Efficiency as a standard in capital market law - the application of empirical and economic arguments for the justification of civil law, criminal law and administrative law sanctions

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I. Introduction

a. Empirical Data for the U.S. and German Securities Market

In recent years, a series of scandals has caused the U.S. securities market to shutter: Enron, WorldCom as well as Tyco International are among the most famous – or better said infamous – examples. To avoid a worldwide economic crisis such as last century's so-called Black Friday at the end of the 1920's[1], the American legislature reacted quickly and by 2002 passed the Sarbanes-Oxley Act with extensive federal measures to improve transparency and investor protection.[2] Companies must now commission an outside audit committee.[3] The chief executive officer (CEO) and chief financial officer (CFO) must swear a "balance sheet oath" a written confirmation that they have furnished the Securities and Exchange Commission (SEC) with reports that correctly and completely express the financial state of the company.[4] Incorrect reports are punished by up to twenty years in prison.[5] A federal judge sentenced the ex-WorldCom Inc. Chief Executive Bernard J. Ebbers to 25 years, as well as Tyco director Dennis Kozlowski and the previous CFO Mark Swartz.[6]

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[1] For this Friday, the 25th of October, 1929, cf. Henning, in Pohl, *Deutsche Börsengeschichte* (1992), pp 209, 247; Merkt, in Hopt/Rudolph/Baum, *Börsenreform* (1997), pp 17, 97 et sqq

[2] Public Accounting Reform and Investor Protection Act, Pub.L. No. 107-204 from 7.30.2002, 116 Stat. 745 (2002), which was named according to its two authors, Senator Paul Sarbanes und Congressman Michael G. Oxley, "Sarbanes-Oxley Act" (SOX). The Act can be found under www.sec.gov/about/laws/soa2002.pdf and www.thomas-moellers.de/materialien.

[3] Sec. 301 SOX Act (fn. 2).

[4] For Sec. 302 SOX Act (fn. 2) and Sec. 906 SOX Act as § 1350 U.S.C. cf. *Gruson/Kubicek*, AG (2003), 304, 401 et sqq.

[5] Sec. 906 SOX (Fn. 2) as § 1350 c) (2) U.S.C.; *Hefendehl*, JZ (2004), p 18 et sqq.

[6] In the Enron matter, Jeffrey Skilling and Kenneth Lay were found guilty on all accounts. Jeffrey Skilling was sentenced to 24 years and 4 months in prison on the 23rd of October, 2006. Kenneth Lay died shortly thereafter.

In Germany, a series of scandals also arose: black sheep such as Infomatec, Comroad and EM.TV were "gleaming" with inaccurate ad hoc publications and semiannual reports.[7] With more than seventeen thousand claimants, Deutsche Telekom is anticipating Germany's largest lawsuit because of an inaccurate real estate appraisal before its third recapitalization in 2000.[8] However, insufficient communication policies of listed companies were not the only thing to come under fire; the banks' consulting services did as well. The annual report for 2006 from the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) listed almost 3,500 complaints regarding credit and financial institutions alone.[9] Between 1992 and 1997, thirty-three thousand complaints were made to the Customer Complaints Office (*Kundenbeschwerdestelle*) at the Association of German Banks (*Bundesverband deutscher Banken*).[10]

When investigating the importance of the stock exchange and stock scandals to the national economy, the question of who invests in the stock market must be answered. Fewer than seven percent of Germans possess stock. Although the number of investors doubled from 3.1 to 6.2 million between 1988 and 2000, it fell again after the crash in 2000 to 4.2 million.[11] In the United States, on the other hand, almost 50 percent of all households have their assets in stocks.[12] The losses from the stock market also fell noticeably harder in Germany than in the U.S.[13] Thus, it should not be astounding that the European securities market considered altogether is only half as large as its American counterpart.[14]

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[7] Cf. Möllers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 1 marginal number 2 et sqq.; Möllers/Leisch, in KK-WpHG, § 2007, §§ 37b, c marginal number 51 et seq. as well as the further details in footnote 10.

[8] See Möllers/Weichert, NJW (2005), at p 2737.

[9] BaFin, *Yearly Report 2006*, (2007), at 4.1, p 203.

[10] See *Ombudsmannverfahren der privaten Banken*, as of 31.3.2007, found under http://www.bankenverband.de. These results are confirmed by the investigation of third parties, like the non-profit German consumer organization conducting independent tests or the consulting firm *Booz Allen Hamilton*, which respectively demonstrated bad consulting services for many credit institutions during the years 2000-01. Only five houses had a rating of "faulty," see Finanztest (5/2000), pp 12, 15; Finanztest (3/2001), 70 et sqq. For 2006 see the study on consulting Booz Allen Hamilton, Trade Journal from 6.14.2007, p 23.

[11] The number of stockholders above the age of 14 grew between 1988 and 2000 from 3,192,000 to 6,211,000, only to fall in 2006 to 4,240,000. Because of this only 6.7 percent of the German Investors hold direct stocks after a peak in 2000 of 9.7 percent. See Deutsches Aktieninstitut (DAI), *Factbook, 2007*, 8.3; Leven, *DAI-Kurzstudie* (2/2006), p 1, downloadable under www.dai.de.

[12] Economist from 26.5.2007, p 84. See also Merkt, Opinion G for the 64, DJT, (2002), p 1, 38.

[13] Thus the DAX fell from 8,000 to 2,500 points, while the Dow Jones only fell from 11,500 to 8,500 points. See the graphic from Möllers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 1 marginal number 1 et sqq.

[14] Final Report of the Committee of Wise Men regarding the regulation of the European Securities Market from 2.5.2001 (*Lamfalussy Report*) p 16 available at http://europa.eu.int/comm/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_de.pdf and thomas-moellers.de/materialien.

Consequently, German citizens will forgo higher returns which might hurt retirement benefits. The absence of German willingness to invest in listed companies also has an economically negative effect: the smaller start-up companies especially lack venture capital, which then hurts their international competitiveness.[15]

A common phrase in Germany is "money is as timid as a deer." Investment capital is not subject to geographic restrictions and, because of the worldwide integration of data, can be moved at great speeds with minimal cost.[16] Because investors can invest in stocks from the German Siemens AG just as easily as in those from the Finnish Nokia Oy or the American Microsoft Inc., when in doubt he or she will invest in that venture and in that market, which offers the best rate of return and safeguards the overall conditions the best. Empirical research shows that investor protection regulations and their enforcement constitute a fundamental requirement of developed and liquid markets.[17] In addition, numerous studies confirm the assessment that the harmonization of the European financial markets would clearly bring an increase in gains.[18] In this respect, it is now up to the legislature to install the correct framework so that capital does not disappear from the domestic market, thereby directly harming its own economy. The security of the securities market and the economies therein is a particularly significant subject of protection which states must guard.

The following will therefore examine whether European and German capital market law already contains laws and duties ensuring that capital is invested in the German and European market and not in the U.S. or other securities markets. During this analysis, attention will be called to the availability of measures for enforcing these legal duties, because the appropriate information and prohibition duties are only useful when they do not stay "law in the books," rather are observed by market participants. In order to ensure this, the classical sanctioning mechanisms of civil, criminal and administrative law must be compared and the private governance debate, i.e. law making through private measures, is to be examined. Empirical considerations and the economic analysis of law will also be included in the argument. When talking about the proper level of responsibility, the catchword "over-deterrence" often comes up bringing up the question of the necessary amount

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[15] Lamfalussy Report (Fn. 14), p 16.

[16] Clearly seen in Benicke, *Wertpapiervermögensverwaltung* (2006), p 91

[17] See La Porta/Lopez-de-Silanes/Shleifer/Vishny, 54 J.Fin. 1131 (1997); *idems*, 106 J.Pol.Econ. 1113, 1140 (1998); *idems*, 55 J.Fin. 1, 5 et sqq. (2000); Coffee, 25 J.Corp.L. 1, 2 (1999); Modigliani/Perotti, 1-2 Int.Rev.Fin. 81 et sqq. (2000); Black, 48 UCLA L.Rev. 781, 834 (2001). But see Siems, 16 Int.Co.Commerc.L.Rev. 300 et sqq. (2005); Spamann, Harv.L. & Econ. Discussion Pap. No.12, downloadable under http://ssrn.com/abstract=1095526 (questioning the methodology used by La Porta et al.).

[18] Attachment 1 of the Green paper on Financial Service Policy (2005 - 2010) from 5.3.2005, KOM (2005), 177, attachment 1, pp 4; Lamfalussy Report (Fn. 14), pp 14 et sqq.; Europäische Zentralbank, *The Euro Equity Markets* (August 2001), found under http://www.ecb.int/pub/pdf/other/eurocequitymarketen.pdf, pp 10, 44 et sqq.; Bundesverband deutscher Banken, *Argumente zum Finanzmarkt, März* (2004), found under http://www.bankenverband.de/pic/artikelpic/032004/br0403_vw_azf_eudl_dt.pdf

of fine tuning. Today some smaller companies prefer to completely withdraw from the stock exchange because the high costs are not proportionate to their earnings.[19] As a result, finding the balance between economic arguments and basic legal principles will be repeatedly examined.

b. Economic Considerations in Securities Market Law

i. The Relevance of Economic Arguments in Legal Application

In the U.S., the Law and Economics approach, i.e. an economic analysis of law, became popular through the Chicago school of economics[20] and in particular through judges like Learned Hand[21] and Posner,[22] who based their verdicts[23] on economic factors. In Germany, this approach was shared by among others, Schäfer/Ott, Kirchner and Kirchgässner.[24] However, economic assessment of efficiency criteria conflicting with ethical values is often used as justification against the economic analysis of law.[25] In addition, whether economic arguments are available for the legislature only[26] or whether those applying the law and judges interpreting the law also have access[27] is heavily debated. Only recently, Wagner turned against Eidenmüller's thesis to leave economic analysis open to the legislature alone. It is,

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[19] In 2003, 62 companies left the market, in 2004 40 companies left the market, see Franke, *Die Bank 2005*, Issue 2, at 18. For the withdrawal from the market see Schäfer, in Marsch-Barner/Schäfer, *Handbook of Listed Companies* (2005), §§ 61 et sqq.; Holzborn/Schlösser, *BKR* (2002), 486; Theiß, *AG 2005*, at 225 and fn. 209.

[20] See Eidenmüller, *Effizienz als Rechtsprinzip* (3rd ed., 2005), pp 67 et sqq.

[21] *United States* et al. v. *Caroll Towing Co., Inc.*, et al., 159 et sqq.2d 169 (2d. Cir. 1947).

[22] In addition, the Judges Easterbrook and Breyer are very open to economic considerations.

[23] *United States* et al. v. *Caroll Towing Co., Inc.*, et al., 159 et sqq.2d 169 (2d. Cir. 1947); *United States Fidelity & Guaranty, Co.* v. *Jadranska Slobodna Plovidba*, 683 et sqq.2d. 1022, 1029 (7th. Cir. 1982); see also Posner, 1 J.Leg.Stud. 29, 32 et sqq. (1972); *idem*, *Economic Analysis of Law*, (5th. ed. 1998) (Part I and II of the 2nd ed., translated in: Assmann/Kirchner/Schanze, *Ökonomische Analyse des Rechts* (1993), pp 79 et sqq.

[24] Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (3rd ed., 2005). However, see the opinion of the authors in the following footnote.

[25] Fezer, *JZ* (1986), at 817, 823; *idem*, *JZ* (1988), at 223, 226 et sqq.; Bydlinski, *Fundamentale Rechtsgrundsätze* (1988), pp 285 et sqq.; Kohl, in Ott/Schäfer, *Ökonomische Probleme des Zivilrechts* (1991), pp 41, 50; Möllers, *Rechtsgüterschutz im Umwelt- und Haftungsrecht* (1996), pp 123 et sqq.; Eidenmüller, *Effizienz als Rechtsprinzip* (3rd ed., 2005), pp 481 et sqq.

[26] Raisch, *Vom Nutzen der überkommenen Auslegungskanones für die praktische Rechtsanwendung*, (1988), pp 55, 57 et sqq.; Kohl, in *Jahrbuch Junger Zivilrechtswissenschafter* (1992), pp 29, 45; detailed in Eidenmüller, *Effizienz als Rechtsprinzip* (3rd ed., 2005), pp 426 et sqq., 454 et sqq., 486; also recently Wagner, *Opinion A for the 66. DJT* (2006), pp 61 et sqq.

[27] In the case of silence from the legislature argued for by the supporters in the U.S. as well as Horn, *AcP 176* (1976), 307, 320 et sqq.; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), pp 16; Ott, in Schäfer/Ott, *Allokationseffizienz in der Rechtsordnung* (1989), pp 25, 31 et sqq.; Kötz, *Rechtstheorie 30* (1999), 130, 134 et sqq.; Kübler, in *FS Steindorff*, (1990), pp 687, 690 et sqq.; Grundmann, *RabelsZ 61* (1997), 423, 443 et sqq.; Wagner, in *MünchKomm* (BGB, 4th ed., 2004), Vor § 823 marginal number 39 et sqq., *idem*, *AcP 206* (2006), 352, 425 et sqq. opposing the authors named in fn. 26.

however, largely recognized that those applying the law may, for its interpretation only employ economic analysis when the legislature expressly accepts efficiency as a goal of the law.[28] Even then, economic considerations may not be used exclusively, but rather must be open to other value considerations.[29] The following should show that capital market law in particular is a prime area of law for the consideration of economic factors because the legislature consistently accepts economic factors in its legislative proposals and legislative intent.

ii. Functionability as an Economic Goal of Regulation of the European Capital Market Legislation.

1. Allocation Efficiency

Since the creation of securities market law on the European level, its operability is incorporated into the aim of every securities market law ordinance. This is a prerequisite for the market being able to fulfill its economic function of efficiently allocating capital.[30] Efficient allocation means that the investment capital goes to the areas where it is most urgently needed and can be most promisingly employed.[31] The economic background of the duty to disclose is, in this respect, the supposition of securities market efficiency. This supposition states that openly accessible information is displayed in the market price immediately after it becomes known to the public. The duty to disclose on the one hand ensures that the appropriate information reaches the market and is factored into the price.[32] For example the goal of ad hoc publication is to ensure "that the market participants possess market relevant information in time to make the appropriate investment decisions."[33] Information

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[28] Kirchner/Koch, *Analyse und Kritik 11* (1989), pp 111, 115; Kohl, in *Jahrbuch Junger Zivilrechtswissenschafter* (1992), pp 29, 45; Taupitz, *AcP 196* (1996), 114, 127, 136; Grundmann, *RabelsZ 61* (1997), 423, 434 et sqq.; Eidenmüller, *Effizienz als Rechtsprinzip* (3rd ed., 2005), pp 452 et sqq.

[29] For the required considerations see the following fn. 165 et sqq. and fn. 169 et sqq.

[30] Begr. RegE 2. FFG, BT-Drucks. 12/6679, p 48; Begr. Finanzausschuss 2. FFG, BT-Drucks 12/7918, pp 96. compare also Baums, *ZHR 167* (2003), pp 139, 150; Fuchs/Dühn, *BKR* (2002), pp 1063, 1069; Möllers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 3 marginal number 43; Hopt/Voigt, in Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung* (2006), pp 9, 107, 113; Veil, *ZHR 167* (2003), pp 365, 367; Zimmer, in Schwark, *KMRK* (3rd ed., 2004), § 15 marginal number 8 et sqq.

[31] Assmann, in Assmann/Schütze, *Handbuch des Kapitalanlagerechts* (2nd ed., 1997), § 1 marginal number 24 et sqq.; Kübler, *Gesellschaftsrecht* (5th ed., 1998), § 31.II, p 390 et sqq. as well as fn. 16 above, in addition, one differentiates the operational and institutional efficiency, see Assmann, above.

[32] For information efficiency in the capital market and *Efficient Capital Market Hypothesis (ECMH)* see for instance Fama, 25 J.Fin. 383, 384 et sqq. (1970); *idem*, 46 J.Fin. 1575, 1576 (1991); Fischel, 74 Corn.L.Rev. 907 (1989); Braeley/Myers, *Principles of Corporate Finance* (7th ed. 2003), pp 347 et sqq.; Elton/Gruber/Brown/Goetzmann, *Modern Portfolio Theory and Investment* (6th ed. 2003), pp 402 et sqq.

[33] Begr. RegE 4. FFG, BT-Drucks 14/8017, pp 87 for § 15 WpHG; Begr. RegE AnSVG, BT-Drucks. 15/3174, p 34 right column.

also serves in the equal treatment of market participants.[34] Insider trading laws, on the other hand, aim to frustrate the creation of unreasonable market prices, which have arisen from insufficient information.

2. The Protection of Investor Confidence

Allocation efficiency is regularly associated with individual investor protection.[35] The goal is that the confidence of the investor in the financial market is assured.[36] The European Court of Justice recognized this goal as a justification for restricting the freedom to provide services.[37] Listed companies are information monopolists[38] for matters concerning company statements: the investing public and financial analysts can only inspect this data on a restricted basis. Likewise, the services of investment firms in the securities field as well as financial analysts respectively is inherently a commodity requiring a high amount of trust, which the customer cannot control or can control but only with high costs.[39] Because listed firms and financial intermediaries have access to knowledge that is verifiable by the investor only on a restricted basis, the so-called principal-agent problem arises. Churning and conflicts of interest are only two of the obvious dangers in the process.[40] As has been seen before, manipulation of the market and information asymmetry also lead to a loss of trust, causing the investor to withdraw from the stock market.[41]

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[34] In general Fleischer, *Opinion F for the 64. DJT*, (2002), pp 1, 27 et sqq. For the right to take over see § 3 Abs. 1 WpÜG; for customers of securities exchange providers see also Koller, in Assmann/Schneider, *WpHG* (4th ed., 2006), §§ 31 marginal number 53.

[35] The ground for consideration 1 in the Investment Services in the Securities Field 93/22/EEC from 5.10.1993, OJ Nr. L 141, 27: "(...)in order to protect investors and the stability of the financial system," Fleischer, ibid, pp 1, 25 et sqq.; further proof from Möllers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 3 marginal number 24 et sqq.

[36] Recital 1 of the Directive on publication of information when a major holding in a listed company is acquired or disposed of 88/627/EEC from 12.12.1988, OJ Nr. L 248, 62 and Rectial 1-4 Insider-Directive 89/592/EEC from 11.13.1989, OJ Nr. L 334, 30

[37] European Court of Justice from 5.10.1995, Case C-384/93, ECR 1995, I-1167 paragraph 42, (NJW 1995), 2541 – *Alpine Investments/Minister van Financiën* speaking of the "Reputation of Holland's Financial Market."

[38] Compare Möllers/Leisch, WM (2001), pp 1648, 1654.

[39] For the division into three parts of *Suchgüter* (search goods), *Erfahrungsgüter* (experience goods) and *Vertrauensgüter* (credence goods) see Nelson, 78 Pol.Eco. 729 (1974); see also van der Bergh/Lehmann, GRUR Int. (1992), pp 588, 591.

[40] Akerlof, 84 Q.J.Econ. 488, 493, 495 (1970); Spence, 87 Q.J.Econ. 651, 659 (1973); Hopt, *Der Kapitalanlegerschutz im Recht der Banken* (1975), pp 108 et sqq., Benicke, *Wertpapiervermögensverwaltung* (2006), p 159.

[41] Hopt, *AG* (1995), pp 353, 357; Posner, *Economic Analysis of Law* (7th ed. 2007), § 14.12, pp 449 et sqq.; Easterbrook/Fischel, *The Economic Structure of Corporate Law* (1991), pp 253 et sqq.; Grundmann, *RabelsZ 61* (1997), pp 425, 436; Lahmann, *Insiderhandel – Ökonomische Analyse eines ordnungspolitischen Dilemmas* (1994), pp 31 et sqq., 160 et sqq.; Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001), pp 188 et sqq.; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), pp 659 et sqq.; Fleischer, *ZGR* (2004), pp 1, 30; Hirte, in *KK-WpHG* (2007), Einl. Marginal number 26 et sqq. IIA Manne, Insider *Trading and the Stock Market* (1966), chap. CIII - X, s. 33 158; Kress, *Effizienzorientierte Kapitalmarktregulierung* (1996), pp 161 et sqq.

Precisely such a withdrawal is associated with the previously-mentioned economic costs, like verifiably lower funds for private pension plans and a lack of venture capital after the stock market crash in 2000.[42] As a result it must be ensured that the appropriate reporting requirements guarantee the public confidence in the market.[43]

These thoughts illustrate that the consideration of economic factors are inherent in the German Securities Trading Act (*Wertpapierhandelsgesetz* – WpHG).[44] The Transparency Directive, which recently has been implemented into the WpHG,[45] has newly reemphasized the interplay of these different goals with particular clarity in recital 8: "Efficient, transparent and integrated securities markets contribute to a genuine single market in the Community and foster growth and job creation by better allocation of capital and by reducing costs. The disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency."[46]

iii. *The Aims of the Law and Economic Approach*

While jurisprudence enquires as to the legality of an action, economics is concerned with its costs and utility.[47] It is assumed that individuals' decisions are fundamentally made on a rational basis according to cost and utility aspects with the goal of self maximization in mind (*homo oeconomicus*).[48] According to the Kaldor-Hicks Theorem, a regulation is desirable when the gains of those that are better off exceed

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[42] See above fn. 15 and Lenenbach, *Kapitalmarkt- und Börsenrecht* (2002), Marginal number 8.4, Fleischer, *Opinion F for the 64. DJT* (2002), pp 1, 100; Dühn, *Schadensersatzhaftung börsennotierter Aktiengesellschaften für fehlerhafte Kapitalmarktinformation* (2003), pp 254.

[43] Compare Recital 2 of the Directive 2003/6/EEC from 1.28.2003 insider dealing and market manipulation (Market Abuse Directive), OJ Nr. L 96, pp 16. For the German law, see for instance for the introduction to the WpHG p 2 FFG, Begr. RegE, BT-Drucks. 12/6679, pp 33 (translated): "In addition, the law is trying to raise investor confidence through precise improvements in the area of investor protection. The ability to equitably and quickly access public information regarding the objects traded in the securities market were improved and the coverage of information to be published expanded. These are crucial prerequisites for an equitable and efficient market result"; similar to 3. FGG, Begr. RegE, BT-Drucks. 13/8922, pp 55; 4. FGG, Begr. RegE, BT-Drucks. 14/8017, pp 62; for an overview see Möllers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 3 marginal number 24 et sqq.

[44] Accordingly for insider law; see fn. 41.

[45] Implemented through the Transparency Directive Implementation Act from 1.5.2007, BGBl. I p 10; RegE, BR-Drucks. 579/06, BT-Drucks. 16/2498, BT-Drucks. 16/2917; BT-Drucks. 16/3644; printed in KK-WpHG, Addendum I/2.

[46] See Recital 1 in Directive 2004/109/EC for the harmonization of the transparency standards in relationship to information about issuers whose securities are admitted trade in a regulated market and for the change in Directive 2001/34/EC from 12.15.2005, OJ Nr. L 390, p 38 (Transparency Directive). Italics added.

[47] Schmidtchen, in Schmidtchen/Weth, *Der Effizienz auf der Spur* (1999), pp 9, 14

[48] In Anglo-American law, this presumption is said to be the REMM-hypothesis (*resourceful, evaluating, maximizing man*), Griffith/Goldfarb, in Koford/Miller, *Social Norms and Economic Institutions* (1991), pp 39, 44 et sqq.; Kirchner, *Ökonomische Theorie des Rechts* (1997), pp 11 et sqq.,

the losses of those that are worse off and those that are worse off can be made whole through those that are better off.[49] According to the Coase Theorem, externalities through private transactions will always end up where they can most effectively be employed.[50] Out of these theories, the conclusion was reached amongst other things that transaction costs must be minimized[51] and legal right to action must be given to those persons in whose hands they will be most efficiently used.[52] As an outcome of this, in liability law those parties in the position to prevent the damage at the lowest cost (cheapest cost avoider), should carry the cost of the damage.[53] Listed companies have a greater advantage in regards to their internal information.[54] They can relatively easily provide investors with the necessary information, in order to equalize the investor's information deficit; it is in this facet the cheapest cost avoider.[55] From this point of view, the corresponding publication requirements are justified.[56]

Economic analysis of law researches the consequences of regulations in terms of an evaluation of the consequences and the legal objectives.[57] In trying to analyze its worth, economic analysis of law asks whether the regulations are efficient and further the wellbeing of the collective (allocation efficiency).[58] For this reason, law should also act to control behavior, especially setting preventative incentives to avoid unlawful behavior. This is true first and foremost in liability law.[59]

Kirchgässner, *JZ* (1991), pp 104, 106; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), p 58.

[49] Named after the economists Nockolas Kaldor and Sir John Hicks, see Kaldor, 49 Econ.J. 549 (1939); Hicks, 49 Econ.J. 696 (1939); Mansfield, *Microeconomics* (6th ed. 1988), pp 490 et sqq.

[50] Coase, 3 J.L. & Econ. 1, 6 et sqq. (1960); translated in Assmann/Kirchner/Schanze, *Ökonomische Analyse des Recht* (1993), pp 129 et sqq.

[51] Coase, 3 J.L. & Econ. 1, 27 (1960); Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers*, (1998), pp 198. Regarding the idea see Eidenmüller, *Effizienz als Rechtsprinzip* (3rd ed., 2005), pp 97 et sqq.

[52] Coase, op cit, pp 19 et sqq. (1960), translated in Assmann/Kirchner/Schanze, *Ökonomische Analyse des Rechts*, op cit, pp 129, 169; Cooter, 11 J.Leg.Stud. 225 (1982).

[53] Calabresi, *The Cost of Accidents. A Legal and Economic Analysis* (3rd ed. 1972), pp 135 et sqq.; Coase, op cit, p 6 et sqq. (1960); translated in Assmann/Kirchner/Schanze, *Ökonomische Analyse des Rechts*, op cit, pp 129, 146 et sqq.; Salje, *Rechtstheorie*, p 15 (1984), pp 277, 285; Wehrt, *Kritisches Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (1992), pp 358, 363 et sqq.; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), p 226.

[54] For more on the idea of an information monopolist, see above fn. 38.

[55] Zetzsche, *Aktionärsinformation in der börsennotierten Aktiengesellschaft* (2006), pp 37; Köndgen, in: FS Druey (2002), pp 791, 796 talks about the *cheapest information provider*.

[56] For this see extensively Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001), pp 149, 435, 508.

[57] Posner, *Economic Analysis of Law*, op cit, pp 24 et sqq.

[58] Easterbrook/Fischel, The *Economic Structure of Corporate Law*, op cit, pp 8 et sqq., Posner, *Economic Analysis of Law*, op cit, § 2.2, pp 25; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, op cit, pp 16; Kirchner, *Ökonomische Theorie des Rechts*, op cit, pp 8 et sqq., 12.

[59] Calabresi, 78 Harv.L.Rev. 713, 715 et sqq. (1965); Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, op cit, pp 125 et sqq.; Brüggemeier, *Prinzipien des Haftungsrechts* (1999), pp 3 et sqq. For the question of whether general civil law is also allowed to control personal behavior, see Wagner, *AcP 206* (2006), pp 352, 364 et sqq. and the following fn. 144.

II. Economic Considerations for Law-Making and Legal Enforcement in the Capital Market through the Government and through Private Methods (Private Governance)

a. Inadequate Supervision through the Stock Market

Being able to autonomously make laws can be an effective means of control for the stock exchange[60], especially when setting the price of a negotiable instrument. However when it comes to the implementation of more extensive duties of disclosure or desistance, observation by the exchange can only be seen as conditionally appropriate, as is made clear by three examples. In the course of self-regulation, "Suggestions for Solving the so-called Insider Problem" were passed in 1970, which remained valid in a modified version from 1988[61] until the enactment of the second Act for the Promotion of the Financial Market (*Finanzmarktförderungsgesetzes* – FGG) in 1993. These were neither legal regulations nor customs, rather applied only through contractually based recognition by the parties. Because they were rarely used, they were criticized at once as being ineffective.[62]

The European requirements for the ad hoc publication duty were implemented in 1987. At that time, a violation was, being a misdemeanor for the wrongdoer, only fined monetarily up to 100,000 DM (§ 90 par. 1 number 2, 4 Börsengesetz – BörsG). The exchange directors, who were to oversee the ad hoc publication according to § 44a par. 1 s. 2 BörsG, typically remained idle.[63] Between 1986 and 1993, only six ad hoc notices were published[64] resulting in the regulation receiving little meaning in practice. In retrospect, it should be resigned to pure law in the books.[65] After the ad hoc publication duty was introduced into the WpHG and overseen by the government, the number of ad hoc notifications increased dramatically: since that time between 1,000 and 5,000 ad hoc notifications have been recorded annually.[66]

Similarly negative was the experience in the new market in the years 1999 – 2001. Only bodies of rules and regulations under private law compelled ad hoc

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[60] Kümpel, *Bank- und Kapitalmarktrecht* (3rd ed., 2004), Marginal number 17.386.

[61] Arising from Insider trading Directives, trading and consulting Laws and the constitutional order in the issue from June 1988, BAnz. 1988, p 2833; for this also Baumbach/Hopt, *HGB* (29th ed., 1995), (16) with explanations.

[62] Assmann, *AG* (1994), pp 196, 198; *the same*, in Assmann/Schneider, *WpHG*, op cit, Vor § 12 Marginal number 5 et sqq.

[63] Pellens, *AG* (1991), pp 62, 63.

[64] Schwarze, in *Baetge, Insiderrecht und Ad-hoc-Publizität* (1995), pp 97, 99; Wittich, *AG* (1997), 1, 2; Happ, *JZ* (1994), pp 240, 241.

[65] Hopt, *ZHR 159* (1995), pp 135, 147; Ekkenga, *ZGR* (1999), pp 165, 166; Gehrt, *Die neue Ad-hoc-Publizität nach § 15 Wertpapierhandelsgesetz* (1997), p 27. For skepticism on this issue, see also Schwark, *BörsG* (2nd ed., 1994), § 44a BörsG marginal number 1.

[66] See the evidence presented in Möllers, in Möllers/Rotter, *Ad-hoc-Publizität*, op cit, § 3 marginal number 9 et sqq. Schäfer, in Marsch-Barner/Schäfer, *Handbuch der börsennotierten AG* (2005), § 14 marginal number 4.

publication or quarterly reports, somewhat like the hitherto existing bodies of rules and regulations in the new market.[67] The stock exchange admitted too many companies lacking market readiness: of the 350 new market companies, seven were taken out of the market in the first half of 2001, there were nine insolvencies, and 32 were traded with prices under one EUR.[68] In addition, the exchange did not effectively proceed with grievances.[69] It was also heavily debated to which extent the exchange could unilaterally change its bodies of rules and regulations.[70] The loss in reputation was so large that in the end the new market as a market segment was entirely phased out.[71]

Economically the stock exchange was not in the position personnel- or business-wise for effective supervision. A private regulatory authority can command neither compulsory searches nor subpoena witnesses under threat of sanction.[72] In addition, the exchange was lacking sanction remedies necessary to be able to proceed against violations of the bodies of rules and regulations.[73] While the contractual threat of exclusion as such certainly constitutes a powerful sanction, it cannot be ruled out that the vigorous competition between the exchanges inhibited stricter control because of the danger of otherwise losing customers.[74] For this reason, it was logical that the voluntary self-monitoring of the Insider Directives would be equally formalized as was recently the duty to publish quarterly figures.[75]

b. Supervision through State-run Supervisory Authorities

i. European-wide Introduction of Supervisory Authorities

Already by the end of the 1980s, the European legislature had enacted regulations, partly as a result of the absence of effective supervision, for the purpose of imple-

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[67] Sec. 2 par. 7.1 Body of rules for the New Market from 3.10.1997, printed in *WM 1997*, cross-title 3, pp 11 et sqq., Frankfurter Wertpapierbörse, *Loseblatt Nr. 9*; Hanft/Kretschmer, *AG* (2001), pp 84 et sqq.

[68] Claussen, *BB* (2002), pp 105, 106 providing further sources.

[69] Characteristically the companies successfully sued were listed on the New Market, see the following fn. 135.

[70] LG Frankfurt from 8.16.2001, WM (2001), at 1607; LG Wuppertal from 11.28.2001, BKR (2002), at 191; OLG Frankfurt from 4.23.2002, BKR (2002), at 459; Schwark, in Schwark, *KMRK* (3rd ed., 2004), § 49 BörsG marginal number 4.

[71] For this, Bären, *vom Aussterben bedroht, in Performance - das Kundenmagazin der Berliner Effektenbank* (July 2003), http://www.effektenbank.de/perf/PERF_0703.pdf, p 3; Deutsche Börse stellt Neuen Markt ein und teilt Gesamtmarkt in zwei Segmente, *Börsenzeitung online Series* (27.9.2002), at http://www.boersen-zeitung.com/online/redaktion/aktuell/vollansicht_st.php?artikelID=155_55_109_135_74_156_240_197_.

[72] Damrau, *Selbstregulierung im Kapitalmarktrecht* (2003), p 82.

[73] Along those lines Rudolph/Röhrl, in Hopt/Rudolph/Baum, *Börsenreform* (1997), pp 143, 189 for the punishment of insider trading.

[74] Explicitly addressed by Rudolph/Röhrl, in Hopt/Rudolph/Baum, *Börsenreform*, op cit, pp 143, 217: "The supervisors form a silent cartel with the supervised."

[75] Through the TUG (fn. 45). As a result, this leads to a win of the WpHG and an according loss of the BörsG.

menting supervisory authorities in every Member State. Important areas of capital market law were put under control of a national supervisory authority.[76] With the implementation of the Insider Directive, the German legislature had the goal of creating an attractive financial center – internationally compared – with governmental supervision of the market and an effective prohibition of insider trading.[77] The implementation in the German legislature came about through the second *Finanzmarktförderungsgesetz* (Financial Market Advancement Act) with the creation of the WpHG.[78] Through the implementation of an insider trading prohibition, the improvement of market transparency and the creation of a central and comprehensive market supervisor as well, the aim was to achieve effective investor protection and strengthen the investor confidence, which is indispensible for a functioning capital market.[79] This established capital market law as an independent field of law in Germany.[80] Shortly afterwards, the BaFin was established, a combination of the Federal Securities Supervisory Office (*Bundesaufsichtamt für Wertpapierhandel*), the Federal Banking Supervisory Office (*Bundesaufsichtsamt für Kreditwesen*) and the Federal Insurance Advisory Office (*Bundesaufsichtsamt für das Versicherungswesen*).[81] Similar comprehensive financial supervisory authorities exist in Denmark with the *Finanstilsynet*, in Austria with the Financial Market Supervisory Authority (*Finanzmarktaufsichtsbehörde*), in Great Britian with the Financial Service Authority (FSA) and in France with the *Autorité des Marchés Financiers* (AMF).[82] Through the Lamfalussy Process, legislating at the European level reached even stronger intensity in the direction of full harmonization.[83]

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[76] The first requirements for creation of such an authority were found in Art. 12 of the Directive regarding "information to be published when a major holding in a listed company is acquired or disposed of" (fn. 36), Art. 8 Insider Directive 89/592/EEC (fn. 36) und Art. 22 Investment Services Directive (fn. 35). In the meantime, every Directive designates oversight through a competent authority, like art. 48 et sqq. Directive 2004/39/EC from 4.21.2004 regarding the market for financial instruments (MiFiD), OJ Nr. L 145, 1, changed through the Approximation Directive 2006/31/EC from 4.5.2006, OJ Nr. L 114, 63, art. 21 et sqq. Directive 2003/71/EC from 11.4.2003 regarding the prospectuses, which are to be published when securities are publically offered or admitted into trade, and also for the change of Directive 2001/34/EC (Prospectus Directive), OJ Nr. L 345, 64, art. 12 et sqq. Market Abuse Directive (fn. 43) or art. 24 et sqq. of the Transparency Directive (Fn. 46).

[77] Assmann, *AG* (1994), pp 196, 199; Bundesminister der Finanzen, *Konzept Finanzplatz Deutschland*, *WM* (1992), pp 420, 422; Kümpel, *WM* (1992), pp 381, 385.

[78] The second Act for the Promotion of the Financial Market from 7.26.1994, BGBl. I, pp 1749

[79] 2. FFG, Begr. RegE, BT-Drucks. 12/6679, p 35 as well as Finanzausschuss, BT-Drucks. 12/7918, p 95.

[80] Hopt, *ZHR 159* (1995), pp 135, 163.

[81] Act Regarding the Integrated Financial Services Supervisor (FinDAG) from 4.22.2002, BGBl. I (2004), at 2630.

[82] See Giesberts, in *KK-WpHG* (2007), § 4 marginal number 13.

[83] For the Lamfalussy Process see fn. 14.

ii. *Economic Considerations for State-run Supervision*

In principle, the state should only intervene in the market when the market breaks down.[84] An argument in favor of legislation through private measures is that private legislators often know the market better and have significant advantages in information gathering. This might render their decisions more credible for the regulated community. Private organizations are, moreover, flexible in undertaking the appropriate adjustments.[85] In addition, with administrative law supervision, the transaction cost increases accordingly; the BaFin's budget currently amounts to 126 million EUR, which is significant.[86] To avoid cost for the public hand the BaFin is primarily financed from firms providing investment services in the securities field and only to a small percent from fees.[87] The firms then place these costs on the investor with the result being that, in the end, the transaction costs for buying or selling securities increase. In the case of state-run supervision, fees to enlist increase for the companies subject to supervision as well which would restrict competition.[88]

Four arguments can, however, be used in favor of state-run supervision: Private law-making is often not in a position to be the appropriate supervisor, as the lack of enforcement of the stock exchange regulations has shown. Conflicts of interest arise quite often, like the principle-agent situation between the customer and the firms providing investment services in the securities field,[89] for instance if available insider information is exploited on account of a third party. Since an incentive exists for misconduct, confidence will inevitably suffer.[90] The investor would have high individual costs if he or she had to supervise the firms providing investment services.[91] The state-run authority would clearly reduce such costs. The higher the probability of false information, the higher the precautionary expenses the investor would have to pay.[92] Of course with state-run supervision, the investor can trust that the basic standards will be supervised through the legislature and from a public authority.[93] Because private authorities are often less effective at sanctioning, administrative law supervision is superior. The banks' and market's ability to function is generally essential for a functioning economy. It is therefore a public

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[84] Akerlof, 84 Q.J.Econ. 488, 499 (1970); Köndgen, *AcP 206* (2006), pp 477, 511.

[85] Niemeyer, at http://swopec.hhs.se/hastef/papers/hastef0482.pdf, see 46 et sqq.

[86] BaFin, *Yearly Report 2006* (2007), p 214.

[87] At this time, 84 percent of the costs are financed through the apportionment procedure, see § 16 FinDAG (fn. 81).

[88] Financial service providers, which offered financial portfolio management, decreased from 1,473 in 1998 to 597 in 2000, BAKred, *Yearly Report, 2000* (2001), pp 100. In 2006, there were still 730 financial service providers subject to supervision, see BaFin, *Yearly Report 2006*, op cit, p 133.

[89] For the fiduciary character: Weichert/Wenninger, *WM* (2007) pp 627, 634; For the principal agent problem see Niemeyer, op cit, at http://swopec.hhs.se/hastef/papers/hastef0482.pdf, pp 25, 27 et sqq.

[90] Niemeyer, op cit.

[91] Posner, *Economic Analysis of Law* (7th ed. 2007), § 15.10, p 484.

[92] Mahoney, 78 Va.L.Rev. 623, 630 et sqq. (1992).

[93] See Benicke, *Wertpapiervermögensverwaltung* (2006), p 284 for the Code of Best Practice of Art. 11 of the Securities Services Directive (fn. 40).

good that the state has to protect. As a result, it is especially emphasized in the corresponding capital market law legislation.[94] State-run institutions regularly possess better intervention and sanctioning mechanisms than private organizations. The BaFin can issue cautions, announce fines, publish the measures taken, deliver the action to the *Staatsanwalt* (State Prosecutor) and bar people in the profession in cases of untrustworthiness. Consequently, state-run supervision helps to save total social costs. The market's ability to function should help to deter the danger of a crisis from individual economies. This is ultimately the reason why the supervision in capital market law through institutions using administrative law does not have the same force as perhaps the doctor-patient relationship. Health is indeed a higher legally protected interest than property; the laborious state-run supervision is justified however because experience has taught that entire economies including the total assets of all investors can be affected.

iii. *Publication of Public Law Measures (so-called Shaming)*

When using public law measures to regulate one has to ensure that the control is accepted by the market participants, makes the price as efficient as possible and finally is flexible enough to be adapted to the market development.[95] In the past, the BaFin did not publish its sanctioning decisions, with the effect that the public did not learn who had infringed the requirements of the WpHG. Because the BaFin wants to help deter the formation of inappropriate exchange prices through the supervision and penalization of insider offences, protection of the offender cannot cross its mind.[96] Through the implementation of the Market Abuse Directive[97], the BaFin is now authorized to publish the measures and sanctions it has made regarding violators of the requirements of the WpHG. In the yearly report of the BaFin, companies are also named which have breached the WpHG.[98] Publication is not completely unproblematic because on the one hand deterrence should indeed be reached with the publication, but on the other hand a disproportionately high damage can occur to the offender or to the capital market.[99] In addition, knowledge of the offenses alleviates the enforcement of claims in civil law.[100] The consideration of economic deliberation was forcefully phrased in the following terms by the legislature in § 40b WpHG: "The Federal Agency can publically divulge incontestable measures on their website, which it has made because of the infringement of prohibitions or obligations or this legislation, inasmuch as this is applicable or

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[94] See the previous fn. 35 et sqq.

[95] For these requirements, see Niemeyer, http://swopec.hhs.se/hastef/papers/hastef0482.pdf, 1, 45.

[96] Regarding this criticism, see Möllers, *ZBB* (2003), pp 390, 408.

[97] § 40b WpHG implemented art. 14 par. 4 of the Market Abuse Directive (fn. 43). In the meantime, similar wording can be found in Art. 51 par. 3 MiFiD (fn. 43); Art. 28 par. 2 Transparency Directive (fn. 76).

[98] For the individual processes, see instructively BaFin, *Yearly Report 2006*, op cit, pp 167 et sqq.

[99] Bachmann/Prüfer, *ZRP* (2005), pp 109, 113; Fleischer, *ZGR* (2004), pp 437, 476; Altenhain, in *KK-WpHG* (2007), § 40b marginal number 1.

[100] Fleischer, *ZGR* (2004), pp 437, 477; Möllers, *ZBB* (2003), pp 390, 498.

needed and for the elimination or prevention of grievances according to § 4 para 2 s. 2, unless the publication would extensively endanger the financial market or lead to disproportionate damage for the parties."[101]

In other publications, such an obligation to consider cannot to be found.[102] Indeed, it could be argued the multitude of imprecise concepts of law would inhibit an efficient application of the norm. Admittedly, in the past the administration was already in the position to define such articles. Moreover, indefinite concepts of law complicate the avoidance offences and raise with it the deterrence effect.[103]

c. *The Interplay of Private and Public Governance*

i. *Private Legislation: Compliance and the Running of a Register of Insiders*

Implementing private regulation is on the tip of everyone's tongue again in the form of private governance. Because governmental authorities are coming on their limits, it makes quite a lot of sense economically to use private measures. The concept of private legislation is used when private organizations make laws.[104] In comparison to the abovementioned exclusive monitoring by the stock exchange, the modern form of private governance in capital market law can be distinguished in that the government is the final overseer of the regulations and legal enforcement. For years, the legislature has obliged the firms providing investment services in the securities field to establish internal controls in order to supervise the responsibilities of the firms themselves, § 33 par. 1 number 3 WpHG.[105] Listed companies must compile an insider directory, § 15b WpHG. However, the mandatory integration of compliance mechanisms or insider directories creates new costs for the listed companies.[106] To balance these additional costs, the legislature tried to choose a solution that is as economical as possible. It did not define mandatory rules, rather leaves the companies flexibility in implementing the requirements.[107] The coverage of the compliance mechanisms for the firms providing investment services in the securities field[108] or the administration of insider directories for

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[101] Italics added.

[102] Compare similarly § 43 BörsG.

[103] That nicely clarifies par. 10 (b) SEA in connection with rule 10b-5 in U.S. law, see fn. 129.

[104] Schwartz, 97 Nw.U.L.Rev. 319 et sqq. (2002); Kirchhof, *Private Rechtsetzung* (1987), p 107. Compare also Engel, *A Constitutional Framework for Private Governance*, MPI-Paper, 2001/4, pp 4 et sqq., 34 et sqq.

[105] Based on Art. 10 sentence 2 first indent Securities Exchange Directive (fn. 40) and/or art. 13 par. 2 MiFiD (fn. 69).

[106] CIO-Magazin (online edition) talks of 5,5 billion US dollars for Compliance costs alone in 2005 (http://www.cio.de/news/808972/index.html). From considerable administrative expenses see Sethe, in Assmann/Schneider, *WpHG* (4th ed., 2006), § 15b marginal number 46; Heinrich, in *KK-WpHG* § 2007 § 15b marginal number 5.

[107] This is different depending on the size of the firm; for and overview see BAWe, *Yearly Report 2002* (2003), pp 79 et sqq.

[108] Koller, in Assmann/Schneider, *WpHG*, op cit, § 33 marginal number 35.

listed companies respectively is somewhat dependent on the size of the company.[107] These rules do not only aim at better supervision, rather at the deterrence as well: the company should be urged to keep the number of people that can come in contact with insider information as small as possible.[110] With the insider directory, the integrity of the market and in turn the investor's confidence in this market should be strengthened in the end.[111]

ii. Legal Implementation through Financial Auditors and the Supervision of the Supervisors

Compliance rules are first supervised internally in a company for example through the compliance officer. In addition, an option that could be considered would be that private organizations would undertake the monitoring duties and these then would be supervised by state-run authorities. This approach has been employed for years in fulfilling the idea of "less government."[112] It finds expression for example in § 36 WpHG which requires that firms providing investment services in the securities field be examined annually by financial auditors. Incorrect administration of an insider directory can be punished as a misdemeanor, § 39 par. 2 number 8 WpHG.[113] This therefore helps to make the regulations efficient because they approve public and criminal law measures alongside private supervision. The newly implemented enforcement procedure for financial statements in § 342b HGB (in connection with § 37n WpHG) works in a similar manner. The Financial Reporting Enforcement Panel (*Prüfstelle für Rechnungslegung* DPR) examines the annual reports of listed companies in advance; the BaFin acts when the company refuses to cooperate with the DPR or rejects the findings of its examination.[114]

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[107] For § 15b WpHG see BegrE BMF WpAIV, Sec. 5 to Sec. 14, found under http www.bafin.de/verordnungen/wpaiv_beg.pdf. See also Heinrich, in *KK-WpHG* (2007), § 15 marginal number 33 et sqq.

[110] Sethe, in Assmann/Schneider, *WpHG*, op cit, § 15b marginal number 46 Heinrich, in *KK-WpHG*, § 2007 § 15b marginal number 4; for the costs of the duty to disclose see also Easterbrook Fischel, *The Economic Structure of Corporate Law*, op cit, pp 309 et sqq.

[111] Recital 12 Market Abuse Directive (fn. 43) and Recital 6 Implementating Directive 2004/72/EC from 4.29.2004, OJ Nr. L 162, 70. Heinrich, in *KK-WpHG*, § 2007 § 15b marginal number 5

[112] For the implementation, one avails him or herself of the so-called "loaners," person charged with fulfilling state the state function, see Möllers, *Rechtsgüterschutz im Umwelt- und Haftungsrecht* (1996), pp 332 et sqq.

[113] For the steps in an infringement of § 33 WpHG, see Meyer/Paetzel, in *KK-WpHG* (2007) marginal number 115 et sqq.

[114] See Baumbach/Hopt/Merkt, *HGB* (32nd ed., 2006), § 342b marginal number 3 et sqq See also the graph in BaFin, *Yearly Report 2006*, op cit, p 189.

iii. Examples of Ineffective Supervision

1. The Double-Examination in the Scope of the Enforcement Action

Multilevel supervision of this kind however can also be ineffective. The enforcement procedure leads to an inefficient double-examination because accountants commissioned by the board of directors have already inspected the annual accounts of the company, § 111 par. 2 sentence 3 AktG.[115] Financial accountants, according to § 36 WpHG, independently examine adherence to the rules in §§ 31 et seq. WpHG regarding the firms responsibilities, although independent financial accountants have already examined the financial statements during the enforcement procedure. If the BaFin would directly confirm the reports of the financial accountants commissioned by the companies, this would have series of advantages:[116] a double-examination of the annual accounts by financial accountants leads inevitably to additional (transactional-) costs. Independence is greater with a governmental authority than with private financial accountants, with the result being that it is trusted more than a second inspection by financial accountants.[117] The current German system is unknown in other European Member States. Direct supervision through the BaFin would be like the U.S.'s inspection by the SEC. Consequently, it would therefore be efficient if, *de lege ferenda*, the certificates of the financial accountants commissioned by the board of directors would be examined directly by the BaFin as the state-run supervisory board.

2. The Supervision of Financial Analysts through the German Press Council

The Market Abuse Directive noticeably tightened the requirements for the financial analysts. Financial analysts must disclose conditions that could create conflicts of interests together with the their financial analysis, § 34b WpHG.[118] According to European and German law, this does, however, not apply to journalists, inasmuch as they are subject to a similar internal regulation including effective control mechanisms.[119] With this provision, the freedom of the press was supposed to be appeased.[120] In the meantime, the German Press Council has however revised the press code (*Pressekodex*).[121] This method of implementing laws has two grave

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[115] Schulze-Osterloh, *Der Konzern* (2004), pp 173, 182 and the author in fn. 116 et sqq.

[116] Böcking, *BFuP* (2004), pp 268, 269; Hirte/Mock, in *KK-WpHG*, § 37n marginal number 46.

[117] Lenz/Bauer, *BFuP* (2002), pp 246, 252, 260; Böcking, *ZFBF* (2003), PP683, 702; Schulze-Osterloh, *Der Konzern* (2004), pp 173, 182.

[118] § 34 para. 1 No. 2 WpHG in connection with § 5 FinanzanalyseVO from 12.17.2004, BGBl. I pp 3522 Based on Art. 6 par. 5 Market Abuse Directive (fn. 43) as well as the Implementation Directive 2003/125/EC from 12.22.2003, OJ Nr. L 339, 73. For this and further duties, see Möllers, in *KK-WpHG* (2007), § 34b marginal number 151 et sqq.

[119] § 34 Abs. 4 WpHG based on Art. 2 par. 4, 3 par. 3, 5 par. 5 Implementation Directive 2003/125/EC (fn. 118).

[120] For the U.S. precursor, see Release No. 33-8193, http://www.sec.gov/rules/final/33-8193.htm; File No. S7-30-02 SEC.

[121] *Pressekodex* (Journalistic principles) of the German Press Council from 3.2.2006, found under www.presserat.de.

disadvantages though: First, the press code as a formal sanction is only foreseen as a public reprobation; an additional monetary fine or disbarment from the organization would clearly be more effective. Second, exclusively private supervision has proved to be less effective, as was shown with the supervision of the stock exchange. This control degenerates herewith to the state seen in the 1990s.[122] Therefore, the regulation should – on the European level as well – be changed so that governmental supervision is implemented at least on a subordinate level. The privilege of journalists with stock exchange manipulation is clearly more effective, § 20a par. 6 WpHG. The supervision through the BaFin is continued, however, taking the professional particularities into account.[123]

d. Civil Law Liability

i. Empirical Data Regarding Ad Hoc Publications

Public law supervision through the BAWe (*Bundesaufsichtsamt für den Wertpapierhandel*) and the BaFin have definitely led to a significant increase of ad hoc publications.[124] Many of these ad hoc publications were pure PR measures and, if anything, disguised the economic situation rather than appropriately representing it. The legislature thus felt constrained to intervene and outlaw deceptive statements.[125] In the past, the securities as well as the stock laws stayed essentially law in the books. Between 1995 and 2001, only twelve cases led to the imposition of fines and in three cases turned over to the public prosecutor.[126] In the meantime, although the BaFin has acted more and more routinely, gaps still exist. Neither the public prosecutor nor the BaFin have had the manpower until now to extensively follow up on capital market fraud.[127] For this reason, the BaFin, as it has pointed out, is continually dependent on the collaboration of private parties.[128]

In the U.S., the possibility to file a civil lawsuit for inaccurate information by

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[122] In addition, with the 672 submitted complaints in 2004, only 27 reprimands were issued, see for this presserat.de (as of 5.2.2006); see *Möllers*, in KK-WpHG 2007, § 34b marginal number 232.

[123] § 20a par. 6 WpHG states: "For journalists acting in the exercise of their occupation, the existence of the requirements according to par. 1 s. 1 No. 1 is to be judged under consideration of their professional regulations, unless these persons, through false or deceptive statements, directly or indirectly benefit or make profits."

[124] See the previous fn. 66.

[125] Compare § 15 par. 1 sentence 6, par. 2 sentence 1 WpHG; for this Mollers, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 3 marginal number 13.

[126] BAWe, *Yearly Report 2001* (2002), p 59; for this see Rotter, in Möllers/Rotter, *Ad-hoc-Publizität*, op cit, § 11 marginal number 1. For Comroad, Infomatec and EM.TV see Möllers/Leisch, in *KK-WpHG*, (2007) §§ 37b, c marginal number 51 et sqq.

[127] For the excessive demands on the public prosecutor, see Möllers, *WM* (2002), p 309; Altenhain, *WM* (2002), pp 1874, 1875; Lenzen, *ZBB* (2002), pp 279, 280; recently also Benicke, *Wertpapiervermögensverwaltung* (2006), p 807.

[128] According to statements by the BaFin, *Yearly Report 2006* (2007), p 163, tips from investors have doubled in comparison to previous years.

listed companies has existed for more than twenty years.[129] In France, multiple cases have also been decided.[130] In Germany, claims for inaccurate ad hoc publications are governed by special laws, §§ 37b,c WpHG. Claims stemming from § 826 BGB or § 400 AktG in connection with § 823 par. 2 BGB are also conceivable. Whether further information requirements contain protection characteristics within the meaning of § 823 par. 2 BGB is heavily debated, for example with regards to insider violations[131], market manipulation[132], director dealings[133] or the administration of insider directories.[134] Until now, civil law actions have not arisen very often for damages claims. This is seen principally in the affairs of Informatec, EM.TV and Comroad. However, after civil law liability of inaccurate ad hoc publications was recognized by the German Federal Court of Justice[135], deceptive

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[129] Civil law damage claims can, in the case of injury from the capital market publication duties, be based on both Sec. 10 (b) SEA in connection with Rule 10b-5 as well as Sec. 18 (a) SEA. Jurisprudence and related literature have extensively developed the legal practices in the last 30 years for damages, causation, as well as the subjective requirements for Rule 10b-5. see for instance *Kardon* v. *National Gypsum Co.*, 69 et sqq. Supp 512 (1946); *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 380 (1983); *Basic* v. *Levinson*, 485 U.S. 224, 241 – 249 (1988). For an overview see for instance Hazen, *The Law of Securities Regulations* (4th ed. 2002), pp 568 et sqq.; (5th ed. 2005), Chap. 12.12. pp 521 et sqq.; Fleischer, *Opinion F for the 64. DJT* (2002), pp 100 et sqq.; Schulte, in Möllers/Rotter, *Ad-hoc-Publizität*, op cit, § 6 marginal number 47 et sqq., Kulms, in Hopt/Voigt, *Prospekt- und Kapitalmarkthaftung* (2005), pp 1101 et sqq.

[130] CA Paris (15 Jan 1992), Gaz. Pal. (23 Apr 1992), 293, note Marchi; Cass. crim. (15 Mar 1993), Bull. crim. n 113, pp 280; Bull. Joly Bourse (1993), 365, note Jeantin; CA Paris (18 Dec 1995), Banque et droit n 48, (Jul-Aug 1996), 35, chron. *Peltier/de Vauplane*; CA Paris (30 Apr 1997), Rev. sc. crim. (Jan-Mar 1999), 129, note Riffault; T. corr. Paris, (17 Dec 1997), Bull. Joly Bourse (1998), 121, note Lesguillier ; T. corr. Paris, (27 Feb 1998), RTD com. (Jul-Aug 1998), 640, note Rontchevsky; CA Paris, (8 Oct 1999), RD bancaire et financier (Jan-Feb 2000), 34. Cass. crim. (15 May 1997), D. affaires (1997), 924; see also Fleischer/Jänig *RIW 2002*, 729 et sqq.

[131] § 13 WpHG. Negative because of the missing evidence of causation according to the effective law see Assmann, in Assmann/Schneider, *WpHG*, op cit, § 13 marginal number 208 et sqq. In the U.S., civil law liability in insider trading is imaginable. Based on the Insider Trading and Securities Fraud Enforcement Act 1988, 15 U.S.C.A. § 78t-1(a), evidence of precise causation is not necessary, because it is sufficient that at the same time the insider bought and/or sold. See *In Re American Business Computers Corp. Securities Regulation Ligitation*, 1994 WL 848690 [1995 Transfer Binner] Fes.Sec.L.Pre. (CCH) S.D.N.Y. 1994: "Contemporaneously" may embrace the entire period while revenant inside information remains undisclosed;" see Hazen, *The Law of Securities Regulations*, op cit, Chap. 12.17. p 548.

[132] § 20a WpHG. Seen as negative by Vogel, in Assmann/Schneider, *WpHG*, op cit, § 20a marginal number 19; a different view by Mock/Stoll/Eufinger, in *KK-WpHG* (2007), § 20a marginal number 432. For the dispute standing see Möllers/Leisch, in *KK-WpHG* (2007), §§ 37b, c marginal number 455 fn. 867.

[133] § 15a WpHG. Seen as negative by Heinrich, in *KK-WpHG* (2007), § 15a marginal number 82; Sethe, in Assmann/Schneider, *WpHG*, op cit, § 15a marginal number 114; Zimmer, in Schwark, *KMRK* (3rd ed., 2004), § 15a marginal number 47.

[134] § 15b WpHG. Seen as negative by Sethe, in Assmann/Schneider, *WpHG*, op cit, § 15b marginal number 78.

[135] BGH from 7.19.2004, II ZR 402/02, BGHZ 160, 149 – Infomatec I; BGH from 7.19.2004, II ZR 218/03, BGHZ 160, 134 – Infomatec II; BGH from 7.19.2004, II ZR 217/03, NJW (2004), 2668 –

ad hoc publications have gone down. In addition, the possibility now exists with the Investors' Joint Action Act (*Kapitalanleger-Musterverfahrensgesetz* – KapMuG)[136] to legally clarify a decision in a joint action for all parties with a "test case."[137] The proceedings in Deutsche Telekom and Daimler Chrysler have shown the effectiveness of this option in lowering the hurdles to litigation.[138]

ii. *Economic Considerations*

1. Compensatory Damages and Prevention

Frequently, an investor will purchase shares because of incorrect information published by the listed company. Claims for damages are then the only way in individual cases to remove the direct consequences caused by the breach of the duty to disclose. Public law cannot achieve this damage compensation. Accordingly, damage liability serves classically to compensate for damages. It is therefore of considerable importance that precisely that person, who has the greatest interest in guaranteeing protection, is given an effective legal tool in his or her hand: the injured investor him or herself.[139] The private claim for damages makes the self-interests of the solitary injured investor useful for the implementation of the duties.[140] He or she becomes a private attorney.[141] The claims of private parties supplement state supervision and become particularly important when the supervision through the state is not sufficiently effective. When accountability to private investors is non-existing, further social costs arise: the investor carries the risk of deception and loses his or her investment, the dishonest company squanders resources to conceal the true circumstances[142] and dutiful companies must make substantial expenditures in order to regain lost investor confidence and as the case may be over-

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Infomatec III: In Infomatec I/II/III the Federal Court of Justice affirmed liability for omissions violating morality (for more details see Möllers, 30 Journal of Inter'l L. & Com. Reg. 279, 303 et sqq.(2004)); see further BGH from 5.9.2005, NJW 2005, 2450 – EM.TV; BGH from 5.9.2005, OLG Frankfurt a.M. from 3.17.2005, ZIP 2005, 710 – Comroad I; OLG München from 4.20.2005, ZIP 2005, 901 – Comroad II. For an overview see Möllers/Leisch, in *KK-WpHG*, § 2007 §§ 37b, c marginal number 51 et sqq.

[136] Law for the implementation of investors' joint action from 8.16.2005, BGBl. I, pp 2437, see for this Braun/Rotter, *BKR* (2004), 296; Duve/Pfitzner, *BB* (2005), 673; Hess, *WM* (2004), 2329; Hess/ Michailidou, *ZIP* (2004), p 1381; Möllers/Weichert, *NJW* (2005), p 2737 et sqq.; Reuschle, *Das Kapitalanleger-Musterverfahrensgesetz* (2006); Hess/Reuschle/Veil (Hrsg.), *KK-KapMuG* (2007).

[137] That can be the fault of capital market information.

[138] LG Frankfurt a.M. from 7.11.2006, ZIP (2006), p 1730 – "Test case" regarding the incorrectness of the prospectus of Telekom during its third public offering; LG Stuttgart from 7.3.2006, ZIP (2006), p 1731 – "Test case" regarding timeliness of the ad hoc publication concerning the resignation of DaimlerChrysler's CEO. The decision of the Oberlandesgericht Stuttgart from 2.15.2007, WM (2007), p 585 with comments by Möllers/Weichert, *EWiR* (2007), p 285 et sqq.; Fleischer, *BB* (2007), p 401 et sqq.

[139] Leisch, in Möllers/Rotter, *Ad-hoc-Publizität* (2003), § 16 marginal number 3; Lenzen, *ZBB* (2002), pp 279, 280.

[140] See the previous fn. 135.

[141] For more information on this concept stemming from U.S. civil liberty law suits see *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968).

[142] Posner, *Economic Analysis of Law* (7th ed. 2007), § 15.10, p 484.

come the existing doubt (so-called signaling).[143] It is not the admission of damage claims, rather their denial, which weakens confidence in the integrity of the securities market.

In addition to this equalizing function found in civil law liability, the preventive function is becoming more and more acknowledged.[144] The possibility of being held liable for damages is a factor that must be considered by the company in its financial planning.[145] The threat of liability alone will induce the company out of economic reasons to establish an effective regulatory and supervisory system to avoid potential breaches of duties.[146] The liability regulations for this reason have an indirect (general-) preventative importance that should not be underestimated.[147]

2. Market Risk, Excessive Liability and the Probability of Implementation

In private suits, the danger exists that the investor will not bring a claim because the risk of financial loss from a lawsuit would exceed the damages. Especially in lawsuits whose subject-matter is the injury caused from a breach of a disclosure duty, cost intensive expert opinion is often needed in the scope of the hearing.[148] Likewise, there is also the danger of over-deterrence. This theory was developed in the U.S.[149] and carried over into German law.[150] The concept of over-deterrence has unfortunately still not been sufficiently explained: at least four variations of market risk and over-deterrence can be distinguished: the investor must carry the risk of an inaccurately incurred investment decision when he or she is responsible

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[143] For the so-called signaling see Spence, 87 Q.J.Econ. 355 (1973); Fleischer, *Informationsasymmetrie im Vertragsrecht* (2001), pp 124 et sqq.; Merkt, *Unternehmenspublizität* (2001), pp 213 et sqq., Dühn, *Schadensersatzhaftung börsennotierter Aktiengesellschaften für fehlerhafte Kapitalmarktinformation* (2003), pp 254 et sqq., Sauer, *Haftung für Falschinformation des Sekundärmarktes* (2004), p 342; Weichert, *Der Anlegerschaden bei fehlerhafter Kapitalmarktinformation* (doctoral thesis Augsburg 2007), p 295. Many companies are experiencing this at the New Market right now. See for example a statement of the chairman of the board of the Bechtle AG, in FAZ from 12.8.2002, p 15: "We must wait out the weaknesses in the new market."

[144] Deutsch, *Haftungsrecht* (2nd ed., 1995), marginal number 18; Brüggemeier, *Prinzipien des Haftungsrechts* (1999), pp 3 et sqq., Wagner, in MünchKomm, *BGB* (4th ed., 2004), Vor § 823 marginal number 34 et sqq.; *idem*, *AcP 206* (2006), 352, 451; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), p 125.

[145] Koller, *ZIP* (1986), pp 1089, 1092.

[146] Posner, *Economic Analysis of Law*, op cit. § 15.10., p 484: "[...] if forced to pay [the] losses [of thoses stockholders who were harmed by the delay in the release of the news], the corporation will have an incentive to police its managers more carefully".

[147] Zimmer, in Schwark, *KMRK* (3rd ed., 2004), §§ 37b, 37c marginal number 3; Möllers/Leisch, in *KK-WpHG* (2007), §§ 37b, c marginal number 1.

[148] For these dispersed damages see Begr. RegE, BT-Drucks. 15/5091, pp 1, 13.

[149] Pritchard, 85 Va.L.Rev. 925, 945 et sqq. (1999); Langevoort, 38 Ariz.L.Rev. 639, 651 et sqq. (1996); Easterbrook/Fischel, 52 U.Chi.L.Rev. 611, 639 et sqq. (1982); *the same*, *The Economic Structure of Corporate Law*, pp 315 et sqq., 339; Mahoney, 78 Va.L.Rev. 623, 647 et sqq. (1992); Alexander, 48 Stan.L.Rev. 1487, 1496 et sqq. (1996); vgl. auch Posner, 54 Geo.Wash.L.Rev. 159, 169; *idem*, *Economic Analysis of Law* (5th ed. 1998), § 15.8, p 489.

[150] See for instance Gottschalk, *DStR* (2005), pp 1648, 1651; Sauer, *ZBB* (2005), pp 24, 30 et sqq.; Mülbert/Steup, *WM* (2005), pp 1633, 1637; Duve/Basak, *BB* (2005), pp 2645, 2647.

for this decision.[151] Certain forms of behavioral science belong to this, which are the matter of behavioral finance.[152] Also general market risk, i.e. the risk of not obtaining the desired profits due to general price loss, for example caused by terror attacks, must be carried by the investor.[153]

Over-deterrence is claimed because, unlike for instance in competition law, the person that has released false information does not necessarily draw the according gains from it. Rather, third parties often receive the gains. The macroeconomic dead weight losses are therefore lower than the total of the individual losses because a corresponding gain of a different investor stands in contrast to every personal loss.[154] Finally, over-deterrence is spoken of when the reporting duties and secondary requirements involved with a breach of duty rise to the level that the costs of an initial public offering clearly exceed the advantages of a listing.[155]

However, the theory of over-deterrence can be rebutted by two considerations: In the introduction, it was shown that the capital market is especially worthy of protection. Therefore, not only the costs of the currently injured parties must be considered, but also the costs that arise from investors not investing in the securities market. These social costs are composed of the total of all the financial precautionary costs[156] as well as the total of all the damage costs.[157] Precautionary expenditures should hence be used only as long as a reduction of damage costs results that is at least equally as large.[158] Furthermore, precautionary costs depend on the probability of assertion: the smaller the probability of assertion, the lower the macroeconomic efficiency. The theory of overcompensation is consequently to be examined in light of the assertion of that right, above all the likelihood of assertion.[159]

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[151] Casually worded by Loss, *ZHR 129* (1969), pp 197, 208 "*sacred right to make a fool of oneself*".

[152] Like for instance "lemmings" blindly following recommendations of alleged financial gurus, see generally for *Behavioral Finance* for example Thaler (Hrsg.), *Advances in Behavioral Finances, vol I* (1993), vol. II (2005); Goldberg/von Nitzsch, *Behavioral Finance* (4th ed., 2004); Fleischer, in *FS Immenga* (2004), pp 575 et sqq.

[153] See Engelhardt, *BKR* (2006), p 447.

[154] See the named authors in fn. 143 as well as Posner, *Economic Analysis of Law*, op cit, § 15.10, pp 483 et sqq.; Sauer, *ZBB*, op cit, pp 24, 31; Weichert, *Der Anlegerschaden bei fehlerhafter Kapitalmarktinformation* (Diss. Augsburg 2007), p 296.

[155] Fundamentally to the question of the cost and the benefit of the duty to report see Easterbrook Fischel, *The Economic Structure of Corporate Law* (1991), pp 309 et sqq.

[156] See fn. 143.

[157] Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, op cit, p 129.

[158] Brown, 2 J.Leg.Stud. 323 et sqq. (1973), pp 323, 347; Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts*, op cit, S. 130; for the law of damages, see the previous fn. 21 and Wagner, *AcP 206* (2006), pp 352, 458.

[159] See generally Wagner, *AcP 206* (2006), pp 352, 463 et sqq., see also Weichert, *Anlegerschaden bei fehlerhafter Kapitalmarktinformation*, op cit, pp 282 et sqq.

iii. Extending Civil Law Liability

1. Extent of Damages

When publishing inaccurate information, the publisher is liable for damages when the requirements of § 826 BGB are fulfilled. As for the amount of damages, § 249 par. 1 BGB dictates, that a situation be created identical to the in which no damages (breach of duty) occurred. Once this situation is created – the breach of reporting duties are made as though they never existed – two conditions would be imaginable in the case of an investment decision. The breach could have been the cause of the purchase decision. If this is the case, the claim for damages should lead to a rescission. § 249 par. 1 BGB contains the principle of total reparation found in liability law. Accordingly, case law involving breaches of reporting duties regularly lead to a rescission.[160] This, jurisprudence has predominantly met with approval. It is also imaginable that the investor acquired the paper without knowledge of the inaccurate information. The damage claims should then be limited to the amount the investor paid too much (share value loss).

According to countless authors, out of fear of over-deterrence, only the share value loss should be recoverable under §§ 37b, c WpHG and not a rescission.[161] This theory is vulnerable however to three attacks. Even if the premise is correct that damage compensation would be higher than the total damages to the market participants[162], the social costs mentioned in the introduction must also be considered from an economical standpoint, which can be higher than the total damages to the investors. Moreover, the investor can only sue for rescission when he or she has precisely demonstrated buying on account of the inaccurate information. This is only possible in the most seldom cases because the plaintiff must prove the causation between misinformation and acquisition and/or disposition of the security. Over-deterrence will thus not be a threat because of the low likelihood of assertion. The theory of over-deterrence therefore turns to dust and emerges as a purely theoretical problem.[163] From an economic viewpoint, it should be stressed that, above all, the principal of total reparation will cause the wrongdoer to practice the required provisions.[164]

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[160] BGH from 10.14.1971, BGHZ 57, 137, 142 et sqq.; BGH from 5.17.1982, NJW (1982), pp 2815, 2816 et sqq.; BGH from 7.19.2004, II ZR 402/02, BGHZ 160, 149, 159 – Infomatec I; BGH from 5.9.2005, NJW (2005), pp 2450, 2451 – EM.TV.

[161] See, in addition to the authors in fn. 150, also Maier-Reimer/Webering, *WM* (2002), pp 1857, 1860 et sqq.; Rützel, *AG* (2003), pp 69, 79; Zimmer, in Schwark, *KMRK* (3rd ed., 2004), §§ 37b, 37c WpHG marginal number 87 et sqq.; Hopt/Voigt, in Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung* (2005), pp 9, 128 et sqq.; Langenbucher, *ZIP* (2005), pp 239, 240 et sqq.; Sethe, in Assmann/Schneider, *WpHG* (4th ed., 2006), §§ 37b, 37c marginal number 73 et sqq.

[162] See the previous fn. 154.

[163] Möllers/Leisch, in *KK-WpHG*, (2007), §§ 37b, c marginal number 279.

[164] Cooter/Ulen, *Law and Economics* (4th ed. 2004), pp 328 et sqq.; Wagner, *AcP 206* (2006), pp 352, 459.

Furthermore, the assessments made through the law must also be taken into account. In legal literature, a balance of economic and legal principles in the terms of a practical concordance has been suggested.[165] American literature has stated it would come to overcompensation because among other things active investors with a diversified portfolio would have about the same chances in the long run to be winners of or injured from inaccurate capital market information.[166] An investor cannot be deprived of damages claims for inaccurate capital market information because he or she achieved or, where appropriate, would have achieved a gain at a different time, with a different stock and independent from the information being disputed. The principle of total reparation of § 249 BGB is expression of the principle of equalizing justice that fundamentally defines law, which was already spoken of by Aristotle.[167] Inasmuch, U.S. criticism is not compatible with German tort law, which is predominately based on reasonable compensation.[168] The approach from Drexl is also sophisticated, which requires the consideration of the autonomous decision as further deliberation criteria along with economic considerations. Accordingly, unilateral measures are not allowed to lead to alternative decision being taken away from other market participants.[169] As shown in the legislative material for § 15 WpHG, legislators intended that ad hoc publications contribute to "market participants possessing market relevant information as soon as possible so that they can make appropriate investment decisions."[170] The normative efficiency demands the consideration of this value judgment.

2. Damage Claims with Inaccurate Periodic Recording *de lege ferenda*

With specific liability legislation for inaccurate ad hoc publication according to §§ 37b, c WpHG, the German legislature entered into new territory. In addition, Art. 7 of the Transparency Directive requires civil law liability for incorrect semi-annual or annual financial reports as well as announcements according to the respective national regulations.[171] The legislature abstained from the implementation

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[165] Grundmann, *RabelsZ 61* (1997), pp 423, 444 et sqq.

[166] Langevoort, 38 Ariz.L.Rev. 639, 646, 650 (1996). For this argument, see generally Schäfer/Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (4th ed., 2005), pp 35 et sqq.

[167] Aristoteles, "Nikomachische Ethik" 5. Buch 7. Kap., 1132b; Wendehorst, *Anspruch und Ausgleich* (1999), pp 4 et sqq.; Jansen, *Die Struktur des Haftungsrechts* (2003), pp 89 et sqq.

[168] Weichert, *Der Anlegerschaden bei fehlerhafter Kapitalmarktinformation*, op cit, p 309.

[169] For his concept of basic efficiency, see. Drexl, *Die wirtschaftliche Selbstbestimmung des Verbrauchers* (1998), pp 202 et sqq. Previously stated for competition law see Lukes, in FS Böhm, (1965), pp 199, 225.

[170] Begr. RegE 4. FFG, BT-Drucks. 14/8017, p 87 on § 15 WpHG (italics added). In the governmental draft for the AnSVG, this protection purpose of § 15 is highlighted anew in identical words. Compare Begr. RegE AnSVG, BT-Drucks. 15/3174, p 34 right column. For this Möllers/Leisch, in *KK-WpHG* (2007), §§ 37b, c marginal number 260.

[171] Art. 7 of the Transparency Directive (Fn. 49) states: "Member States shall ensure that responsibility for the information to be drawn up and made public in accordance with Articles 4, 5, 6 and 16 lies at least with the issuer or its administrative, management or supervisory bodies and shall ensure that *their laws, regulations and administrative provisions* on liability apply to the issuers, the bodies referred to in this article or the persons responsible within the issuers." (italics added).

of this norm in the Transparency Implementation Act[172] without further justifying this renunciation in the legal history. Because of the higher requirements for intent and moral principle violations, simply resorting to § 826 BGB is not sufficient. § 823 par. 2 BGB in connection with § 400 AktG as well only apply to willful actions. The legislature probably believed that the current version of §§ 93, 116 AktG satisfies the implementation requirements. In contrast, however, the European legislature mentioned just such an internal liability of the companies against the shareholders in the Amending Directive 2006/46/EC for the Annual Account Directive 78/660/EEC for liability for inaccurate financial statements,[173] but did not in the Transparency Directive.[174] In its case law for the equal treatment of males and females, the European Court of Justice, at the time, clearly expanded the requirements for damages.[175] In legal literature it is still being discussed, whether the duty to create announcements[176], semiannual and annual financial reports approaches the protection capacity required by § 823 par. 2 BGB.[177] The German Federal Court of Justice had already approved in the past the legal protection capacity of § 400 AktG.[178]

Even if the legal protection capacity required by § 823 par. 2 BGB would be approved for periodic publication, this will not be sufficient for the implementation of the Directive. According to consistent case-law from the European Court of Justice, Directives must be implemented clearly and precisely.[179] A lack of clear requirements on the one hand would deter the injured party from suing and on the other hand would not clearly and definitively discourage the injuring party. As long as such a law is absent, the effect leading to prevention will not be achieved. This loophole is also economically not desirable.

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[172] See the previous fn. 45.

[173] Art. 50c of Directive 78/660/EC, implemented through Directive 2006/46/EC from 6.14.2006, OJ Nr. L 224, states: "Member States shall ensure that *their laws, regulations and administrative provisions* on liability apply to the members of the administrative, management and supervisory bodies referred to in Art. 50b. *at least towards the company, for breach of the duty referred to in Art. 50b.*" (italics added).

[174] Consequently Mülbert/Steup, *WM* (2005, pp 1633, 1653 support external liability.

[175] ECJ from 4.10.1984, Case 14/83, ECR 1984, 1891 paragraphs 24, 28 – from Colson and Kamann; ECJ from 11.8.1990, Case C-177/88, ECR 1990, I-3941 paragraphs 23 et sqq. – Dekker; ECJ from 4.22.1997, Case C-180/95, ECR 1997, I-2195 paragraphs 20 et sqq. – Draehmpaehl.

[176] Groß, *Kapitalmarktrecht* (3rd ed., 2006), § 40 BörsG marginal number 4; Mock, in *KK-WpHG*, (2007), § 37x marginal number 37.

[177] Concerning semiannual and annual reports, the regulations requiring a "balance-sheet-oath" are said to have such protection capacity, so that private parties have a right to sue, cf. Mock, in: *KK-WpHG*, op cit, § 37v marginal number 36, § 37w marginal number 41; *Schnorr*, ZHR 170 (2006), 9, 29 et sqq.; Hennrichs, in: FS Kollhosser, (Bd. 2, 2004), pp 201, 214; für § 331 HGB: Baumbach/Hopt/Merkt, 32th ed., (2006), § 331 HGB marginal number 1.

[178] § 823 par. 2 BGB i.V.m. § 400 AktG, BGH from 19.9.2001, BGHZ 149, 10, 20 et sqq. – Bremer Vulkan, *Re Ad-hoc-Publizität: BGH* from 16.12.2004, NJW (2005), pp 445, 449 – EM.TV.

[179] Expressly like this from GA Tizzano, Final claim from 1.23.2001, Case C-144/99, ECR 2001, I-3543 marginal number 35 et sqq. – Transparency law in Directive 93/13/EEC. The way from Mülbert/Steup, *WM* (2005), pp 1633, 1651 et sqq. is not passable, which is support an analogy to §§ 37b, 37c WpHG.