marginal note 255; *D. Einsele*, Anlegerschutz durch Information und Beratung, JZ 2008, 477, 481 f.; also *P. Müllert*, Anlegerschutz bei Zertifikaten — Beratungspflichten, Offenlegungspflichten bei Interessenkonflikten und die Änderungen durch das Finanzmarkt-Richtlinie-Umsetzungsgesetz (FRUG), WM 2007, 1149, 1156; *R. Veil*, Vermögensverwaltung und Anlageberatung im neuen Wertpapierhandelsrecht — eine behutsame Reform der Wohlverhaltensregeln?, ZBB 2008, 34, 38 f.

*Securities Trading Act* (WpHG)) in that the appropriateness assessment of the investment product for the client must be based on the client's knowledge and experience and their financial risk tolerance.<sup>100</sup> (3) A personal recommendation for a certain financial product is to be made on this basis.<sup>101</sup> Therefore, in accordance with the provisions of the *Securities Trading Act* (WpHG), the investment advice must always be investor-centric. Asset management differs from investment advice in that, in the latter, it is the client who makes the investment decision independently.<sup>102</sup>

A recommendation is assessed as suitable under the provisions of MiFID I if the product meets the investment aims (length of investment, risk tolerance, purpose of investment)<sup>103</sup> and financial strength of the client, and the client is able to understand the risks.<sup>104</sup>

Giving investment advice is time- and cost-intensive, and investment advisers are subject to considerable commission pressure. It is not surprising that clients are often given recommendations for the product that generates the highest commission, though it is not necessarily the one that is most suitable for their needs.<sup>105</sup>

### (ii) *Stipulations of MiFID I Implementation Directive 2006/73*

The MiFID I Implementation Directive 2006/73<sup>106</sup> substantiates the general duty to avoid such conflicts of interest by generally outlawing inducements. This provision was implemented in Germany in Section 31 (1) No. 2 of the *Securities Trading Act* (WpHG).<sup>107</sup> Inducements<sup>108</sup> are only permissible if they allow or are necessary for the provision of investment services (Section 31d (5) WpHG), if the

<sup>100</sup> For extent of assessment, see Section 6 (1) No. 1 WpDVerOV (*supra* note 59).

<sup>101</sup> *F. Braun/V. Lang/A. Loy*, in J. Ellenberger/H. Schäfer/P. Clouth/V. Lang, eds., *Praktikerhandbuch Wertpapier- und Derivategeschäft*, 4th ed. 2011, marginal note 301.

<sup>102</sup> *R. Sethe*, *Anlegerschutz im Recht der Vermögensverwaltung*, 2005, at 26 f.; *T. Möllers*, *Vermögensbetreuungsvertrag, graue Vermögensverwaltung und Zweitberatung — Vertragstypen zwischen klassischer Anlageberatung und Vermögensverwaltung*, WM 2008, 93 ff.; *A. Fuchs*, in A. Fuchs, ed., WpHG, 2009, § 31 marginal note 244.

<sup>103</sup> See Section 6 (1) No. 2 WpDVerOV (*supra* note 59).

<sup>104</sup> *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31 marginal note 151; *A. Fuchs*, in A. Fuchs, ed., WpHG, 2009, § 31 marginal note 257 ff.

<sup>105</sup> *K. Uffmann*, *Fehlansätze in der Anlageberatung durch interne Vertriebsvorgaben*, JZ 2015, 282 ff.

<sup>106</sup> Art. 26 Implementation Directive 2006/73 (*supra* note 30).

<sup>107</sup> Section 31d (1) sentence 1 WpHG; see *T. Möllers*, in H. Hirte/T. Möllers, eds., *Kölnner Kommentar zum WpHG*, 2d ed. 2014, § 31d marginal note 4; *J. Koch*, in E. Schwark/D. Zimmer, *KMRK*, 4th ed. 2010, § 31d WpHG marginal note 2; *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, § 31d marginal note 4; *C. Herresthal*, *Die Grundlage und Reichweite von Aufklärungspflichten beim Eigenhandel mit Zertifikaten*, ZBB 2012, 89, 99.

<sup>108</sup> Includes commissions, other fees or other cash, and any non-cash benefits, Section 31d (2) WpHG.

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 would also be permissible if they enhance the quality of the service to the client, 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 No. 1, 2 WpHG).<sup>109</sup>

## (b) Solutions from the German legislature — Pressing Ahead Again

### (i) Kickbacks and Fee-Based Advice

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>110</sup> Parties involved in proprietary trading are not required to disclose trading margins.<sup>111</sup>

Although MiFID does not have to be implemented until 3 January 2017, the German legislature has already passed the *Fee-Based Investment Advice Act* (Honoraranlage-beratungsgesetz)<sup>112</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(4c) sentence 1 WpHG).<sup>113</sup>

<sup>109</sup> See *I. Koller*, in H.-D. Assmann/S. Schneider, eds., WpHG, 6th ed. 2012, 31d marginal note 27 ff.

<sup>110</sup> *H. Grigoleit*, Anlegerschutz, Produktinformation und Produktverbote, ZHR 177 (2013), 264, 291; previously, *M. Habersack*, Die Pflicht zur Aufklärung über Rückvergütungen und Innenprovisionen und ihre Grenzen, WM 2010, 1245, 1251; *P. Mülbert*, Anlegerschutz bei Zertifikaten — Beratungspflichten, Offenlegungspflichten bei Interessenkonflikten und die Änderungen durch das Finanzmarkt-Richtlinie-Umsetzungsgesetz (FRUG), WM 2007, 1149, 1160.

<sup>111</sup> BGH, judgement of 27.9.2011, Az. XI ZR 182/10, NJW 2012, 66 (guiding principle 5); BGH, judgement of 27.9.2011, Az. XI ZR 178/10, NJW-RR 2012, 43, 47 marginal note 47.

<sup>112</sup> See *infra* note 189; re Sections 31 (4b), (4c), Sections 33 (1) No. 3a, 36c, 36d WpHG, see *T. Möllers*, in H. Hirte/T. Möllers, eds., Kölner Kommentar zum WpHG, 2d ed. 2014, §§ 36c, 36d marginal note 1 ff.

<sup>113</sup> For another view on civil law duty, BGH, judgement of 19.12.2006, Az. XI ZR 56/05, BGHZ 170, 226, 233 marginal note 21 with comment, *T. Möllers/T. Wenninger*, BGH: Aufklärungspflichten der Bank über verdeckte Rückvergütungen (Retrozessionen/kick back-Provision) beim Vertrieb von Anteilen an Investmentfonds, LMK 2007, 220857.

**(ii) Investment Advice Minutes, Certificate of Competence, Registration Obligation, and Complaints Register**

The German legislature went further and also introduced investment advice minutes — Section 34 (2a) of the *Securities Trading Act* (WpHG).<sup>114</sup> The intention was to relieve some of the pressure on the Federal Financial Supervisory Authority (BaFin) in its supervision of investment services enterprises and to give clients evidence to allow them to pursue civil remedies if they were given incorrect advice.<sup>115</sup>

The German legislature went further than the MiFID provisions with the introduction of the *Investor Protection Improvement Act* (AnSFuG).<sup>116</sup> It substantiated the competence provisions for staff,<sup>117</sup> required registration with BaFin, and introduced a complaints register at BaFin (Section 34d WpHG).<sup>118</sup>

**(c) Numerous Changes to the Legislative Process: MiFID II Proposal, MiFID II, and the Planned Delegated Acts**

**(i) Introduction of Fee-Based Advice (Art. 24 (4) and (7) MiFID II)**

MiFID II was the first law at a European level to distinguish between independent and non-independent investment advice. Fee-based advice can be found in the United Kingdom,<sup>119</sup> the Netherlands, and the USA.<sup>120</sup> Traditional advice is usually given free of charge; the conflict of interest arises when the advisor recommends financial instruments issued or provided by the investment firm itself or receives kickbacks from a third party. Fee-based advice seeks to avoid exactly this problem. In the insurance industry, there are insurance brokers; fee-based advice means that the advisor receives the fee only from the customer and not from any third party. MiFID II requires advisors to disclose whether or not the advice is given on an independent basis.<sup>121</sup> Fee-based advice

<sup>114</sup> Section 34d (2a) WpHG, introduced by Art. 4 No. 4 SchVG (*infra* note 187).

<sup>115</sup> Government draft to SchVG of 29.4.2009, BT printed papers 16/12814, at 14, 27 f.; J.-U. Franck, *Unionsrechtliche Regulierung des Wertpapierhandels und mitgliedstaatliche Gestaltungsspielräume: Dokumentation der Anlageberatung als Paradigma*, BKR 2012, 1, 2.

<sup>116</sup> See *infra* note 188.

<sup>117</sup> Regulation relating to the use of employees in the provision of investment advice, as distribution officers or as compliance officers and to the reporting requirements pursuant to section 34d of the *Securities Trading Act* dated 21.12.2011, BGBl. I, at 3116, last amended by Art. 2 of Act dated 15.7.2003, BGBl. I, at 2390 (WpHG Employee Notification Regulation (WpHGMAAnzV)).

<sup>118</sup> See T. Möllers, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 34d marginal note 14 ff.

<sup>119</sup> Rules 6.2A.3, 6.2A.4A COBS, online: .

<sup>120</sup> D. Manzei, *Rechtsvergleichende Betrachtung von Verhaltensregeln für Wertpapierdienstleistungsunternehmen im Privatkundengeschäft unter deutschem wie US-amerikanischem Aufsichtsrecht*, WM 2009, 393, 396.

prohibits payment of fees by third parties<sup>122</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>123</sup>

*(ii) Prohibition of Commission-Based Advice — ESMA and the “Technical Advices”?*

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>124</sup> If Member States had taken up this option, it would have meant the end of commission-based advice. 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. The German Banking Federation fears that ESMA’s Technical Advices could tighten up provisions on permitted fees to such an extent that commission-based advice would become virtually impossible.<sup>125</sup>

ESMA’s Consultation Paper dated 22 May 2014 included a formulation of a prohibition on commissions.<sup>126</sup> After protests from business, this prohibition was significantly watered down in the Final Report dated 19 December 2014.<sup>127</sup> There will be no certainty on the matter until the Level II implementation provisions have been passed. ESMA’s Technical Advices also need to be approved by the Economic and Monetary Affairs Committee of the European Parliament before they become binding. The responsible parliamentarians have already indicated that they will fight the provision.<sup>128</sup> There is a bit of a war going on behind closed doors.

<sup>121</sup> Art. 24 (4) sentence 2 (a) (ii) MiFID II (*supra* note 33).

<sup>122</sup> Art. 24 (7) (b) MiFID II (*supra* note 33).

<sup>123</sup> Art. 24 (7) (a) MiFID II (*supra* note 33).

<sup>124</sup> 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 *T. Möllers/M. Poppele*, Paradigmenwechsel durch MiFID II: divergierende Anlegerleitbilder und neue Instrumentarien wie Qualitätskontrolle und Verbote, ZGR 2013, 437, 465, 471 f.

<sup>125</sup> See *Anon.*, Bankberatung könnte teuer werden, FAZ dated 21.3.2015, at 31.

<sup>126</sup> 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 (*supra* note 36).

<sup>127</sup> 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, at 141 ff., online: <[http://www.esma.europa.eu/system/files/2014-1569\\_final\\_report\\_-\\_esmas\\_technical\\_advice\\_to\\_the\\_commission\\_on\\_mifi-dii\\_and\\_mifir.pdf](http://www.esma.europa.eu/system/files/2014-1569_final_report_-_esmas_technical_advice_to_the_commission_on_mifi-dii_and_mifir.pdf)>.

*(iii) Striking Out Provisions On Sales Incentives*

The original intention of the MiFID II Proposal was that the remuneration structures involved should “not impede compliance with its [the advisor’s] obligation to act in the best interests of clients.”<sup>129</sup> With respect to provision of advice and sales to retail clients, the Proposal envisaged that the remuneration structures should not prejudice the ability of advisors to provide an objective recommendation and clear and understandable information.<sup>130</sup> Remuneration should not be largely dependent on targets for the sale or profitability of the recommended products.<sup>131</sup> In advising retail clients, the advisor’s performance assessment must also not provide an incentive for them to recommend a particular investment product when another product would better meet that client’s objectives.<sup>132</sup> Unfortunately, these provisions were deleted from the final version of MiFID II.

*(iv) Certificate of Competence and Monitoring by Compliance Officials, Suitability Report*

MiFID II requires investment firms to ensure that persons giving investment advice to clients have the necessary knowledge and competence to fulfil their duties and to publish the criteria used for assessing such knowledge and competence.<sup>133</sup> A compliance management body shall be responsible for a remuneration policy aimed at avoiding conflict of interest in client relationships (Art. 9 (3) (c) MiFID II).<sup>134</sup> Investment firms must also ensure that they do not remunerate or assess staff performance in a way that conflicts with their duty to act in the best interests of clients (Art. 24 (10) MiFID II).

MiFID II also states that, with recommendations for a package of services, each individual product and the overall product package should be suitable for the client.<sup>135</sup> A MiFID II suitability report should also inform the clients how the advice has been tailored to their own personal requirements.<sup>136</sup>

<sup>128</sup> Member of the EU Parliament Markus Ferber: see <<http://www.markus-ferber.de/verschiedenes/presse-aktuell-single-view/article/provisionsverbot-durch-die-hinter-tuer.html>> .

<sup>129</sup> Art. 24 (1b) sentence 1 MiFID II draft (EUP) (*supra* note 32).

<sup>130</sup> Art. 24 (1b) sentence 2 MiFID II draft (EUP) (*supra* note 32).

<sup>131</sup> Art. 24 (1b) sentence 3 (a) MiFID II draft (EUP) (*supra* note 32).

<sup>132</sup> Art. 24 (1b) sentence 3 (b) MiFID II draft (EUP) (*supra* note 32).

<sup>133</sup> Art. 25 (1) MiFID II (*supra* note 33).

<sup>134</sup> The proposal that, where there are contraventions, the management bodies should be subject to personal criminal and civil penalties, independent of the national legal system, was deleted: Art. 9 (8a) MiFID II draft (EUP) (*supra* note 32).

<sup>135</sup> Art. 25 (2) second para. MiFID II (*supra* note 33).

<sup>136</sup> Art. 25 (6) second para. MiFID II (*supra* note 33): “When providing investment advice, the investment firm shall, before the transaction is made, provide the client with a statement on suitability in a durable medium specifying the advice given and how that advice meets the preferences, objectives and other characteristics of the retail client.”

## (d) Evaluation: Pressing Ahead by the German Legislator Again

### (i) Conflict: Commission-Based Advice Versus Fee-Based Advice

German influence to retain the present forms of commission-based advice was impossible to ignore. The Proposal for MiFID II was toned down accordingly. However, there was an attempt to temper conflicts of interest by raising the competence certification requirements and evidencing the suitability of advice by providing documentation in the form of investment advice minutes. 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 about fee-based advice is that the classic conflict of interest of commission-based advice is no longer present. However, at €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 €50,000. This fact means that fee-based advice is effectively excluded for large sections of the population. Although fee-based advice has already been available in Germany for many years, it is not used much by investors.<sup>137</sup> In my opinion, it would be overly paternalistic to allow for only one form of advice — each has its own advantages and disadvantages. Therefore, as a first step, the legislature should permit other forms of advice in addition to commission-based and fee-based advice, and not just prohibit commission-based advice. Execution-only transactions, without any form of suitability or appropriateness assessment, are already allowed — Section 31 (7) of the *Securities Trading Act (WpHG)*.<sup>138</sup> Other models are already being developed in the USA — for example robo advice, or computer algorithms that replace traditional investment advice.<sup>139</sup> Such forms of investment advice can be offered much more cheaply. It would be helpful to include such alternative forms of advice in the laws by way of example, and doing so would encourage the development of alternative forms of advice. However, transparency for investors must remain the highest priority, so that they can clearly understand the

<sup>137</sup> For arguments in favour and against, see *T. Möllers*, in *H. Hirte/T. Möllers*, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, §§ 36c, 36d marginal note 9 ff.; *H. Grigoleit*, *Anlegerschutz, Produktinformation und Produktverbote*, ZHR 177 (2013), 264, 297; *M. Poppele*, *Kapitalmarktinvestmentsprodukte*, 2015, at 452.

<sup>138</sup> Based on Art. 19 (6) MiFID I (*supra* note 7); see also *A. Fuchs*, in *A. Fuchs*, ed., *WpHG*, 2009, § 31 marginal note 302 ff.; *T. Möllers*, in *H. Hirte/T. Möllers*, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 31 marginal note 394 ff.

<sup>139</sup> On “robo advice” offered in the USA by Betterment, Wealthfront, Jemstep, or Personal Capital see *G. Braunberger*, *Der Roboter als Anlageberater*, FAZ.net dated 12.6.2014, online: <faz.net/aktuell/finanzen/meine-finanzen/sparen-und-geld-anlegen/robo-advice-der-roboter-als-anlageberater-12969006.html>; *K. Bode*, *Empfohlen vom Computer*, *Die Zeit* dated 8.1.2015, at 26.

advantages and disadvantages of the various forms of advice and then decide on a certain form.

(ii) *Minimum Harmonisation and Stricter National Laws*

With the introduction of a compliance regulation to ensure strict separation of commission-based advice and fee-based advice (Section 33c (3a) WpHG),<sup>140</sup> a register of fee-based advisors (Section 36c WpHG), and protection of the professional title (Section 36d WpHG), the German legislature exceeds the provisions of MiFID II. This paper has already mentioned the issue of whether a national legislature may be allowed to pass stricter laws. Recital 5 of MiFID II refers only to “minimum standards” and, unlike the Transparency Directive,<sup>141</sup> does not specify a mandatory standard. Therefore, the presumption is raised that there is only a minimum standard of harmonisation and that stricter national laws may be permissible, and therefore that the stricter German laws may be permissible.<sup>142</sup> However, this again relativises the desired “level playing field”; instead, German financial market participants are subject to additional burdens. This also applies to the German desire to retain commission-based advice. The Commission quite evidently wished to make concessions to individual Member States.<sup>143</sup>

#### 4. INFLUENCE OF HARMONISED LAW ON NON-HARMONISED LAW: IMPLEMENTATION USING CIVIL LAW

Until now, the European legislature has introduced only a few civil law liabilities, namely for incorrect prospectuses,<sup>144</sup> for ratings,<sup>145</sup> and within the scope of the Transparency Directive.<sup>146</sup>

<sup>140</sup> Government draft BT Printed papers 17/122295, at 16.

<sup>141</sup> Compare Art. 3 Transparency Directive (*supra* note 21); also *R. Veil*, Europäische Kapitalmarktunion, Verordnungsgebung, Instrumente der europäischen Marktaufsicht und die Idee eines “Single Rulebook”, ZGR 2014, 544, 567, which — though without reasons — assumes full harmonisation by MiFID II.

<sup>142</sup> See already *T. Möllers*, in *H. Hirte/T. Möllers*, eds., Kölner Kommentar zum WpHG, 2d ed. 2014, §§ 36c, 36d marginal note 17 ff.

<sup>143</sup> For other examples of the Transparency Directive (*supra* note 21), see *R. Veil*, Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines “Single Rulebook”, ZGR 2014, 544, 570 ff.

<sup>144</sup> Re Art. 6 of the Prospectus Directive (*supra* note 6), see *T. Möllers/E. Steinberger*, Die BGH-Entscheidung zum Telekom-Prozess und das europäische Anlegerleitbild, NZG 2015, 329, 334.

<sup>145</sup> Re Art. 35a of the Rating Regulation (*supra* note 27), see *T. Möllers*, in *H. Hirte/T. Möllers*, eds., Kölner Kommentar zum WpHG, 2d ed. 2014, § 17 marginal note 29 ff.; *T. Möllers/C. Niedorf*, Regulation and Liability of Credit Rating Agencies, 11 ECFR 333, 346 (2014); *D. Einsele*, Kapitalmarktrecht und Privatrecht, JZ 2014, 703, 708 f.; *R. Veil/L. Teigelack*, in *R. Veil*, ed., Europäisches Kapitalmarktrecht, 2d ed. 2014, § 27 marginal note 73.

<sup>146</sup> Re Art. 37 of the Transparency Directive (*supra* note 21), see *T. Möllers*, Effizienz als

**(a) Civil Law Liability under MiFID I****(i) Different Standard of Civil Law Judicial Interpretation in Germany**

In Germany, there are some special statutory legal liabilities, such as for incorrect prospectuses,<sup>147</sup> ad-hoc notifications,<sup>148</sup> and incorrect offer documentation.<sup>149</sup> Could the duties of investment firms also be enforced by civil law liability? There was also fierce debate regarding to what extent the public regulatory law under MiFID I also carried civil law obligations at a European or national level, as such obligations would be enforceable with claims for damages.<sup>150</sup> There is an extensive body of civil law decisions on incorrect investment advice,<sup>151</sup> but these cases lead to curious results. In some areas, public law and civil law obligations run parallel,<sup>152</sup> but in some areas, civil law obligations are more onerous. An example of this situation is the interest-swap decision where the Federal Court of Justice (BGH) required that the advice and information about the investment risk provided to a client should ensure that the client then had the same level of knowledge and understanding of the transaction as the advising bank.<sup>153</sup> This decision was heavily criticised in academic literature.<sup>154</sup> It is not possible to provide such a level of advice in practice,

Mastab des Kapitalmarktrechts, AcP 208 (2008), 1, 28; S. Mock, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 37v marginal note 143.

<sup>147</sup> Sections 21, 22 of the *Securities Prospectus Act* (WpPG); see BGH, judgement of 12.7.1982, Az. II ZR 175/81, NJW 1982, 2823 — Beton- und Monierbau; BGH, judgement of 18.9.2012, Az. XI ZR 344/11, BGHZ 195, 1 — Wohnungsbaugesellschaft Leipzig West; BGH, decision of 21.10.2014, Az. XI ZB 12/12, NZG 2015, 20 — Telekom; on this, see T. Möllers/E. Steinberger, *Die BGH-Entscheidung zum Telekom-Prozess und das europäische Anlegerleitbild*, NZG 2015, 329 ff.

<sup>148</sup> For an overview of current grounds for liability and judgements, see in detail T. Möllers/F. Leisch, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, §§ 37b, c marginal note 1 ff.

<sup>149</sup> T. Möllers, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 12 marginal note 1 ff.; however, there has not yet been a decision made on Section 12 of the *Securities Acquisition and Takeover Act* (WpÜG).

<sup>150</sup> For current state of dispute, see W.-H. Roth, *Die "Lehman-Zertifikate"-Entscheidungen des BGH im Lichte des Unionsrechts*, ZBB 2012, 429, 436; C. Herresthal, *Die Grundlage und Reichweite von Aufklärungspflichten beim Eigenhandel mit Zertifikaten*, ZBB 2012, 89, 103; T. Möllers, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, § 31 marginal note 17 ff.

<sup>151</sup> This is now widespread. For evidence, see H. Edelmann, in H.-D. Assmann/R. Schütze, eds., *Handbuch des Kapitalanlagerechts*, 4th ed. 2015, §§ 3 f.

<sup>152</sup> See *supra* note 49.

<sup>153</sup> BGH, judgement of 22.3.2011, Az. XI ZR 33/10, BGHZ 189, 13, 25 marginal note 29 — Zinswette.

<sup>154</sup> S. Grundmann, *Wohlverhaltenspflichten, interessenkonfliktfreie Aufklärung und MiFID II — Jüngere höchstrichterliche Rechtsprechung und Reformschritte in Europa*, WM 2012, 1745, 1752; J. Köndgen, *Grenzen des informationsbasierten Anlegerschutzes*;

especially when the standard is not the state of knowledge of the individual advisor but of the bank that developed the products.<sup>155</sup> Conversely, the national civil law standard can also be lower, such as when the Federal Court of Justice declined to uphold the public law norm to protect the injured party within the meaning of Section 823 (2) of the *Civil Code* (BGB) and allow a civil law claim for damages.<sup>156</sup> Finally, there is one last deficiency: in Germany, various judgements lead in different directions, meaning that public law and civil law can be contradictory.<sup>157</sup>

(ii) *Different Protection Standards in Various Member States*

In contrast to the legal position in Germany, the Austrian Supreme Court of Justice (OGH) has upheld support for giving civil law effect to public law liabilities.<sup>158</sup> The same applies to the Supreme Court of Cassation in Italy.<sup>159</sup>

also comment on BGH, judgement of 22. 3. 2011 — Az. XI ZR 33/10, BKR 2011, 283: “*Man darf deshalb getrost unterstellen, dass nicht einmal jeder durchschnittlich befähigte Kundenberater zwischen Konstanz und Flensburg das kunstvolle Design dieser Produkte zur Gänze durchschaut hat.*” (Translation: “Therefore, one can confidently assume that not even the averagely qualified investment advisor across the length and breadth of this country has been able to understand the clever design of these products.”); C. Schmitt, Aktuelle Rechtsprechung zur Anlageberatung bei OTC-Derivaten, BB 2011, 2824, 2826; also L. Klöhn, comment on BGH, judgement of 22.3.2011-XI ZR 33/10, Schadensersatz wegen unzureichender Aufklärung über ein Zinsswap-Geschäft, ZIP 2011, 762, 763; for a critical view, see M. Lehmann, Zum Schadensersatz bei Beratungspflichtverletzungen der Bank im Zusammenhang mit Zinsswap-Verträgen, JZ 2011, 749, 750 ff.

<sup>155</sup> T. Möllers/M. Poppele, Paradigmenwechsel durch MiFID II: divergierende Anlegerleitbilder und neue Instrumentarien wie Qualitätskontrolle und Verbote, ZGR 2013, 437, 469 f.

<sup>156</sup> BGH, judgement of 22.6.2010, Az. VI ZR 212/09, BGHZ 186, 58 marginal note 26 ff. re Section 34a (1) sentence 1 WpHG; BGH, judgement of 19.2.2008, Az. XI ZR 170/07, BGHZ 175, 276 marginal note 18 with further evidence to Section 32 (1) No. 1 WpHG; BGH, judgement of 13.12.2011, Az. XI ZR 51/10, BGHZ 192, 90 marginal note 20 ff. — IKB on Section 20a WpHG.

<sup>157</sup> BaFin levied an administrative fine against Daimler AG due to late submission of ad hoc notification, but the Higher Regional Court (OLG) in Stuttgart found in favour of Daimler AG; see OLG Frankfurt, judgement of 12.2.2009, Az. 2 Ss-Owi 514/08, 2 Ss OWi 514/08, NJW 2009, 1520, and also OLG Stuttgart, judgement of 15.2.2007, Az. 901 Kap 1/06, NZG 2007, 352; on this, see T. Möllers, Der BGH, die BaFin und der EuGH: Ad-hoc-Publizität beim einvernehmlichen vorzeitigen Ausscheiden des Vorstandsvorsitzenden Jürgen Schrepp, NZG 2008, 330 ff.; T. Möllers/S. Seidenschwann, Anlegerfreundliche Auslegung des Insiderrechts durch den EuGH, Das Ende der Daimler/Schrepp-Odysee in Luxemburg, NJW 2012, 2762, 2764; M. Wundenberg, Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht, Möglichkeiten und Grenzen der Harmonisierung der kapitalmarktrechtlichen Informationshaftung, ZGR 2015, 124, 155.

<sup>158</sup> OGH, judgement of 20.4.2005, Az. 7 Ob 64/04v, ÖBA 2005, 721, 725; OGH, judgement of 20.1.2005, Az. 2 OB 236/04a, ÖBA 2009, 635, 640; Also, on market manipulation pursuant to Section 48a (1) of the *Stock Market Act* (BörseG), see OGH, judgement of 24.1.2013, Az. 8 Ob 104/12w, ÖBA 2913, 438/1922 under 6.2 with further evidence;

Sweden has a separate law that gives investors a claim for damages if they have been given incorrect investment advice.<sup>160</sup>

On top of this, there are differences in implementation of the laws. In Germany, after reforms, the *Capital Markets Model Case Act* (KapMuG) now allows for joint claims for damages to be made by a class of complainants after incorrect advice has been provided.<sup>161</sup> Consumer organisations have also been strengthened: acting as a sort of market watchman, they are supposed to draw attention to black sheep at an early stage and ensure that they no longer participate in the markets.<sup>162</sup>

### (iii) European Provisions under MiFID I and MiFID II

In a preliminary reference decision in a Spanish case, the Court of Justice of the European Union (CJEU) has decided that MiFID I does not require Member States to introduce corresponding civil law liability.<sup>163</sup> Therefore, it will not be possible to argue civil law sanctions *de lege lata* as a binding provision of European law.<sup>164</sup> But it has not yet been decided whether Member States *may* introduce civil law liability.<sup>165</sup>

OGH, judgement of 15.3.2012, Az. 6 Ob 28/12d, RIS-Justiz RS0127724 under 3.4; online: < <https://www.ris.bka.gv.at> > .

<sup>159</sup> Cass. Civ., judgement of 17.2.2009, n. 3773; Tribunale Salerno, judgement of 15.10.2009, in Giur. It. 2010, 1840 ff.; see also *A. Ferrone/S. Valente*, Against All Odds: Investor Protection in Italy and the Role of Courts, 13 EBOR 31, 33 (2012).

<sup>160</sup> *F. Walla*, The Swedish Capital Markets Law from a European Perspective, 22 EBLR 211, 218 f. (2011).

<sup>161</sup> *Act on Model Case Proceedings in Disputes under Capital Markets Law* (KapMuG) of 19.10.2012, BGBl. I, at 2182; on this, see B. Hess/F. Reuschle/B. Rimmelpacher, eds., *Kölner Kommentar zum KapMuG*, 2d ed. 2014; *T. Möllers/F. Leisch*, in H. Hirte/T. Möllers, eds., *Kölner Kommentar zum WpHG*, 2d ed. 2014, §§ 37b, 37c marginal note 523 ff. with further evidence.

<sup>162</sup> *Anon.*, “Marktwächter” für Finanzprodukte und digitale Dienste, FAZ dated 27.3.2015, at 25 and the *Small Investor Protection Act* (*infra* note 190).

<sup>163</sup> CJEU, judgement of 30.5.2013, Rs. C-604/11, ECLI: EU:C:2013:344 = NZG 2013, 786 ff. marginal note 57 — Genil 48 SL: “In the absence of EU legislation on the point, it is for the internal legal order of each Member State to determine the contractual consequences of non-compliance with those obligations, subject to observance of the principles of equivalence and effectiveness.”

<sup>164</sup> *M. Wundenberg*, Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht, Möglichkeiten und Grenzen der Harmonisierung der kapitalmarktrechtlichen Informationshaftung, ZGR 2015, 124, 135; in detail, *M. Poppele*, Kapitalmarktinvestmentprodukte (PRIP)-Horizontaler Privatanlegerschutz im Lichte der MiFID II, Augsburg 2015 (Diss.); also on MiFID I, see *A. Hellgardt*, Europäische Vorgaben für die Kapitalmarktinformationshaftung, AG 2012, 154, 165 ff.; *C. Seibt*, Europäische Finanzmarktregulierung zu Insiderrecht und Ad hoc-Publizität, ZHR 177 (2013), 388, 424 ff.

<sup>165</sup> On this, see *T. Möllers/M. Poppele*, Paradigmenwechsel durch MiFID II: divergierende

**(b) Extra-Judicial Settlements and Civil Law Liability After MiFID II and PRIIP Regulation**

During the legislative process of MiFID II, civil law claims for damages were discussed by the Commission<sup>166</sup> and by the Parliament, and civil law liability for Board Members was to be mandatory.<sup>167</sup> However, once again this version was watered down. The final version refers only to “compensation” or “other remedial action”, without specifying to whom this refers.<sup>168</sup> Nevertheless, the Directive does specify mandatory extra-judicial mechanisms for settling consumer complaints (Article 75), and consumer organisations may take action to ensure compliance with provisions (Article 74 (2) (b)).

The PRIIP Regulation requires Member States to set up complaint procedures (Art. 19 (a)). The Regulation is of particular interest from a legal theory perspective because, exceptionally, it formalises civil law claims for damages at the European level. Contraventions of prescriptions (uniform format, understandable language and content)<sup>169</sup> would be sanctioned with a claim for damages by the retail investor against the product manufacturer.<sup>170</sup> The original Proposal envisaged liability if the Key Information Document was not succinct, comprehensible, or clear within the meaning of Article 6. It also contained a burden of proof in favour of the investor. If the investor could prove that a loss had been incurred due to reliance on the information provided, the burden of proof would be on the product manufacturer to show that the information sheet complied with statutory requirements.<sup>171</sup> Interested organisations complained

Anlegerleitbilder und neue Instrumentarien wie Qualitätskontrolle und Verbote, ZGR 2013, 437, 469.

<sup>166</sup> Public Consultation, Review of the Markets in Financial Instruments Directive (MiFID) of 8.12.2010, No. 7.2.6, at 63: “Introducing a principle of civil liability of investment services providers would be essential for ensuring an equal level of investor protection in the EU.” Online: <[http://ec.europa.eu/internal\\_market/consultations/docs/2010/mifid/consultation\\_paper\\_en.pdf](http://ec.europa.eu/internal_market/consultations/docs/2010/mifid/consultation_paper_en.pdf)>.

<sup>167</sup> Art. 9 (8a) MiFID II draft (EUP) (*supra* note 32) states: “Without prejudice to the legal systems of the Member States, Member States shall ensure that where it is alleged that a member of the management board has breached the provisions of or has committed an offence in relation to matters falling within the scope of this Directive or of Regulation (EU) No .../... [MiFIR], he may be personally subject to criminal *and civil proceedings*” (emphasized by the author).

<sup>168</sup> Art. 69 (2) para. 3 MiFID II (*supra* note 33) states: “Member States shall ensure that mechanisms are in place to ensure that compensation may be paid or other remedial action be taken in accordance with national law for any financial loss or damage suffered as a result of an infringement of this Directive or of Regulation (EU) No 600/2014.”

<sup>169</sup> Art. 8 PRIIP Regulation (*supra* note 70).

<sup>170</sup> Art. 11 (1) PRIIP Regulation (*supra* note 70).

<sup>171</sup> Art. 11 (2), (3) Proposal for PRIIP Regulation (*supra* note 69); contraventions should also be sanctioned by supervisors — see Arts. 15 ff. Proposal for PRIIP Regulation (*supra* note 69); on this, see *M. Gruber, PRIIP-Verordnung ante portas*, ZFR 2012, 311, 313; *J. Seitz/A. Juhnke/S. Seibold, PIBs, KIIDs und nun KIDs* — Vorschlag der

that this would extend liability because the terms “succinct, comprehensible, or clear” were too vague. In addition, national laws did not contain any provisions easing the burden of proof in favour of investors in this form. It is clear that these two objections were taken into account, and the provisions are no longer to be found in the current version. The provisions to ease the burden of proof and the reference to Article 6 were deleted. Liability arises only if the Key Information Document is misleading or incorrect, or if it contradicts the provisions of Article 8.<sup>172</sup> In addition, “loss” is defined in accordance with national law or private international law. Finally, stricter national provisions are permissible (Article 11 (4)).

### (c) Evaluation

#### (i) *Extra-Judicial Settlement and Liability*

Extra-judicial settlement, which is included in both MiFID II and in the PRIIP Regulation, is innovative<sup>173</sup> and has already been successful in Germany with institutions such as the Banking Ombudsman.<sup>174</sup> But agreeing to settle disputes extra-judicially in this manner goes far beyond the voluntary extra-judicial settlement in the European Directive.<sup>175</sup>

The innovative aspect is that liability is introduced for the first time to the area of providing information and advice. This innovation is to be welcomed. However, the formulation of the constituent elements is already fixed where they refer to the law of Member States.<sup>176</sup> This means that ESMA or EIOPA would

Europäischen Kommission für eine Verordnung über Basisinformationsblätter für Anlageprodukte im Rahmen der PRIPs-Initiative, BKR 2013, 1, 6 f.

<sup>172</sup> See *supra* note 73 f.

<sup>173</sup> Positive evaluation also in *N. Moloney*, *EU Securities and Financial Markets Regulation*, 3d ed. 2014, IV.11.6.2, at 415.

<sup>174</sup> On the basis in European law under Art. 10 of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ. L. 43, 14.2.1997, pp. 25-27; see *T. Höche*, in *H. Schimansky/H.-J. Bunte/H.-J. Lwowski*, eds., *Bankrechtshandbuch*, 4th ed. 2011, § 3 marginal note 9 ff.

<sup>175</sup> At present, participation is only seen as voluntary, see Art. 1 of Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending regulation (EC) No 2006/2004 and Directive 2009/22/EC (Alternative Dispute Resolution Directive), OJ. L. 165, 18.6.2013, pp. 63-79 (ADR Directive); see also Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Umsetzung der Richtlinie über alternative Streitbeilegung in Verbraucherangelegenheiten und zur Durchführung der Verordnung über Online-Streitbeilegung in Verbraucherangelegenheiten (Draft law of the Federal Ministry of Justice and Consumer Protection to implement the Alternative Dispute Resolution Directive and to implement the Regulation on Online Dispute Resolution) dated 10.11.2014. Online: <www.bmjv.de> .

<sup>176</sup> On the lack of substantiation competence of the European Union in such reference clauses, see *T. Möllers*, *Vollharmonisierung im Kapitalmarktrecht — Zur Regelungs-*

not have any competence to further substantiate the liability requirements. Nevertheless, the European regulators may still be able to draw up comparative legal models on liability.

*(ii) Liability under MiFID II and the Necessary Harmonisation of Civil Law Liability — European Antitrust Laws as a Model*

The power of the competent authority to impose remedies can only be seen as traces of civil law liability that can still be found in MiFID II.<sup>177</sup> Some argue the view that a harmonisation of civil law liability would be absurd, as this would transform the Court of Justice of the European Union (CJEU) into a sort of super court of appeal that would have to make decisions on all sorts of civil law disputes.<sup>178</sup> Others demand that the different public law sanction systems of Member States must be brought more into line with each other before a harmonization of civil law liability could be introduced successfully.<sup>179</sup> There are also fears that the introduction of civil law liability could lead to Anglo-American legal conditions with an excessive litigation industry.<sup>180</sup> However, the argument about a super court of appeal has been deflated by a decision of the CJEU. The Court has handed down many judgements in recent years in the areas of standard terms and conditions or unfair competition. Originally, the CJEU demanded a power of final substantiation,<sup>181</sup> but in later cases it only claimed the right to develop “general criteria,” with the application of these criteria being left up to national courts.<sup>182</sup> Lastly, experience in Germany with civil liability claims for incorrect advice has not yet resulted in an uncontrolled flood of legal claims.

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kompetenz nationaler Gerichte und Parlamente, in B. Gsell/C. Herresthal, eds., *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, 2009, at 247, 249.

<sup>177</sup> Arguing against liability in excess of the current status quo, see *M. Wundenberg*, *Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht, Möglichkeiten und Grenzen der Harmonisierung der kapitalmarktrechtlichen Informationshaftung*, ZGR 2015, 124, 133; but, more positively, *N. Moloney*, *EU Securities and Financial Markets Regulation*, 3d ed. 2014, IV.11.6.2., at 415.

<sup>178</sup> *H. Grigoleit*, *Anlegerschutz, Produktinformation und Produktverbote*, ZHR 177 (2013), 264, 273.

<sup>179</sup> *M. Wundenberg*, *Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht, Möglichkeiten und Grenzen der Harmonisierung der kapitalmarktrechtlichen Informationshaftung*, ZGR 2015, 124, 154.

<sup>180</sup> *N. Moloney*, *EU Securities and Financial Markets Regulation*, 3d ed. 2014, XI.4.1.3, at 968.

<sup>181</sup> CJEU, judgement of 27.6.2000, joined cases Rs. C-240/98 to C-244/98, ECLI:EU:C:2000:346 = Slg. 2000, I-4941 marginal note 24 — *Océano*.

<sup>182</sup> CJEU, judgement of 1.4.2004, Rs. C-237/02, ECLI:EU:C:2004:209 = Slg. 2004, I-3403 marginal note 23 — *Freiburger Kommunalbauten*; CJEU, judgement of 26.4.2012, Rs. C-472/10, ECLI:EU:C:2012:242 = *EuZW* 2012, 786 marginal note 22 — *Invitel*; CJEU, judgement of 14.3.2013, Rs. C-415/11, ECLI:EU:C:2013:164 = *EuZW* 2013, 464 marginal note 34 — *Aziz*.

## 5. CONCLUSIONS AND OUTLOOK

### (a) Relationship between European and National Laws

#### (i) *Minimum and Maximum Harmonisation*

On the one hand, we have seen that the European legislature has been extremely active. On the other hand, the obligation to implement directives into national law has the disadvantage that the search for applicable national provisions based on European law is usually made very difficult.<sup>183</sup> But there are also advantages: as demonstrated by the discussion on the permissibility of commission-based advice, it is often impossible to take account of national peculiarities. For this reason, the approach taken at the European level is minimum harmonisation, in order to preserve the individual approaches taken by Member States.<sup>184</sup> Today, it often seems to be a matter of chance or political wrangling whether, as a directive is being drawn up, provisions will be implemented on the basis of minimum harmonisation or maximum harmonisation. There can be no doubt that there is a need for deeper theoretical discussion as to when competition between different legal forms delivers a better result and when harmonised uniform European law is preferable.<sup>185</sup> If the legislature has nothing to say on the matter, each individual provision should be examined to see if it is binding or if it permits stricter national provisions.<sup>186</sup> In order to avoid these extensive assessments, the European legislature should clearly state its position and say with respect to directives when minimum harmonisation applies and when a binding maximum harmonisation is intended.

<sup>183</sup> An overview of the different national laws can be found in *R. Veil*, ed., *Europäisches Kapitalmarktrecht*, 2d ed. 2014, Annex, at 687 ff.; For unfair competition, see the studies of *T. Möllers/A. Heinemann*, *The Enforcement of Competition Law in Europe*, 2007; *A. Foer/J. Cuneo*, eds., *The International Handbook on Private Enforcement of Competition Law*, 2010.

<sup>184</sup> Generally, see also *R. Veil*, *Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines "Single Rulebook"*, *ZGR* 2014, 544, 568 f.

<sup>185</sup> The combination of both is in part seen as a possible solution: see *M. Wundenberg*, *Perspektiven der privaten Rechtsdurchsetzung im europäischen Kapitalmarktrecht, Möglichkeiten und Grenzen der Harmonisierung der kapitalmarktrechtlichen Informationshaftung*, *ZGR* 2015, 124, 152; *H. Fleischer/K. Schmolke*, *Die Reform der Transparenzrichtlinie: Mindest- oder Vollharmonisierung der kapitalmarktrechtlichen Beteiligungspublizität?*, *NZG* 2010, 1241, 1248; *R. Veil*, *Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines "Single Rulebook"*, *ZGR* 2014, 544, 565.

<sup>186</sup> *T. Buchmann*, *Umsetzung vollharmonisierter Richtlinien*, 2008, at 66 ff.; *T. Möllers*, *Vollharmonisierung im Kapitalmarktrecht — Zur Regelungskompetenz nationaler Gerichte und Parlamente*, in *B. Gsell/C. Herresthal* eds., *Vollharmonisierung im Privatrecht, Die Konzeption der Richtlinie am Scheideweg?*, 2009, at 247 ff.

(ii) *German Legislature Pressing Ahead with Changes*

Although MiFID II does not have to be implemented by Member States until 3 January 2017, the German government has already implemented some of the measures. Some of the legislative measures introduced in Germany and worthy of mention are the *Debt Securities Act (SchVG)*,<sup>187</sup> which introduced investment advice minutes; the *Investor Protection and Capital Markets Improvement Act (AnSFuG)*,<sup>188</sup> which introduced information sheets and a registration obligation; the *Fee-Based Investment Advice Act (Honoraranlageberatungsgesetz)*,<sup>189</sup> which introduced the provisions on fee-based remuneration; and now the *Small Investor Protection Act (Kleinanlegerschutzgesetz)*,<sup>190</sup> which seeks to close gaps in grey areas after the Prokon affair. Should this pressing ahead by a national legislature be regarded in a positive light, or does it have more disadvantages than advantages? The disadvantages have been shown to outweigh the advantages. Misusing citizens and market participants as guinea pigs and landing them with high costs just serves to weaken competition in the national economy.

(iii) *Civil Law Liability in Capital Markets Law*

We are still at the genesis of a system of civil law liability in capital markets law. In the discussion above, we have shown two different approaches to civil law liability in MiFID II and the PRIIP Regulation. Whilst MiFID II almost totally avoids liability, the PRIIP Regulation introduces such a liability. A uniform European approach to liability is desirable *de lege ferenda*, as it is the only way to create a joint level playing field. Antitrust law has had experience with public law sanctions for breaches of the law by companies since 1958. In contrast to MiFID I, the Court of Justice of the European Union (CJEU) has called for civil law liability,<sup>191</sup> and this is now being implemented by the European legislature.<sup>192</sup>

<sup>187</sup> *Act on Debt Securities (SchVG)* of 31.7.2009, BGBl. I, at 2512.

<sup>188</sup> *Act to Increase Investor Protection and Improve the Functioning of the Capital Markets (AnSFuG)* of 5.4.2011, BGBl. I, at 538.

<sup>189</sup> *Fee-Based Investment Advice Act (Honoraranlageberatungsgesetz)* of 15.7.2013, BGBl. I, at 2390.

<sup>190</sup> *Small Investor Protection Act (Kleinanlegerschutzgesetz)* of 3.7.2015, BGBl. I, at 1114; *T. Möllers/S. Kastl, Das Kleinanlegerschutzgesetz*, NZG 2015, 849 ff.

<sup>191</sup> CJEU, judgement of 20.9.2001, Rs. C-453/99, ECLI:EU:C:2001:465 = Slg. 2001, I-6314, 6324 marginal note 30 — Courtage/Crehan; CJEU, judgement of 13.7.2006, Rs. C-295/04 — C-298/04, ECLI:EU:C:2006:461 = Slg. 2006, I-6641, 6670 marginal note 94 f. — Manfredi.

<sup>192</sup> 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 and of the European Union, OJ. L. 349, 5.12.2014, at pp. 1-19; on the proposal, see *T. Möllers, Private Enforcement of Competition Law in Europe — The Directive Proposal for Damages For Infringements of Competition Law Provisions*, 3 *Europa e diritto privato* 2014, 822-846.

European antitrust law can provide useful experience here in order to steer legal considerations into a sensible direction. The interplay between the application of public law and civil law needs to be better determined in advance, by introducing a mandatory effect of supervisors' decisions with respect to civil law complainants. This situation already applies in antitrust law at national and European levels (Section 33 (4) of the *Act Against Restraints of Competition (GWB)*).<sup>193</sup> The Directive on liability law also harmonises the definition of loss and questions of causality.<sup>194</sup>

## (b) Good Legislative Practice at the European Level — Horizontal Harmonisation

### (i) Advantages of Regulations

In the area of capital markets law, the European legislature is increasingly passing statutes in the form of regulations. Pursuant to Article 288 (2) of the Treaty on the Functioning of the European Union (TFEU), these regulations are directly applicable, unlike legislation passed in the legal form of a directive. Therefore, regulations can now be categorised both at the first level of the Lamfalussy Process and at the second level. First or second level regulations include the Rating Regulation,<sup>195</sup> the Market Abuse Regulation,<sup>196</sup> and the Prospectus Regulation.<sup>197</sup> The advantage of this approach is that the same rules are applicable across the whole of the EU, thus increasing the level of harmonisation. However, this level of harmonisation is not really evident in practice.<sup>198</sup> Users applying national rules have to assimilate the texts of the regulations and ESMA guidelines and leave their national regulations to one side. Even if ESMA guidelines have now been translated into the official languages,<sup>199</sup> it is helpful to be able to use English as the working language.

<sup>193</sup> See the Commission's statement on the occasion of publishing the fine decision dated 19.10.2011, IP/11/1214; CRT-Glas, online: <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1214&format=HTML&aged=0&language=DE&guiLanguage=en>>; T. Möllers/B. Pregler, Civil Law Enforcement and Collective Redress in Economic Law, 2 Europa e diritto privato 2013, 27, 39.

<sup>194</sup> Arts. 3, 5 and 17 of Directive 2014/104/EU on certain provisions under national law (*supra* note 192); T. Möllers, Private Enforcement of Competition Law in Europe — The Directive Proposal for Damages For Infringements of Competition Law Provisions, 3 Europa e diritto privato 2014, 822, 826 f.

<sup>195</sup> First level regulation, *supra* note 27.

<sup>196</sup> First level regulation, *supra* note 19.

<sup>197</sup> Second level regulation, *supra* note 18.

<sup>198</sup> See M. Lutter, Die Auslegung angeglichenen Rechts, JZ 1992, 593, 604; T. Möllers, Die Rolle des Rechts im Rahmen der europäischen Integration, 1999, at 74 ff.; H. Kötz, Der Bundesgerichtshof und die Rechtsvergleichung, in FG 50 Jahre BGH, Bd. 2, 2000, at 825, 831; H. Rösler, Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts, 2012, at 437 ff.; B. Gsell, Zivilrechtsanwendung im Europäischen Mehrebenensystem, AcP 214 (2014), 99, 141 ff.

because not all documents are available in all languages. It would be useful to have a source of academic (secondary) literature that could be accepted and applied across Europe. This could be in the form of traditional treatises, or in the German form of commentaries. Or — more likely — there is a fear that the intensive stream of regulations from ESMA will make traditional academic literature redundant.<sup>200</sup> Another option could be databanks to create a central correlation of laws and judicial decisions, and to also provide translations.<sup>201</sup> Such a databank, which includes various judicial decisions, already exists for the CISG<sup>202</sup> under the UN Sale of Goods law.<sup>203</sup>

(ii) *National Laws Becoming Less Important in Capital Markets Law*

A shocking and novel experience for German lawyers has been that more and more elements of this codification are effectively making German capital markets law redundant, because in future it is the European regulations that will be directly applicable in law instead of German legal provisions.<sup>204</sup> German lawyers learn about law by studying the *Civil Code* (BGB), and they are trained with the terminological and systemic clarity of nineteenth-century pandectic science.<sup>205</sup> German laws in the area of capital markets law, such as the *Securities Trading Act* (WpHG), the *Securities Acquisition and Takeover Act* (WpÜG), and the *Securities Prospectus Act* (WpPG), are structured into a systematic unit that comprises a unified set of rules and regulations. Another example of this highly crafted systematic codification is the *Investment Code* (KAGB),<sup>206</sup> which implemented the UCITS IV Directive and the AIFM Directive.

<sup>199</sup> R. Veil, *Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines "Single Rulebook"*, ZGR 2014, 544, 595.

<sup>200</sup> R. Kiem, Book Review: H.-D. Assmann/ U. Schneider, eds., *Wertpapierhandelsgesetz, Kommentar*, 6th ed. in ZHR 176 (2012) 456, 461; following him, P. Mülberr, *Regulierungstsunami im europäischen Kapitalmarktrecht*, ZHR 176 (2012), 369, 379.

<sup>201</sup> See the databank on European capital markets law (*supra* note 42); see also the suggestion of N. Moloney, *EU Securities and Financial Markets Regulation*, 3d ed. 2014, XI.4.1.3, at 969 f.

<sup>202</sup> United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG).

<sup>203</sup> For the CISG, see in general <<http://www.cisg.law.pace.edu>>; <<http://www.cisg-online.ch>> (Switzerland); <<http://www.uc3m.es/cisg>> (Spain); <<http://www.cisg.at>> (Austria).

<sup>204</sup> Applies for the Market Abuse Regulation (*supra* note 19) and the PRIIP Regulation (*supra* note 70).

<sup>205</sup> Of note are A. Thibaut, *System des Pandektenrechts*, 3 volumes, 5th ed. 1818; G.F. Puchta, *Pandekten*, 5th ed. 1850; B. Windscheid, *Lehrbuch des Pandektenrechts*, 7th edn. 1891; H. Dernburg, *Pandekten*, 3 volumes, 4th ed. 1894; F. Regelsberger, *Pandekten*, 1 volume 1893; R. Zimmermann, in *Historisch-kritischer Kommentar zum BGB (HKK)*, 2003, before § 1 marginal note 6 ff.

<sup>206</sup> T. Möllers, NJW Editorial: *Alleingang beim Anlegerschutz — das KAGB*, NJW 2012, vol. 52, I; T. Möllers/A. Kloyer, eds., *Kapitalanlagegesetzbuch*, 2013.

(iii) *Pandectics of the Nineteenth Century: Inner and Outer Systems of European Regulations in Capital Markets Law*

In recent years, the European legislature has been trying to merge and systematise its directives, but further linguistic and systematic precision is still required. From a systemic perspective, notification requirements under the Market Abuse Directive and Transparency Directive can be aligned, as has been implemented in France and Spain.<sup>207</sup> The rules on financial analysis do not fit under market abuse, and would be better housed in a finance and rating regulation.<sup>208</sup> Above, we have seen that sanctions under the PRIIP Regulation apply not only for EIOPA but also for ESMA.<sup>209</sup> As demonstrated, the mix of sanctions on the legal consequences side is less consistent, and further action is required in this area.<sup>210</sup>

The EBA already has a Single Rulebook,<sup>211</sup> but it contains only the individual directives. ESMA is working on a uniform European Single Rulebook for Capital Markets<sup>212</sup> in line with English models.<sup>213</sup> But will this satisfy the requirements of German lawyers, who are trained in the inner and outer systems of codification? The outer system comprises the formal structure of a statute, the classification of the statute, and the development of regulations. The inner system refers to the logical lack of contradictions and teleological consistency, and references a consistent system of value judgements.<sup>214</sup> It would be desirable to have rules that are consistent, that allow for systematic interpretation, that

<sup>207</sup> On this, see *M. Wundenberg*, in *R. Veil*, ed., *Europäisches Kapitalmarktrecht*, 2d ed. 2014, § 32 marginal note 18; *P. Koch*, in *R. Veil*, ed., *Europäisches Kapitalmarktrecht*, 2d ed. 2014, § 19 marginal note 4 ff.

<sup>208</sup> On this, see *M. Wundenberg*, in *R. Veil*, ed., *Europäisches Kapitalmarktrecht*, 2d ed. 2014, § 32 marginal note 18; *R. Veil*, *Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines "Single Rulebook"*, *ZGR* 2014, 544, 575.

<sup>209</sup> See above, Part 2(d)(iii).

<sup>210</sup> Just as clear under reporter *Edgardo Maria Iozia* (*supra* note 45) under 3.12.

<sup>211</sup> *EBA*, The Single Rulebook, online: <<https://www.eba.europa.eu/regulation-and-policy/single-rulebook/interactive-single-rulebook/-/interactive-single>> .

<sup>212</sup> See *ESMA*, <<https://www.wko.at/Content.Node/branchen/oe/BankVersicherung/Chamber-of-Commerce-FMA.pdf>> . On this, see *R. Veil*, *Zeitenwende in der Kapitalmarktgesetzgebung, Europäisierung von Recht und Aufsicht*, in *FS Hommelhoff*, 2012, 1263 ff; *C. Gerner-Beuerle*, *United in Diversity: maximum versus minimum harmonization in EU securities regulation*, 7 *CMLJ* 317 ff. (2012).

<sup>213</sup> On previous FSA Handbook of the UK *Financial Service Authority*, see online: <<http://www.fsa.gov.uk/handbook>> . The FSA Handbook was replaced by the *Financial Conduct Authority (FCA)*, *Financial Conduct Authority Handbook*, online: <<https://fshandbook.info/FS/html/FCA/>> .

<sup>214</sup> See *P. Heck*, *Begriffsbildung und Interessenjurisprudenz*, 1932, at 139, 142 ff.; *K. Engisch*, *Die Einheit der Rechtsordnung*, 1935, at 2 f.; *id.*, *Sinn und Tragweite juristischer Systematik*, in *Studium generale*, 10. Jhg. 1957, at 173 ff.; *C.-W. Canaris*, *Systemdenken und Systembegriff in der Jurisprudenz*, 2d ed. 1983, at 19 ff. Followed by *U. Karpen*, *Zum*

permit gaps in legal and methodical analysis to be filled by individual analogy, and in an ideal world that also have room for general principles.

*(iv) Three Steps to Good Legislative Practice*

MiFID II is a directive, while MiFIR and the PRIIP Regulation are directly applicable regulations. It still seems to be a matter of chance whether the legal form chosen for a new law is a directive or a regulation.<sup>215</sup> Academic literature sometimes explains this selection on the temperament of the responsible department in the Commission.<sup>216</sup> Some seem to favour directives, in order to take account of the principle of subsidiarity.<sup>217</sup> Others favour regulations, in order to pass effective statutes.<sup>218</sup> This lack of clarity cannot be sufficient, and there should be clarification from a legal and methodological perspective as to how and when the decision is made between a regulation and a directive. Three considerations are possible here.

Due to the principle of limited competence pursuant to Article 5 (2) of the Treaty on European Union (TEU), the European legislature must first establish the basis of competence. In passing European capital markets laws, the legislature bases its authority on Article 50 (2)(g), Article 53 (1), and Article 114 of the Treaty on the Functioning of the European Union (TFEU), although full harmonisation is only uncontested with respect to provisions harmonising the single market pursuant to Article 114 TFEU.

The current form of the subsidiarity principle is in itself not sufficient to favour the legal form of the directive. In the opinion of the Court of Justice of the European Union (CJEU), the European legislature often enjoys a wide discretion in passing European laws.<sup>219</sup> Therefore, content issues concerning the circumstances of the subsidiarity principle are decisive. A regulation is preferable if there is no need for Member States to implement stricter rules. Or, put another way: so long as numerous minimum harmonisation clauses take account of special circumstances in individual Member States, the legal form

gegenwärtigen Stand der Gesetzgebungslehre in der Bundesrepublik Deutschland, ZG 1986, 5, 31; E. Kramer, *Juristische Methodenlehre*, 4th ed. 2013, at 93 ff.

<sup>215</sup> See U. Schneider, *Die Vertreibung aus dem Paradies — oder auf dem Weg ins kapitalmarktrechtliche Arkadien?*, AG 2012, 823, 824.

<sup>216</sup> P. Mühlert, *Regulierungstsunami im europäischen Kapitalmarktrecht*, ZHR 176 (2012), 369, 374.

<sup>217</sup> W. Kahl, in C. Callies/M. Ruffert, eds., *EUV/AEU*, 4th ed. 2011, Art. 114 marginal note 27.

<sup>218</sup> R. Veil, *Europäische Kapitalmarktunion, Verordnungsgesetzgebung, Instrumente der europäischen Marktaufsicht und die Idee eines "Single Rulebook"*, ZGR 2014, 544, 568.

<sup>219</sup> See CJEU, judgement of 14.12.2004, Rs. C-210/03, ECLI:EU:C:2004:802 = Slg. 2004, I-11893 marginal note 46 ff. — *Swedish Match*; CJEU, judgement of 6.12.2005, Rs. C-66/04, ECLI:EU:C:2005:743 = Slg. 2005, I-10553 marginal note 45 — *United Kingdom/Parliament and Council*; W. Kahl, in C. Callies/M. Ruffert, eds., *EUV/AEU*, 4th ed. 2011, Art. 114 marginal note 59.

should remain the directive. However, this does not exclude allowing alternative solutions within the form of a regulation. Conceivable would be a third MiFID round passed as a regulation to MiFIR III that at the same time allowed fee-based advice and commission-based advice. This model works for the European company (*Societas Europaea* — SE), which itself allows for both one-tier and two-tier systems.<sup>220</sup>

It has been argued above that national legislatures passing laws in advance of European laws creates higher transaction costs.<sup>221</sup> This applies even more so at the European level — more extensive use should be made of cost-benefit analyses.<sup>222</sup> Sets of rules that have a systematic basis would be an important step to reduce exaggerated complexity. Regulations require a certain systematic maturity. Notably, the PRIIP Regulation has a horizontal approach to regulation and includes both financial and insurance products. Whether it will be possible to create a systematic, coherent set of rules remains to be seen.<sup>223</sup>

## 6. SUMMARY

European and national capital markets law is fast-paced and now being structured by Lamfalussy and de Larosière Processes to three relevant legal European levels and three relevant national levels (including framework act, implementation act, supervisory authority action).

This double complexity is extended by four special features that result from the relationship between European and national laws: the problem of minimum and maximum harmonisation; national legislatures pressing ahead with passing laws; the relationship between directives and directly applicable regulations; and the influence of European law on non-harmonised areas of law. Three areas of regulation in MiFID II are supposed to stress these problems.

The PRIIP Regulation provides for the Key Information Document. The Product Information Sheet introduced in advance in Germany differs from the European stipulations in several points. Therefore, national provisions in advance make little sense.

<sup>220</sup> Arts. 38-60 of Regulation (EG) No 2157/2001 of the Council dated 8.10.2001 on the Statute for a European company (SE), OJ. L. 294, 10.11.2001, pp. 1-33; T. Möllers, *Gesellschafts- und Unternehmensrecht, kleinere und mittlere Unternehmen*, in R. Schulze/M. Zuleeg/S. Kadelbach, eds., *Europarecht, Handbuch für die deutsche Rechtspraxis*, 3d ed. 2015, § 18 marginal note 178 ff.

<sup>221</sup> See above Part 2(d)(ii).

<sup>222</sup> H. Fleischer/K. Schmolke, *Die Reform der Transparenzrichtlinie: Mindest- oder Vollharmonisierung der kapitalmarktrechtlichen Beteiligungspublizität?*, NZG 2010, 1241, 1248; Willemaers, *The EU Issuer-Disclosure Regime 2011*, at 254.

<sup>223</sup> Not without reason has the Green Paper on building a capital markets union dated 18.2.2015 set aims including free movement of capital, to make it easier to access sources of finance across Europe; see Green Paper on Building a Capital Markets Union, 18.2.2015, Com(2015) 63 final, online: <[http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper\\_de.pdf](http://ec.europa.eu/finance/consultations/2015/capital-markets-union/docs/green-paper_de.pdf)> .

Commission-based advice remains permissible at the European level, but is supplemented by the concept of fee-based advice. Investment advice minutes, certification of competence, and other measures are supposed to reduce conflicts of interests for commission-based advice. As a stricter national set of rules, national provisions take account of several other national differences in addition to minimum harmonisation.

In Germany, civil law liability is sometimes stricter and sometimes less strict than the obligations set out by the European legislature. In other Member States, there is a much stronger consonance of national and European duties for market participants. The different solutions for civil law liability in the various Member States are unsatisfactory because they counter the idea of a level playing field. A harmonisation of questions of causality and losses could be based on the latest Directive on private actions for damages for infringements of competition law provisions.

If the tendency should continue to harmonise European capital markets law by way of issuing regulations instead of directives, this would have a massive impact on the importance of systematically drawn up national capital markets laws. Therefore, it would be preferable if European capital markets law would be better structured in terms of form and content. The commission should justify *in concreto* why the use of a directive or a regulation is efficient.

Harmonisation of law has reached an intense creation of vertical regulation because of Lamfalussy I and Lamfalussy II. Now, the commission should focus on horizontal harmonisation of law, i.e., coordinate directives and regulations. This is the only way to derive general provisions and principles, which may help to improve the enforcement of a still new area of law.