Market Manipulation Through Short Selling Attacks and Misleading Financial Analyses

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I. Short Sales and Targeted Price Drops Due to Misinformation

A. MARKET MANIPULATION

1. *The Protective Purpose of the Offense*

Stock exchanges are the lifeblood of a market economy or, in the words of the former Vice-President of the Bundesbank, "a source and a reflection of the growth, innovation, and competitive power of a market economy."[1] They aim to determine the "right price"[2] in the shortest possible time. They are extremely important for the respective national economy: for companies, in order to provide (risk) capital; for investors, in order to be able to use an attractive form of investment, for example for pension provision for consumers.[3] The prohibition of market manipulation serves the reliability and truth of price information on the stock exchanges.[4] Investors' confidence in the integrity of the market must be protected—that is, the loss

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1. Franz-Josef Zeitler, *in* BÖRSENREFORM, V (Klaus J. Hopt et al. eds., 1997) (Original German quote: "Quelle wie Spiegelbild der Wachstums-, Innovations- und Wettbewerbskraft einer Marktwirtschaft").

2. For the objective of proper pricing, see Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 12/6679, at 79 (Ger.).

3. Jeremy Greenwood & Bruce Smith, *Financial Markets in Development, and the Development of Financial Markets*, 21 J. OF ECON. DYNAMICS & CONTROL 145, 145 – 47 (1997); Thomas M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts*, 208 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 1, 7 (2008); Stefan Grundmann, *Kreditwesen und Organisation*, *in* HGB, BANKVERTRAGSRECHT, INVESTMENT BANKING TEIL 1, mn. 8 et seq. (Claus-Wilhelm Canaris & Hermann Staub eds., 5th ed. 2017). For more on the protection of functions, see Mark Oulds, *in* BANK- UND KAPITALMARKTRECHT, mn. 14.143 (Arne Wittig eds., 2d ed. 2011); SUSANNE KALSS ET AL., KAPITALMARKTRECHT, mn. 17 (2d ed. 2015); PETRA BUCK-HEEB, KAPITALMARKTRECHT, mn. 2 (9th ed. 2017).

4. Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL I at 2708, last amended by Gesetz [G], June 22, 2011, BGBL I at 1126, § 20(a) (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html (with regard to the old version of section 20a); *see* Regierungsentwurf [Cabinet Draft], DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 14/8017, at 176 (Ger.).

of confidence due to market manipulation must be avoided. The recitals of the Market Abuse Regulation (MAR) contain the correct wording: "Market abuse harms the integrity of financial markets and public confidence in securities and derivatives."[5] If legal protection on the stock exchanges is inadequate and there is a lack of trust, citizens will not buy shares.[6]

The European markets are demonstrably less liquid, and the price-earnings ratio of listed companies is significantly lower than in the United States.[7] German consumers also hold significantly fewer shares than consumers in other Member States.[8] In this respect, European legislators should have an interest in correcting legal deficits and closing gaps. This was also recognized as the objective of the European legislature with the Lamfalussy procedures.[9] The following shows that this goal has not yet been achieved in the area of short-selling attacks through misleading research reports.

2. *Digitization and Short Selling Attacks – A Global Business Model*

Recently, Elon Musk promised to withdraw from the stock market, delisting the company TESLA, for a price of 420 USD per share.[10] The financing of the delisting had never been seriously audited, he rather wanted to impress his girlfriend.[11] This conduct was "reckless" and an impermissible market manipulation.[12] The SEC proposed that TESLA and Elon Musk pay twenty million USD respectively and that Elon Musk resign

5. *See* Commission Regulation 596/2014, 2014 O.J. (L 173) 1 (EU).

6. James Chen, *Stock Market*, INVESTOPEDIA (Jun. 25, 2019), https://www.investopedia.com/terms/s/shortsale.asp.

7. *See generally* THOMAS M.J. MÖLLERS ET AL., AD-HOC-PUBLIZITÄT: HANDBUCH DER RECHTE UND PFLICHTEN VON BÖRSENNOTIERTEN UNTERNEHMEN UND KAPITALANLEGERN (C.H. Beck ed., 2003). *See* Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1, 2 (2006) (general information on the "law matters hypothesis"); John C. Coffee, *Law and the Market: The Impact of Enforcement*, 156 U. PENN. L. REV. 229, 230 (2007); Utpal Bhattacharya & Hazem Daouk, *When No Law is Better than a Good Law*, 13 REV. FIN. 577, 578, 591 (2009); Thomas M.J. Möllers, *Effizienz als Maßstab des Kapitalmarktrechts*, 208 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 1, 4 (2008); Philipp Maume, *Staatliche Rechtsdurchsetzung im deutschen Kapitalmarktrecht: eine kritische Bestandsaufnahme*, 180 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 358, 362 (2016).

8. Coffee, *supra* note 7, at 259.

9. Thomas M. J. Möllers, *Europäische Methoden– und Gesetzgebungslehre im Kapitalmarktrecht Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens als Mittel zur Etablierung von Standards*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT [ZEuP] 480, 482 (2008); *see Commission Proposal for an Action Plan on Building a Capital Markets Union*, COM (2015) 468 final (Sept. 30, 2015).

10. Complaint at 1 – 2, U.S. Sec. & Exch. Comm'n v. Musk, No. 1:18-cv-8865 (S.D.N.Y. Sept. 27, 2018), https://www.sec.gov/litigation/complaints/2018/comp-pr2018-219.pdf

11. *Id.* at 7 – 8.

12. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b); SEC Rule 10-b, 17 C.F.R. § 240.10b—5 (1951).

from the board of directors.[13] Judge Alisan Nathan approved this settlement.[14] Such forms of market manipulation are easy to assess legally. Cases in which the collaboration of several parties is legally problematic are significantly more difficult. The following part discusses short-selling attacks which often coincide with misleading financial analyses.

The internationally interwoven stock exchanges show perfectly how powerful innovation and digitization are. Rumors are spreading at lightning speed; millions can be moved with a mouse click by market participants betting on rising or falling prices. "Money knows no fatherland."[15] Digitalization is both a blessing and a curse for the stock markets. It creates transparency and facilitates a highly lucrative business model for organized crime.[16] In recent times, numerous listed companies have been exposed to attacks from market participants on German stock exchanges who always implement a similar strategy: short sellers speculate on falling prices by short selling and spread negative rumors or negative financial analyses via Twitter or similar media beforehand.[17] In Germany, listed companies such as Aurelius, Ströer, Wirecard, and Pro-SiebenSat.1 Media have been repeatedly affected by these short selling attacks in recent years.[18] Share prices plummeted by up to thirty percent within a very short period of time.[19] The most recent attack took place in January and February 2019, when the Financial Times brought up accusations of counterfeinting and

13. Complaint, *supra* note 10, at 21 – 22; Jackie Wattles, *Elon Musk Agrees to Pay $20 Million and Quit as Tesla Chairman in Deal With SEC*, CNN (Sept. 30, 2018, 12:57 PM), https://money.cnn.com/2018/09/29/technology/business/elon-musk-tesla-sec-settlement/index.html.

14. *Judge Approves Musk, SEC Settlement*, AUTOMOTIVE NEWS EUROPE (May 1, 2019, 6:08 PM), https://europe.autonews.com/automakers/judge-approves-musk-sec-settlement.

15. PETER F. DRUCKER, POST-CAPITALIST SOCIETY 130 (1993).

16. Tatiana Tropina, *Do Digital Technologies Facilitate Illicit Financial Flows?*, WORLD DEVELOPMENT REPORT 1, 17 (2016), http://documents.worldbank.org/curated/en/896341468190180202/pdf/102953-WP-Box394845B-PUBLIC-WDR16-BP-Do-Digital-Technologies-Facilitate-Illicit-Financial-Flows-Tropina.pdf.

17. Finanzmarktnovellierungsgesetz [FiMaNoG] [First Financial Market Amendment Act] June 30, 2016, BGBL I at 1514 (Ger.). Before the term "financial analysis" was used, but after Erstes, the term has been adapted to European legal acts so that it is now referred to as "investment recommendation."

18. On the facts, for example, see Martin Schockenhoff & Johannes Culmann, *Rechtsschutz gegen Leerverkäufer?*, DIE AKTIENGESELLSCHAFT [AG] 517, 518 (2016). On ProSiebenSat.1, see Nikolas Kessler, *ProSiebenSat.1: Short-Attacke!*, DER AKTIONÄR (June 3, 2018), https://www.deraktionaer.de/artikel/aktien/prosiebensat1-short-attacke-362400.html. *See also* Peter O. Mülbert, *Rechtsschutzlücken bei Short Seller-Attacken – und wenn ja, welche?*, 182 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 105 (2018). Mülbert's contribution, however, assumes without further subsumption that the attacks are legally permissible. *See id.*

19. *See Aurelius-Atkie: Ein Jahr nach Dem Hedgefonds-Angriff*, BÖRSE ONLINE, (March 27, 2018, 3:00 AM), https://www.boerse-online.de/nachrichten/aktien/aurelius-aktie-ein-jahr-nach-dem-hedgefonds-angriff-1019450414 (price fall of Wirecard on Feb. 24, 2016; price fall of Ströer on Apr. 21, 2016; price fall of Aurelius from 66 to 45 Euro).

money laundering against Wirecard in a series of reports;[20] as a result, stock prices fell from 170 € to below 100 € within days.[21] At the same time, short sell shares doubled,[22] which led to a temporary ban of such practices by BaFin[23] and investigations into possible market manipulation by public prosecutors.[24] The short sellers cut their profits by being able to buy back the shares sold at a favorable price after the price slump.

In the United States, there is now a financial industry consisting of analysts, hedge funds, and law firms that use short selling attacks to try to bring down the prices of listed companies.[25]

Activist investors include Aurelius Value, Citron Research, Gotham City Research, Muddy Waters Research, and Viceroy Research.[26] They work with law firms and report on their successes:[27] every year there are well over 100 such short-selling attacks worldwide.[28] The tactics are always the same: the companies are accused of false balance sheet figures, and this accusation

20. Olaf Storbeck, *German Regulators Probe Price Decline At Wirecard*, FIN. TIMES ONLINE (Jan. 31, 2019), https://www.ft.com/content/2997a4b2-255f-11e9-8ce6-5db4543da632; Dan McCrum & Stefania Palma, *Wirecard's Law Firm Found Evidence of Forgery and False Accounts*, FIN. TIMES ONLINE (Feb. 1, 2019), https://www.ft.com/content/79f23db0-260d-11e9-8ce6-5db4543da632; Dan McCrum & Stefania Palma, *Wirecard: Inside An Accounting Scandal*, FIN. TIMES ONLINE (Feb. 7, 2019), https://www.ft.com/content/d51a012e-1d6f-11e9-b126-46fc3ad87c65?sharetype=blocked.

21. *Wirecard-Aktienkurs fällt um 20 Prozent*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ.NET] (Feb. 7, 2019), https://www.faz.net/aktuell/wirtschaft/unternehmen/naechster-medienbericht-wirecard-aktienkurs-faellt-um-20-prozent-16029424.html#void; *see* Dan McCrum & Stefania Palma, *Wirecard's Law Firm Found Evidence of Forgery and False Accounts*, FIN. TIMES ONLINE (Feb. 1, 2019).

22. *Wirecard-Aktie: Das ist wirklich außergewöhnlich*, DER AKTIONÄR (Feb. 15, 2019, 6:45 AM), http://www.deraktionaer.de/aktie/wirecard—aktie—fakten—wissen—leerverkaeufer—deutsche-bank—deutsche-boerse-–verlust—top-verlierer—hdax—boersenbriefing-442690.htm.

23. *General Administrative Act of the Federal Financial Supervisory Authority*, BAFIN (Feb. 18, 2019), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Verfuegung/vf_190218_leerverkaufsmassnahme_en.html?nn=9866146.

24. Henning Peitsmeier, *Staatsanwaltschaft ermittelt gegen einen Financial-Times-Journalisten*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ.NET] (Feb. 18, 2019, 10:57 AM), https://www.faz.net/aktuell/finanzen/wirecard-ermittlungen-gegen-financial-times-journalisten-16047237.html.

25. Jeff Katz & Annie Hancock, *Short Activism: The Rise in Anonymous Online Short Attacks*, HARV. L. REV. FORUM (Nov. 27, 2017), https://corpgov.law.harvard.edu/2017/11/27/short-activism-the-rise-in-anonymous-online-short-attacks.

26. Instructive Activist Insight/Schulte Roth & Zabel, *The Activist Investing Annual Review 2018*, ACTIVIST INSIGHT 1, 44 – 45 (2018), https://www.activistinsight.com/resources/reports/.

27. *Id.* at 6.

28. Instructive Activist Insight/Schulte Roth & Zabel, *The Activist Investing Annual Review 2017*, ACTIVIST INSIGHT 7, 8 (2017), https://www.srz.com/images/content/1/4/v2/147747/Activist-Insight-The-Activist-Investing-Annual-Review-2017.pdf. There were more than 700 influences in share activism in 2016.

is supported by numerous details.[29] The Zatarra Report[30] accused the payment processor Wirecard of false balance sheet figures and illegal money laundering; Muddy Waters Capital[31] accused Ströer of this too. At the beginning of 2018, the Southern Investigative Reporting Foundation (SIRF) accused Wirecard of irregularities during a takeover in India, thus triggering another price drop.[32] Gotham City Research[33] accused Aurelius of false balance sheet figures and alleged that the value of the company's investments was too high, in particular that the company Secop was completely worthless and could not be sold.[34] The market value of the Aurelius share is "no more than €8.56" and, thus, eighty-eight percent is too high.[35] Aurelius tried to refute the accusations; German financial analysts also described the accusations as irrelevant shortly afterwards.[36] A few weeks later, Aurelius sold Secop in April 2017 for 185 million euros.[37] Recently, Viceroy Research accused ProSiebenSat.1 Media of false balance sheets and described the intrinsic value of the share at EUR 7.51 and, thus, 75 percent below the current closing price.[38]

29. *See generally* GOTHAM CITY RESEARCH LLC, DO AURELIUS' SWEDISH SUBSIDIARIES EXIST? 1, 11 (2017), https://www.gothamcityresearch.com/archive (providing an example) [hereinafter DO AURELIUS' SWEDISH SUBSIDIARIES EXIST?].

30. ZATARRA RESEARCH & INVESTIGATIONS, WIRECARD AG (WDI GR) (2016), http://www.heibel-ticker.de/downloads/FINALMainreportZatarra.pdf.

31. *Muddy Waters is Short Ströer*, MUDDY WATERS RESEARCH (Apr. 21, 2016), http://www.muddywatersresearch.com/research/sax/mw-is-short-stroeer.

32. Roddy Boyd, *Wirecard AG: The Great Indian Shareholder Robbery*, S. INVESTIGATIVE REPORTING FOUND. (Jan. 23, 2018), http://sirf-online.org/2018/01/23/wirecard-ag-the-great-indian-shareholder-robbery.

33. GOTHAM CITY RESEARCH LLC, AURELIUS EQUITY OPPORTUNITIES SE & CO KGAA: THE NEXT ARQUES AG OR THE NEXT PHILIP GREEN? 1, 4 – 5 (2017) [hereinafter AURELIUS: THE NEXT ARQUES AG OR THE NEXT PHILIP GREEN?], https://www.gothamcityresearch.com/archive; DO AURELIUS' SWEDISH SUBSIDIARIES EXIST?, *supra* note 29, at 11 – 12.

34. DO AURELIUS' SWEDISH SUBSIDIARIES EXIST?, *supra* note 29, at 19 – 21.

35. AURELIUS: THE NEXT ARQUES AG OR THE NEXT PHILIP GREEN?, *supra* note 33, at 4.

36. *See* Johannes Stoffels, *Aurelius: Gegenstandslose Vorwürfe*, 4INVESTORS, (Mar. 29, 2017, 4:49 PM), http://www.4investors.de/php_fe/index.php?sektion=stock&ID=112571; *see also* Michael C. Kissing, *Short, shorter, Attacke: Ströer, Wirecard - und jetzt auch Aurelius . . .*, INTELLIGENT INVESTIEREN (Mar. 28, 2017), http://www.intelligent-investieren.net/2017/03/short-shorter-attacke-stroer-wirecard.html.

37. *Aurelius Equity Says Sells Compressor Manufacturer Secop to Nidec Group*, REUTERS (Apr. 24, 2017), https://www.reuters.com/article/brief-aurelius-equity-says-sells-compres/brief-aurelius-equity-says-sells-compressor-manufacturer-secop-to-nidec-group-idUSASN0006SD.

38. *ProSieben – TV's Real House of Cards*, VICEROY RESEARCH (Mar. 6, 2018), https://viceroyresearch.files.wordpress.com/2018/03/prosieben-6-mar-20171.pdf.

B. Short Selling and Dissemination of Information Under the New MAR Law and Its Delegated Acts

1. *Short Sales as Lawful Action in Principle*

As a result, the activist companies legitimize their actions: inefficient actions of management board members would thus be uncovered, and sometimes criminal activities of the board members would also be discovered. Jim Chanos accused the U.S. energy company Enron of over-yielding, which turned out to be true in retrospect.[39] Viceroy Research recently uncovered the irregularities at the second largest furniture manufacturer in the world, Steinhoff International, with the result that the share price plummeted by more than 90 percent.[40] It is quite commendable when the short seller investigates, like a public prosecutor, and catches the "financial thief."[41] They should then also be able to take advantage of their information advantage as a result of short selling.[42] Finally, it is not illegal to bet on falling prices and short selling. Negative information about a company is thus published more quickly—priced into the prices of the listed company—and in sum information asymmetries are reduced.[43] As a result, the U.S. government and regulators in Europe banned short selling to a limited number of banks in 2008 for a limited time.[44] The now-issued Short Sale Regulation only lays out transparency obligations and merely prohibits uncovered short selling.[45] A study shows that, after such research reports, fifty percent of companies would disappear from the stock market and a further twenty-three percent would correct their sales figures.[46]

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39. John Kay, *It Often Takes a Short-Seller to Catch a Financial Thief*, Financial Times Online (Jan. 13, 2016), https://www.ft.com/content/53c6e62e-b93f-11e5-b151-8e15c9a029fb.

40. The share price dropped from 3.00 Euro to less than 0.20 Euro. *The Activist Investing Annual Review 2018*, *supra* note 27, at 42, 44.

41. Kay, *supra* note 39.

42. *See* Lars Klöhn, Kapitalmarkt, Spekulation und Behavioral Finance 73 (2006); David Hirshleifer et al., *Short Arbitrage, Return Asymmetry, and the Accrual Anomaly*, 24 Rev. of Fin. Stud. 2429, 2432 (2011); Jonathan M. Karpoff & Xiaoxia Lou, *Short Sellers and Financial Misconduct*, 65 J. of Fin. 1879, 1881, 1894 (2010).

43. Thomas M.J. Möllers et al., *Nationale Alleingänge und die europäische Reaktion auf ein Verbot ungedeckter Leerverkäufe*, Neue Zeitschrift für Gesellschaftsrecht [NZG] 1167, 1168 (2010); Jennifer Payne, *The Regulation of Short Selling and Its Reform in Europe*, 13 Eur. Bus. Org. L. Rev. 413, 418 (2012).

44. Short Selling and Issuer Stock Repurchases, Exchange Act Release No. 2008-235, (Oct. 1, 2008); *see also* Thomas Hazen, The Law of Securities Regulation § 6.2(8) (6th ed. 2009); Melissa W. Palombo, *The Short-Changing of Investors*, 75 Brook. L. Rev. 1447, 1458 (2010); Christian Bonser, *If You Only Knew the Power of the Dark Side: An Analysis of the One-Sided Long Position Hedge Fund Public Disclosure Regime and a Call for Short Position Inclusion*, 22 Fordham J. Corp. & Fin. L. 328, 330 – 31, 354 (2017).

45. Short Sale Regulation 236/2012, 2012 O.J. (L 86) 1; *see* Elizabeth Howell, *Short Selling Restrictions in the EU and the US: A Comparative Analysis*, 16 J. Corp. L. Stud. 333, 346 – 47, 51 (2016) (regarding European and U.S. law).

46. Alexander Ljungqvist & Wenlen Qian, *How Constraining Are Limits to Arbitrage?*, 29 Rev. of Fin. Stud. 1975, 1978 (2016).

Consequently, the positive value of the short sellers is recognized by the U.S. Securities Exchange Commission (SEC).[47] The actions of short sellers are not unlawful per se.[48]

2. *Misleading Research Reports and the Unsatisfactory Applicable Law*

Conversely, however, there is also a worldwide agreement that misleading or incorrect information to affect pricing can constitute impermissible market manipulation.[49] This also applies to false or misleading research reports. We speak of "short and distort"[50] or "trash and cash."[51] The study just mentioned also shows that about seventeen percent of the accusations of the attackers are refuted by investigations of the supervisory authority or the market.[52] The tensions between prohibited market manipulation, financial analysis, and freedom of the press and opinion have not yet been resolved, as will be shown below. Legally, there is still a lot in a sorry state. This fact is confirmed by the statements of numerous employees of the supervisory and prosecuting authorities.[53] The current requirements result first of all from the European regulation, the MAR, which has been in force throughout Europe since July 2, 2014.[54]

a) The offense of *information-based market manipulation* prohibits the dissemination of "*false or misleading signals*," according to article 12(1) lit. a) of the MAR, or the dissemination of rumors via the media where the person who made the dissemination knew or ought to have known that the information was false or misleading, according to article 12(1) lit. c) of the

47. SEC Halts Short Selling of Financial Stocks to Protect Investors and Markets, Exchange Act Release No. 2008-211, 67 Fed. Reg. 71670 (proposed Sept. 19, 2008).

48. *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 207 – 10 (3d Cir. 2001).

49. Emergency Order Pursuant to Sec. 12(k)(2) of the Securities Exchange Act Taking Temporary Action to Respond to Market Developments, Exchange Act Release No. 58166, 73 Fed. Reg. 42379 (July 21, 2008); Christopher Cox, *What the SEC Really Did on Short Selling*, WALL. ST. J. (July 24, 2008, 12:01 AM), https://www.wsj.com/articles/SB121685865187779279.

50. In the "pump-and-dump" strategy, the perpetrator tries to drive the price up through inaccurate information; in the "short-and-distort" strategy, however, one tries to move the price down. *See* Perrie M. Weiner et al., *The Growing Menace of 'Short and Distort' Campaigns*, 23 No. 9 WESTLAW J. SEC. LITIG. & REG. 1 (2017); Bernd Graßl & Tobias Nikoleyczik, *Shareholder Activism und Investor Activism*, DIE AKTIENGESELLSCHAFT [AG] 49, 51 (2007).

51. Commission Delegated Regulation 2016/522, 2015 O.J. (L 88) 1, 15.

52. Ljungqvist & Qian, *supra* note 46, at 1979.

53. *See* Regulation (EU) 1095/2010 of the European Parliament and of the Council of 24 November 2010, Establishing a European Supervisory Authority (European Securities and Markets Authority), and Amending Decision 716/2009/EC and Repealing Commission Decision 2009/77/EC, 2010 O.J. (L 331) 84.

54. 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, art. 4, 2014 O.J. (L 173) 21 [hereinafter Market Abuse Regulation 596/2014].

MAR.[55] Scalping—that is, the acquisition of one's own shares and the subsequent investment recommendation without reference to the conflicts of interest involved—is also prohibited, according to article 12(2) lit. d) of the MAR.[56] The embezzlement of essential information can also be incorrect information.[57] But when a "false or misleading signal" is present *in concreto* is not specified. Admittedly, there is further clarification by means of so-called indicators in Annex I of the MAR.[58] But these are not relevant as they relate only to trade orders and thus to trade-based market manipulation. Although the Delegated Regulation (EU) 2016/522 explicitly mentions the "trash and cash" situation as an example of market manipulation,[59] when "negative information" is to be understood as a "false or misleading signal" in the sense of market manipulation is not further specified.

b) Article 20(1) of the MAR briefly states that the investment recommendation must be "*objectively presented.*"[60] The MAR is designed to prevent market participants from being misled.[61] After all, further explanations can now be found in a delegated regulation adopted at a second level within the framework of the Lamfalussy procedure.[62] Article 2(1) of Delegated Regulation (EU) 2016/958 obliges the person making a recommendation to state his identity.[63] Article 3(1) requires that facts be separated from statements and that essential sources of information be clearly identified and doubts expressed.[64] But it remains unclear when the accusation of accounting fraud is not objective, and thus illegal, or whether there are further obligations such as research.

c) The situation becomes even more complicated because article 12(1) lit. c) and article 20 of the MAR are restricted by the fundamental rights of freedom of press and freedom of expression. This is generally already clear from article 11 of the Charter of Fundamental Rights of the EU and as *lex*

55. *Id.* art. 12(1), at 29 – 30.

56. *Id.* art. 12(2), at 30.

57. *Id.* at 9 (Recital 47).

58. *Id.* at 55.

59. *See* LARS KLÖHN, KAPITALMARKT, SPEKULATION UND BEHAVIORAL FINANCE 73 (2006); David Hirshleifer et al., *Short Arbitrage, Return Asymmetry, and the Accrual Anomaly*, 24 REV. OF FIN. STUD. 2429, 2432 (2011); Jonathan M. Karpoff & Xiaoxia Lou, *Short Sellers and Financial Misconduct*, 65 J. OF FIN. 1879, 1881, 1894 (2010).

60. Market Abuse Regulation 958/2014, *supra* note 54, art. 20(1), at 41.

61. Commission Delegated Regulation 2016/958, 2016 O.J. No (L 160) 15 (Recital 1: "In particular, in order to ensure high standards of fairness, probity and transparency in the market, recommendations should be presented objectively and in a way that does not mislead market participants or the public.").

62. *Lamafalussy*, EU MONITOR (Nov. 11, 2015), https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vhd2ia5yfduu.

63. Commission Delegated Regulation 2016/958, art. 2(1), 2016 O.J. (L 160) 17.

64. *Id.* art. 3(1), at 17 – 18.

specialis explicitly by article 21 of the MAR.[65] According to this, the journalistic professional rules and ethics must always be taken into account.[66]

3. *Intermediate Result: The Inadequate Specification by the European Legislature*

Whether the allegation of accounting fraud is ultimately an "objective presentation" of an investment recommendation remains unclear, as well as the question of whether this constitutes "false or misleading signals." In addition, there is a lack of clarification on the journalistic professional rules and ethics. There are no definitions and clear obligations of the person concerned.[67] Without the necessary substantiation of the general legal terms, the specifications remain so general that a subsumption is impossible.[68] The discussion in legal literature is also not very useful. The remark that the distinction is difficult in individual cases[69] does not help on its own. In addition, no case groups are mentioned in which the investment recommendation is clearly unlawful.[70] Rather, there are doubts as to whether the rules of the investment recommendation will intervene if the reports do not claim to be neutral.[71]

C. The Combination of Short Selling Attacks and Misleading Research Reports as Illegal Action – A Step Backward by the MAR

Surprisingly, the national regulations issued so far have been more precise than the MAR currently in force with its delegated regulations.

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65. According to Lars Klöhn & Siegfried Büttner, *Finanzjournalismus und neues Marktmissbrauchsrecht – Hintergrund, Inhalt und praktische Bedeutung von Art. 21 MAR*, Wertpapier-Mitteilungen [WM] 2241, 2242 (2016), article 21 MAR should only be of a clarifying nature.

66. This is notwithstanding situations where disclosure is intentionally made to mislead the market. *See* Market Abuse Regulation 596/2014, *supra* note 54, art. 21(b), at 42.

67. *See generally* Thomas M.J. Möllers, Juristische Methodenlehre § 4 mn. 9 et seq., §§ 9 – 12 (2017).

68. *Id.*

69. Sebastian Mock, Kölner Kommentar zum WpHG § 20a mn. 18 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014); Bernd Graßl & Tobias Nikoleyczik, *Shareholder Activism und Investor Activism*, Die Aktiengesellschaft [AG] 49, 57 (2007). Lars Klöhn & Siegfried Büttner, *Finanzjournalismus und neues Marktmissbrauchsrecht – Hintergrund, Inhalt und praktische Bedeutung von Art.* 21 MAR, Wertpapier-Mitteilungen [WM] 2241, 2245 (2016), also fails to specify the manipulative purpose.

70. *Id.*

71. Martin Schockenhoff & Johannes Culmann, *Rechtsschutz gegen Leerverkäufer?*, Die Aktiengesellschaft [AG] 517, 523 (2016) ("Es wäre daher nicht sachgerecht, den Bericht von Muddy Wasters am gleichen Maßstab zu messen wie Anlageempfehlungen von Banken und Beratern, die vorgeben, neutral zu sein."; translation: "It would therefore not be appropriate to measure Muddy Wasters' report by the same standards as investment recommendations from banks and advisors who pretend to be neutral.").

1. *The Incorrect or Misleading Signal of Information – Driven Market Manipulation*

The former "MaKonV"[72] already referred in its wording to other acts of deception pursuant to section 4(2) no. 2 as "incorrect, erroneous, distorting or financial analyses influenced by economic interests"; these could already be information-driven manipulations.[73] Under German law, terms were already defined: false information—that is, information that was not true—was prohibited,[74] and incorrect statements of fact were also not covered by freedom of expression.[75] Furthermore, value judgements or forecasts could be incorrect, namely if they were randomly and simultaneously suggested, such that an examination of the underlying facts had taken place.[76] Moreover, pure value judgements were incorrect even if they or the forecast were evidently unjustifiable with a reasonable appraisal.[77] *Misleading* information was also inadmissible, i.e. information which, although correct in content, due to its presentation to the recipient, suggested a misconception of the facts described.[78] Rumors were also covered.[79] The average, reasonably well-informed investor was decisive.[80]

2. *The Formal Due Diligence Obligations of the Investment Recommendation*

With regard to the financial analyses, the national regulations in force went beyond current law as well. Not only was there vague talk of objective

72. Verordnung zur Konkretisierung des Verbotes der Marktmanipulation [MaKonV] [Regulation Specifying the Prohibition of Market Manipulation], Mar. 1, 2005, BGBL I at 1162 (Ger.).

73. Oliver Knauth & Corina Käsler, § 20a WpHG und die Verordnung zur Konkretisierung des Marktmanipulationsverbotes (MaKonV), WERTPAPIER-MITTEILUNGEN [WM] 1041, 1050 (2006); Holger Fleischer, *in* WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] § 20a mn. 63 (Andreas Fuchs ed., 2d ed. 2016).

74. Holger Fleischer, *in* WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] § 20a mn. 21 et seq. (Andreas Fuchs ed., 2d ed. 2016) (with further references); Andreas Stoll, KÖLNER KOMMENTAR ZUM WPHG § 20a mn. 182 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014) (with further references).

75. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 99 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 185, 197 (Ger.); Holger Fleischer, *in* WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] § 20a mn. 145 (Andreas Fuchs ed., 2d ed. 2016).

76. Andreas Stoll, KÖLNER KOMMENTAR ZUM WPHG § 20a mn. 181 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

77. Andreas Stoll, KÖLNER KOMMENTAR ZUM WPHG § 20a mn. 181 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014) (with further references); *see also* Fleischer, *supra* note 74.

78. Regarding the old law, *see* Fleischer, *supra* note 74.

79. On the arguments, *see* Fleischer, *supra* note 74, § 20a mn. 17.

80. Stefan Grundmann, *Kreditwesen und Organisation*, HGB, BANKVERTRAGSRECHT, INVESTMENT BANKING TEIL 1, mn. 447 (Claus-Wilhelm Canaris & Hermann Staub eds., 5th ed. 2017).

presentation, but section 34b(1) 1 of the German Securities Trading Act (WpHG; old version) required the financial analyst to have the necessary *expertise, diligence and conscientiousness*.[81] Diligence meant that the analysis must be truthful, correct, and complete.[82] Formally, financial analysts were also aware of the requirement to separate and the obligation to conduct research.[83] Apart from that, the wording of previous German law was already more precise than the requirements of the Delegated Regulation (EU) 2016/958; for example, section 3(2) sentence 1 of the Financial Analysis Ordinance (FinAnV) required "that the reliability of information sources be *ensured with reasonable effort*."[84]

If one now looks at the reports mentioned at the beginning in detail, then formal- and content-wise offences against the valid law so far are noticeable. The Zatarra Research & Investigations Report does not reveal the author and therefore already formally violates article 2(1) of the Delegated Regulation (EU) 2016/958.[85] The Gotham City Research Report also formally violated the research obligation required at that time.[86] It accuses Aurelius, for example, of not owning any companies in Sweden, although this was not difficult to find out from the commercial register.[87] The accusations of a criminal conviction, that the CFO is not independent, or that the auditor is not serious, were also irrelevant.[88] Finally, Gotham City Research did not ask Aurelius, although the allegations were massive.[89]

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81. Detailed in Thomas M.J. Möllers, *in* KÖLNER KOMMENTAR ZUM WPHG § 34b mn. 125 et seq. (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

82. *Id.*

83. *Id.*

84. Verordnung über die Analyse von Finanzinstrumenten [FinAnV] [Regulation on the Analysis of Financial Instruments], Dec. 17, 2004, BGBL I at 3349 (Ger.).

85. Journalists and the supervisory authorities have not yet succeeded in identifying the authors of the study. *See* Büdding Legal, *Verleumdung?, "Zatarra Research" attackiert Wirecard-Aktie*, BÜDDING LEGAL BLOG (Feb. 24, 2016), https://www.budding-legal.net/zatarra-research-attackiert-wirecard-aktie/. In December 2018, the Munich I Public Prosecutor's Office has applied a punishment order (*Strafbefehl*, § 407 et seq. GERMAN CODE OF CRIMINAL PROCEDURE (StPO)) against several presumed authors of the report. *See Strafbefehl Erlassen: Ermittler sehen Manipulation mit Wirecard-Aktien als erwiesen an*, HANDELSBLATT (Dec. 10, 2018), https://www.handelsblatt.com/finanzen/steuern-recht/recht/strafbefehl-erlassen-ermittler-sehen-manipulation-mit-wirecard-aktien-als-erwiesen-an/23743626.html?ticket=ST-1322391-IGKcjD3nnhCejbdT2UiC-ap1.

86. *See generally* DO AURELIUS' SWEDISH SUBSIDIARIES EXIST?, *supra* note 29.

87. *Id.*

88. *See* Press Release, Aurelius Equity Opportunities, Detaillierte zweite Stellungnahme der Aurelius Equity Opportunities SE & Co. KGaA zu den zusätzlichen Behauptungen von Gotham 3 – 5 (April 8, 2017), http://aureliusinvest.de/zweite_stellungnahme_aurelius_gotham.pdf.

89. *Id.* at 2 (stating, under A.2. Preamble, "Jedes Analysehaus mit einem ernsthaften Interesse dran, die Marktdebatte zu unserer Bewertung und der Analyse unseres fairen Unternehmenswertes voranzubringen, hätte uns vor Veröffentlichung eines Research Reports vorab dazu befragt. Wir stellen fest, dass Gotham dies vor keiner seiner Veröffentlichung getan hat, und wir überlassen den Markteilnehmern die Beurteilung dieser Tatsache."; translation: "Any analyst with a serious interest in advancing the market debate on our valuation and the

3. *Content Requirements for a Report: Objectivity and Traceability*

The content requirements for financial analysis were also more precise in previous German law than the requirements in current European law. According to section 5(1) of FinAnV, the financial analysis had to be prepared "*without bias.*"[90] In this respect, the principles of objectivity and neutrality applied.[91] This was also in line with the Code of Conduct of the financial analysts.[92] Financial analyses had to be adequately explained with valuation parameters.[93] It was therefore inadmissible to embezzle both positive and negative circumstances. Finally, financial analysts had to be able to demonstrate to the German Federal Financial Supervisory Authority (BaFin) the proper preparation in a "comprehensible manner."[94] This meant that random statements were inadmissible.[95] This was in accordance with Austrian law, according to which the recommendation must be substantiated as reasonable at the request of the FMA.[96] Moreover, U.S. law also requires that the information be sufficient to enable reasonable investor decisions,[97] that investment recommendations are based on a reasonable basis, and that exaggerations be avoided.[98]

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analysis of our fair company value would have asked us in advance before publishing a research report. We note that Gotham has not done so before its publication, and we leave the assessment of this fact to market participants."). *See also* Press Release, ProSiebenSat.1, Statement Regarding the Short-Attack by Viceroy (March 6, 2018), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=2ahUKEwj43oOv8ZfgAhVUiaYKHUrnBdIQFjADegQICHAC&url=https%3A%2F%2Fwww.prosiebensat1.de%2Fuploads%2F2018%2F03%2F07%2FPR_P7S1_06032018.pdf&usg=AOvVaw0iZUwTCQ2o1FmL5PrADCNy ("We further note that Viceroy Research did not contact ProSiebenSat.1 prior to publishing its report.").

90. Verordnung über die Analyse von Finanzinstrumenten [FinAnV] [Regulation on the Analysis of Financial Instruments], Dec. 17, 2004, BGBL I at 3349 (Ger.).

91. Thomas M.J. Möllers & Axel Lebherz, *Fehlerhafte Finanzanalysen – Die Konkretisierung inhaltlicher Standards*, ZEITSCHRIFT FÜR BANK- UND KAPITALRECHT [BKR] 349, 352 (2007); DIETER EISELE, VERHALTENSREGELN UND COMPLIANCE, BANKRECHT-HANDBUCH § 109 mn. 88 (Herbert Schimansky et al. eds., 4th ed. 2011); *see* ANDREAS FUCHS, WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] § 34b mn. 34 (Andreas Fuchs ed., 2d ed. 2016).

92. DEUTSCHE VEREINIGUNG FÜR FINANZANALYSE UND ASSET MANAGEMENT, DVFA-VERHALTENSKODEX, at 2 – 4 (2007), http://www.dvfa.de/fileadmin/downloads/Verband/Mitgliedschaft/DVFA_Verhaltenskodex.pdf.

93. FinAnV, Dec. 17, 2004, BGBL I at 3349, § 4(1) No. 3 (Ger.).

94. *Id.* § 3 No. 3.

95. *See generally* Thomas M.J. Möllers & Franz C. Leisch, *in* KÖLNER KOMMENTAR ZUM WPHG § 34b mn. 141 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

96. Previously Börsengesetz [BörsG] [Stock Exchange Act], BGBL No. 555/1989, § 48f(3) (Austria); *see* SUSANNE KALSS ET AL., KAPITALMARKTRECHT § 8 mn. 29 (2d ed. 2015).

97. 15 U.S.C. § 78o-6 (2012); FTC Credit Practices Rule, 17 C.F.R. § 242 (2016); NYSE Rule 472, supp. 10(2) (2016) (Definitions).

98. CFA INST., CODE OF ETHICS AND STANDARDS OF PROFESSIONAL CONDUCT (2014), https://www.cfainstitute.org/-/media/documents/code/code-ethics-standards/code-of-ethics-standards-professional-conduct.ashx; *see also Research Analysts and Research Reports*, FIN. INDUS.

4. *Disclaimer*

Article 12(1) lit. (d) of the MAR expressly prohibits so called "scalping" without clarifying the conflict of interest that the analyst has set on rising or falling prices before making a positive or negative recommendation.[99] But blanket indications without specifying the conflict of interest in concrete terms are not sufficient.[100] Consequently, it is now common practice to refer to such a conflict of interest with a disclaimer.[101]

The above view that a financial analysis—an investment recommendation according to the MAR's terminology—would not exist if the creator lacked objectivity[102] is to be rejected. Article 20(1) of the MAR is already mandatory law in its wording and therefore cannot be waived.[103] This means that the objectivity of the presentation according to non-subjective criteria must be taken into account. Otherwise, it would be in the hands of the creator to circumvent the obligations of capital market law. The objective receiver horizon of an average investor is decisive.[104]

II. The Insufficient Legal Protection in Germany Compared to the USA

A. State and Companies

1. *The Federal Financial Supervisory Authority*

All parties involved acknowledge that these are cases of the "black market," sometimes even organized crime. BaFin has repeatedly warned against these practices and called on investors to be cautious.[105] It stresses

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Regulatory Auth. (Aug. 16, 2019), https://www.finra.org/rules-guidance/rulebooks/finra-rules/2241.

99. With regard to the earlier law with the same content, see Holger Fleischer, *in* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] § 20a mn. 67 et seq. (2d ed. 2016).

100. Bundesgerichtshof [BGH] [Federal Court of Justice], Neue Zeitschrift für Gesellschaftsrecht [NZG] 590 mn. 40, 2014 (Ger.); Holger Fleischer, *in* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act] § 20a mn. 67 (2d ed. 2016); Milan Bayram & Dominik Meier, *Marktmanipulation durch Leerverkaufsattacken*, Zeitschrift für Bank- und Kapitalrecht [BKR] 55, 58 (2018).

101. *See Muddy Waters is Short Ströer*, *supra* note 31; Zatarra Research & Investigations, *supra* note 31; Do Aurelius' Swedish Subsidiaries Exist?, *supra* note 29.

102. Martin Schockenhoff & Johannes Culmann, *Rechtsschutz gegen Leerverkäufer?*, Die Aktiengesellschaft [AG] 517, 523 (2016).

103. Commission Delegated Regulation 2016/958, art. 20(1), 2016 O.J. (L 160) 15.

104. Thomas M.J. Möllers, *in* Kölner Kommentar zum WpHG § 34b mn. 80 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

105. *BaFin rät Anlegern zur Informationsrecherche bei Researchberichten*, BaFin (May 9, 2016), https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Verbrauchermitteilung/weitere/2016/vm_160509_warnung_researchberichte.html; *BaFin rät Anlegern erneut zur Informationsrecherche bei Researchberichten*, BaFin (Apr. 6, 2017), https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Meldung/2017/meldung_170406_informationsrecherche.html; Mark Gillert, *Market manipulation: Short attacks – how investors and issuers are targeted by*

that the facts of the case should be investigated and then handed over to the public prosecutor's office.[106] But by then, the short sellers will be long gone and have made a profit at the expense of the market participants. Two problems arise in particular: the intervention of the supervisory or investigative authorities takes *too long*.[107] If preliminary investigations are started after several years, the perpetrators can no longer be found.[108] And when the perpetrators operate from abroad, they are even more difficult to catch.

2. *The Public Prosecutor's Office*

Remarkably, market manipulation proceedings at BaFin have been increasing for years; the number of proceedings handed over to the public prosecutor's office is also increasing impressively: from twenty-two proceedings in 2007 to 291 proceedings in 2015 and 300 proceedings in 2016.[109] But in 2015 and 2016 there were a total of more than 300 closings of proceedings and only six and ten convictions after a trial, respectively; that is just two to three percent of the procedures.[110] In Germany, the competent authority is the public prosecutor's office of the crime scene, section 143 of the Judicial Systems Act (GVG) in conjunction with section 7 et sequitur of the German Code of Criminal Procedure (StPO).[111] This can be the crime scene, the place of residence, the whereabouts, or the place of capture.[112] While greater expertise is available in larger cities and federal states, this does not apply to every public prosecutor's office in every federal state. But even in the larger public prosecutor's offices, it is fully acknowledged that the know-how in the area of market manipulation is only partially available and that one has to rely on the expertise of BaFin. After all, criminal law

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manipulators, BAFIN (May 31, 2017), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Fachartikel/2017/fa_bj_1705_Marktmanipulation_en.html.

106. *Id.*

107. This is also the finding of Dirk Kocher, *Strategien im Umgang mit aktivistischen Aktionären und Investoren in Deutschland*, DER BETRIEB [DB] 2887, 2892 (2016).

108. In the Porsche-Volkswagen case, it took the public prosecutor's office three years before it brought charges. In the diesel scandal, as well as in the above cases of Wirecard, Aurelius, and Ströer, an indictment is still pending.

109. The BaFin annual reports are instructive here; for older figures, see Holger Fleischer, *in* WERTPAPIERHANDELSGESETZ [WPHG] [SECURITIES TRADING ACT] § 20a mn. 38 et seq. (2d ed. 2016); Sebastian Mock, *in* KÖLNER KOMMENTAR ZUM WPHG § 20a mn. 73 (2d ed. 2014); Philipp Maume, *Staatliche Rechtsdurchsetzung im deutschen Kapitalmarktrecht: eine kritische Bestandsaufnahme*, 180 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 358, 374 – 95 (2016).

110. BAFIN, JAHRESBERICHT DER BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSSAUFSICHT 2015 [2015 ANNUAL REPORT OF THE FEDERAL FINANCIAL SUPERVISORY AUTHORITY] 232 (2016); BAFIN, JAHRESBERICHT DER BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSSAUFSICHT 2016 [2016 ANNUAL REPORT OF THE FEDERAL FINANCIAL SUPERVISORY AUTHORITY], 177 – 241 (2017).

111. Maume, *supra* note 109, at 391 – 92.

112. *See id.* at 392.

depends on the offender. There is no corporate criminal law in Germany.[113] As long as it is not possible to link the deed to the concrete perpetrator, there will be no conviction. If the author cannot be identified in a research report, no guarantor position of the company's managing director can be justified.

3. *The Company Concerned*

In addition, there is a lack of legal protection under civil law. The prevailing view in literature rejected section 20a of the WpHG (old version) as a protective law within the scope of section 823(2) of the German Civil Code (BGB).[114] The question as to whether the new article 12 of the MAR is to be recognized as a protective law is highly controversial.[115] Ultimately, this has to be decided by the ECJ.[116] Finally, the requirements of section

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113. *See* Gesetz zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, BUNDESRAT DRUCKSACHEN [BR] 16/127 (Ger.), https://www.landtag.nrw.de/Dokumentenservice/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf;jsessionid=650FA1EF38D5AB386263C E7DD 6723AAA.ifxworker (regarding the legislation proposal of the state North Rhine-Westphalia); *see generally* INST. FOR L. AND FIN. SERIES, UNTERNEHMENSSTRAFRECHT [CORPORATE CRIME] (Eberhard Kempf et al. eds., 2012); INT'L CONG. OF COMP. L., CORPORATE CRIMINAL LIABILITY (Mark Pieth & Radha Ivory eds., 1st ed. 2011); CHARLOTTE SCHMITT-LEONARDY, UNTERNEHMENSKRIMINALITÄT OHNE STRAFRECHT? [CORPORATE CRIME WITHOUT CRIMINAL LAW] (2013); ANJA TSCHIERSCHKE, DIE SANKTIONIERUNG DES UNTERNEHMENSVERBUNDES [THE SANCTIONING OF THE CORPORATE NETWORK] (2013); NIKOLAUS BOSCH, ORGANISATIONSVERSCHULDEN IN UNTERNEHMEN [ORGANIZATIONAL MISBEHAVIOR IN ENTERPRISES] (2002); MICHAEL KUBICIEL, KÖLNER PAPIER ZUR KRIMINALPOLITIK 2/2014, DIE VERBANDSSTRAFE: VERFASSUNGKONFORMITÄT, SYSTEMKOMPTIBILITÄT, FOLGEN (2014), https://www.jura.uni-augsburg.de/lehrende/professoren/kubiciel/downloads/koelner_papiere/verbandsstrafe.pdf (accessed 27 February 2019).

114. Bundesgerichtshof [BGH] [Federal Court of Justice] July 19, 2004, 160 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 134 (139 et seq.) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 13, 2011, 192 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 90 (98 et seq.) (Ger.); Joachim Vogel, *in* WERTPAPIERHANDELSGESETZ: WPHG § 20a mn. 31 (Heinz-Dieter Assmann & Uwe H. Schneider eds., 6th ed. 2012).

115. *See* Alexander Hellgardt, *Europarechtliche Vorgaben für die Kapitalmarktinformationshaftung*, DIE AKTIENGESELLSCHAFT [AG] 154, 158 (2012); Christoph H. Seibt, *Europäische Finanzmarktregulierung zu Insiderrecht und Ad hoc-Publizität*, 117 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 593, 607 (2013); Dörte Poelzig, *Private enforcement im deutschen und europäischen Kapitalmarktrecht*, ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT [ZGR] 801, 814 (2015); Martin Schockenhoff & Johannes Culmann, *Rechtsschutz gegen Leerverkäufer?*, DIE AKTIENGESELLSCHAFT [AG] 517, 520 (2016); *but see* Lars Klöhn, *Die privatrechtliche Durchsetzung des Marktmanipulationsverbots - Europarechtliche Vorgaben und rechtsökonomische Erkenntnisse*, *in* GESELLSCHAFTS- UND KAPITALMARKTRECHT IN DEUTSCHLAND, ÖSTERREICH UND DER SCHWEIZ 229, 248 et seq. (Susanne Kalss et al. eds., 2013).

116. *See* Stefan Grundmann, *Kreditwesen und Organisation*, *in* HGB, BANKVERTRAGSRECHT, INVESTMENT BANKING TEIL 1, mn. 436 (Claus-Wilhelm Canaris & Hermann Staub eds., 5th ed. 2017) ("Sicherheit. . .erst eine Vorlage an den EuGH" ["Security . . . only a submission to the ECJ"]).

826 of the BGB are also very high. In addition to the immorality, it is above all the causal damage that must be proven.[117] Instead, numerous measures against short-selling attacks by the company are proposed in the legal literature: from an emergency team to public relations to contacting the "activist shareholder."[118] Companies often feel left alone by the BaFin and the public prosecutor's office.

B. Highly Unsatisfactory Legal Situation

Some claim that there is already an "over enforcement" in the area of market manipulation.[119] But the cases described here illustrate the exact opposite. There is a deficit in the specification and enforcement of standards.[120] The results are highly unsatisfactory: in the area of market manipulation, which destroys millions several times a year, the victims in Germany remain largely (legally) unprotected. Although the MAR, the MAD,[121] and the implementing regulations at the second and third levels have increased the relevant law tenfold,[122] there are no clear answers in the law. This also illustrates the disadvantage of the regulation as a regulatory instrument: in principle, it must be interpreted autonomously and no longer fall back on national law.[123] The legal harmonization formally leads to a flood of standards, but in terms of content it must be qualified as a step backward. BaFin's reactions have also so far been rather unhelpful.[124]

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117. *See* Thomas M.J. Möllers & Franz C. Leisch, *in* Kölner Kommentar zum WpHG §§ 37b, c mn. 426 et seqq. (2d ed. 2014).

118. Thomas Bunz, *Vorbereitungs- und Reaktionsmöglichkeiten börsennotierter Unternehmen auf Shareholder Activism*, Neue Zeitschrift für Gesellschaftsrecht [NZG] 1049, 1052 et seqq. (2014); Bernd Graßl & Tobias Nikoleyczik, *Shareholder Activism und Investor Activism*, Die Aktiengesellschaft [AG] 49, 59 et seqq. (2007); Richard Mayer-Uellner & Matthias Engelen, *Die erfolgreiche Verteidigung gegen eine Short-Attack*, CMS Blog (Aug. 14, 2017), https://www.cmshs-bloggt.de/gesellschaftsrecht/aktienrecht/erfolgreiche-verteidigung-gegen-short-attack/.

119. Dirk Zetzsche & David Eckner, 6 Europäisches Privat- und Unternehmensrecht § 7 mn. 142 (Martin Gebauer & Christoph Teichmann eds., 2016).

120. *See* Dirk Kocher, *Strategien im Umgang mit aktivistischen Aktionären und Investoren in Deutschland*, Der Betrieb [DB] 2887, 2982 (2016); *see also* Maume, *supra* note 109, at 370 – 71; *but see* Peter O. Mülbert, *Rechtsschutzlücken bei Short Seller-Attacken – und wenn ja, welche?*, 182 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 105 – 06, 108, 111 – 12 (2018) (assuming, without analysis, that in the above cases the research reports and short-seller attacks are legally permissible).

121. Directive 2014/57/EU, of the European Parliament and of the Council of 16 Apr. 2014 on Criminal Sanctions for Market Abuse (market abuse directive), 2014 O.J. (L 173) 179.

122. Peter O. Mülbert, *Regulierungstsunami im europäischen Kapitalmarktrecht*, 176 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 369 et seq. (2012); Thomas M.J. Möllers, *Europäische Gesetzgebungslehre 2.0: Die dynamische Rechtsharmonisierung im Kapitalmarktrecht am Beispiel von MiFID II und PRIIP*, Zeitschrift für Europäisches Privatrecht [ZEuP] 325, 330 et seq. (2016).

123. Möllers, *supra* note 122, at 352 et seq.

124. Legal literature speaks of "[t]he fight with blunt weapons" and "Sleeping Beauty of legal practice." *See* Jürgen Voss, Das US-Amerikanische Insiderkonzept 4 (1984); Gisella

Although the research reports do not meet the requirements of an objective investment recommendation, to date there has been no conviction in the cases mentioned above. Substantial market manipulations thus remain unpunished. On the Internet, the situation for Germany is soberly described as follows: "In all three cases of short selling activism, the German Market and its participants did not seem very well prepared and the short selling activist maybe had too much an easy game."[125]

C. The Legal Situation in the USA and Its Reasons

At this point, a comparison with U.S. law makes sense. Misleading information may be unlawful as market manipulation,[126] as shown by sections 9(a)(4) and 10(b) of the Securities Exchange Act.[127] Violations may result in sanctions under criminal and civil law.[128] But enforcement is not always easy in the United States either.[129] Freedom of the press and freedom of expression are partly expanded further than in Europe. Illegal information is only illegal if the offender is also shown to have acted "willfully and maliciously."[130] Nevertheless, convictions and settlements with the Securities Exchange Commission (SEC) have taken place in the United States in recent years; criminal, civil, and public law proceedings have often been sought at the same time, for example against Barry Minkow, Paul Berliner, and Mark Jacob.[131] In the past, the "uptick rule" also limited

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Victoria Villeda, Prävention und Repression von Insiderhandel 364 (2010). *See also* Sandro Barbato, *Germany: Short Selling Activism*, LinkedIn (Nov. 7, 2016), https://www.linkedin.com/pulse/short-selling-activism-sandro-barbato?trk=mp-author-card.

125. *See* Voss, *supra* note 124; Villeda, *supra* note 124; Barbato, *supra* note 124.

126. *See generally* Perrie M. Weiner et al., *The Growing Menace of 'Short and Distort' Campaigns*, 23 No. 9 Westlaw J. Sec. Litig. & Reg. 1 (2017); Bernd Graßl & Tobias Nikoleyczik, *Shareholder Activism und Investor Activism*, Die Aktiengesellschaft [AG] 49, 51 (2007) (referring to pump-and-dump strategy and short-and-distort strategy).

127. Securities Exchange Act of 1934 §§ 9(a), 10(b), 15 U.S.C. §§ 78(i) – (j) (2018); Rule 10b-5, 17 C.F.R. § 240.10b-5 (2011); *see also* Louis Loss and Joel Seligman, Fundamentals of Securities Regulation 1125 – 27 (5th ed. 2004); Thomas Hazen, The Law of Securities Regulation 433 – 34 (6th ed. 2009).

128. *E.g.*, Abel Ramirez, *Are Short Sellers Really the Enemy of Efficient Securities Markets? A Discussion of Misconceptions After the Financial Crisis*, 41 Sec. Reg. L.J. ART 2 1, 3 (2014).

129. Perrie M. Weiner et al., *The Growing Menace Of 'Short And Distort' Campaigns*, 23 Westlaw J. Sec. Litig. & Reg. 1, 1 – 4 (2017).

130. Thus, complaints fail if the untrue information was made "in good faith" and "fairly represented." *See* Jessica Dye & Jim Finkle, *St. Jude's Lawsuit Against Short-Seller Faces Steep Climb – Lawyers Say, St. Jude Medical v. Muddy Waters Consulting*, Reuters (Sept. 7, 2016), https://www.reuters.com/article/us-st-jude-medical-cyber-legal/st-judes-lawsuit-against-short-seller-faces-steep-climb-lawyers-idUSKCN11D2TP.

131. *See* Charles F. Walker & Colin D. Forbes, *SEC Enforcement Actions and Issuer Litigation in the Context of a "Short Attack"*, 68 Bus. L. 687, 700 (2013).

the profit of the short seller to one eighth.[132] In terms of legal policy, the reintroduction of these or comparable regulations are called for.[133]

Why does it seem easier to sanction information-driven market abuse in the U.S. than in Europe? Three attempts at explanation impose themselves: first, the U.S. jurisdiction is simply bigger. The SEC is responsible for the entire United States, not just one state.[134] This does not require a tedious request for mutual legal assistance between individual states. Secondly, the USA has the oldest capital market law in the world; and the SEC has extensive sanctions at its disposal, such as civil law claims for damages in addition to settlement.[135] After all, Anglo-American law does not have a strict principle of proportionality as it is known in German and European law.[136] Class action lawsuits and punitive damages[137] are much more likely to lead to settlements or even "enforce" them, as the VW diesel scandal graphically illustrates. Within a few months, Volkswagen AG paid twenty-three billion dollars,[138] and its managers can no longer travel to the United States without bearing the risk of being arrested.

III. *De Lege Lata* Proposals: More Effective Enforcement at a National Level

A. Clearer Law: Inclusion of the Required Standard of Due Diligence In The Issuer's Guideline

The previous national law has formulated the formal and substantive requirements more precisely than the new European law of the MAR and its specification at the second and third levels. So far, financial analyses have not been adequately addressed because there are no relevant court decisions. The above-mentioned German legal regulations (MaKonV, FinAnV) and

132. This SEC Rule 10a-1 was introduced by the SEC in 1938, but deleted in 2007. *See* Douglas M. Branson, *Nibbling at the Edges—Regulation of Short Selling: Policing Fails to Deliver and Restoration of an Uptick Rule*, 65 Bus. Law. 67 (2009); Jonathan R. Macey et al., *Restrictions on Short Sales: An Analysis of the Uptick Rule and its Role in View of the October 1987 Stock Market Crash*, 74 Cornell L. Rev. 799 (1989).

133. For a discussion, see Branson, *supra* note 133, at 86; Richard E. Ramirez, *Falling Short: Has The SEC's Quest to Control Market Manipulation and Abusive Short-Selling Come to an End or Has it Really Just Begun?*, 2 Univ. P.R. Bus. L. J. 76, 102 (2011); Macey et al., *supra* note 132, at 835.

134. *See* James Chen, *Securities and Exchange Commission (SEC)*, Investopedia (May 14, 2019), https://www.investopedia.com/terms/s/sec.asp.

135. *See, e.g.*, Paul S. Berliner, File No. 3-13035, Release No. 57774 (May 5, 2008).

136. *See* Thomas M.J. Möllers, Juristische Methodenlehre § 12 mn. 23, 93 et seq. (2017).

137. For a case addressing the limits of proportionality between punitive damages and actual damages, see BMW of North America v. Gore, 517 U.S. 559, 562 – 86 (1996).

138. *VW zahlt weitere Millionen-Entschädigung* [*VW Pays Another Million-Compensation*], n-tv (Mar. 30, 2017), https://www.n-tv.de/wirtschaft/VW-zahlt-weitere-Millionen-Entschaedigung-article19773526.html.

the German issuer guideline of 2005[139] were already more precise in their clarity and the associated ease of use than the MAR with its unclear annexes and delegated regulations.[140] The step backward could easily be corrected if the content and formal requirements of the MaKonV and the FinAnV regarding the standard of due diligence of an investment recommendation were included in the new version of the issuer guideline. BaFin would thus not only address small investors, but all market participants, and it would convey that it would not tolerate such behavior.

In concreto, the requirements for objectivity would be defined more precisely—that is, formally based on the required expertise, diligence, and conscientiousness of the research obligation (reliability of the information sources).[141] The content of the analysis should be unbiased and substantiated in such a way that its results are comprehensible.[142] If necessary, the right to correct a false report[143] and BaFin's public warning[144] could still be included in the issuer's guide.

B. Specification of the Due Diligence Requirements of Financial Analyses

In some cases, the previously legally regulated duties of care[145] can be substantiated by following the case law on product testing. Furthermore, in certain cases, the duty of care must be supplemented by an obligation to hear the other side—*audiatur et altera pars.*

1. *Differentiation between Factual Statements and Opinions*

The financial analysts' accusations usually concern a specifically verifiable core, for example, whether Wirecard had pornographic content on its server[146] or violated the Unlawful Internet Gambling Enforcement Act.[147] At the same time, however, it is stated that these are only one's own

139. *Emittententenleitfaden der Bundesanstalt für Finanzdienstleistungsaufsicht* [*Issuer Guideline of the Federal Financial Supervisory Authority*], BaFin (July 15, 2005), https://www.bafin.de/SharedDocs/Downloads/DE/Leitfaden/WA/dl_emittententenleitfaden_2005.html. The issuer guideline has been revised several times and is now available in its 4th edition (2013).

140. The legislative technique of the "texts of partial rights" still recalls the legislative technique of Great Britain and Scandinavia, which is limited to partial codifications. *See* Konrad Zweigert & Hein Kötz, Einführung in die Rechtsvergleichung 177 et seq., 271 (3d ed. 1996).

141. *See* discussion *infra* Section III.B.3.b.

142. *See* discussion *infra* Section III.B.3.c.

143. Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 21, 2014, Neue Juristische Wochenschrift [NJW] 239, 2015 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 21, 1989, Neue Juristische Wochenschrift [NJW] 1923, 1989 (Ger.).

144. *See* discussion *infra* Section III.D.1.

145. *See* discussion *infra* Section III.B.2.

146. Zatarra Research & Investigations, *supra* note 30, at 65, 80 (2016).

147. *Id.* at 47.

conclusions.[148] Thus, there is a mix between opinion and assertion of facts.[149] Subjective value judgments can also be found in the research reports, for example, when Muddy Waters explains "[w]e see a company that to us appears far less successful"[150] and thus gives its assessment regarding the success of the company. There are also concrete allegations of facts, such as when Gotham City raises the question "Do Aurelius' Swedish subsidiaries exist?" and suspects that Aurelius does not have any subsidiaries in Sweden.[151]

A distinction must therefore be made between factual allegations, as allegations that are completely ascertainable by evidence,[152] and statements that merely constitute opinions.[153] This differentiation has a corresponding effect on the duties of care that apply to financial analysts and whether they also bear an obligation to hear the other side —*audiatur et altera pars.*

2. *Increased Duty of Care in Expressing Opinions*

a. Case Law on Business Damaging Criticism: Product Tests and Gastronomy Criticism

A comparison with the case law on "Stiftung Warentest" (product testing foundation) for the evaluation of opinions is helpful. If two parties are in a competitive relationship and one party criticizes the other party to the detriment of business, the consequences in tort shall be determined in accordance with section 4 nos. 1 and 2 of the Unfair Competition Act (UWG).[154] If this is not the case, then sections 824 and 823(1) – (2) of the BGB are relevant. Whether a concrete criticism is to be measured by sections 824 or 823(1) of the BGB depends on whether a factual assertion or an opinion is present.[155] Assertions of facts are covered by special section 824 of the BGB, while opinions are to be assessed according to section

148. *E.g.*, *id.* at 80 ("evidence shows that"); MUDDY WATER REPORT: STRÖER: BLUE SKY OR BEING TAKEN FOR A RIDE? 2, 20 (2016), http://www.muddywatersresearch.com/research/sax/mw-is-short-stroeer/ ("one reasonable conclusion").

149. Gerhard Wagner, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 824 mn. 16 (Franz J. Säcker et al. eds., 7th ed. 2017).

150. MUDDY WATER REPORT: STRÖER: BLUE SKY OR BEING TAKEN FOR A RIDE?, *supra* note 148, at 4.

151. DO AURELIUS' SWEDISH SUBSIDIARIES EXIST?, *supra* note 29, at 4 – 10.

152. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 22, 1982, 61 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (8) (Ger.); Helmuth Schulze-Fielitz, *in* GRUNDGESETZ KOMMENTAR art. 5 I, II mn. 64, 70 (Horst Dreier eds., 3rd ed. 2013).

153. 61 BVERFGE 1 (7) (Ger.); Schulze-Fielitz, *supra* note 152, art. 5 I, II mn. 62.

154. Gerhard Wagner, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 823 mn. 339 (Franz J. Säcker et al. eds., 7th ed. 2017); Johannes Hager, *in* STAUDINGER BGB § 823 mn. D 27 (Heinz-Peter Mansel ed., 2017); Jan Peter Heidenreich, *The New German Act Against Unfair Competition*, GERMAN LAW ARCHIVE: LITERATURE (Nov. 22, 2013), https://germanlawarchive.iuscomp.org/?p=349#sdfootnote1sym.

155. *See* Wagner, *supra* note 154.

823(1).[156] The results of comparative product tests are usually value judgments and thus opinions according to court rulings.[157]

For assessment within the scope of section 823(1), the jurisdiction has developed a uniform procedural standard of care.[158] This requires neutral, objective, independent, and expert research and reporting.[159] The examination method and the results must appear plausible (i.e. still justifiable and debatable).[160] If this standard of care is violated, the test company shall be liable for damages according to section 824(1) of the BGB for false allegations of facts and according to section 823(1) for unjustifiable value judgments.[161] But the case law does not require the company concerned to be heard. It would also be superfluous, as product testing alone judges the facts and a hearing would not provide any further information.

Criticism in gastronomy also reaches the limits of freedom of expression. As soon as the value judgments constitute defamatory criticism or formal insults, there is an intervention in the established and exercised business, so that damages from section 823(1) are conceivable and at the same time from section 823(2) of the BGB, in connection with section 186 of the German Criminal Code (StGB).[162] In view of article 5 of the Federal Constitution (GG),[163] however, defamation may only be accepted if the primary focus is

156. Hans-Jürgen Ahrens, *Vergleichende Bewertung von Universitätsdienstleistungen – Neue Anwendungsbereiche der Warentestrechtsprechung*, FESTSCHRIFT FÜR EIKE ULLMANN 565, 571 (2006).

157. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 9, 1975, 65 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN[BGHZ] 325 (329) (Warentest II) (Ger.).

158. *See* Wagner, *supra* note 154, § 823 mn. 339.

159. 65 BGHZ 325 (334) (Warentest II) (Ger.); Heinz-Dieter Assmann & Friedrich Kübler, *Testhaftung und Testwerbung – Die Praxis der Stiftung Warentest als Regelungsaufgabe des Privatrechts*, 142 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 413, 427 (1978); Bundesgerichtshof [BGH] [Federal Court of Justice] June 17, 1997, 142 GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 942 (944), 1997 (Ger.); *see also* Wagner, *supra* note 154, § 823 mn. 347; Helmut Köhler, *in* GESETZ GEGEN DEN UNLAUTEREN WETTBEWERB § 6 UWG mn. 197 et seq. (Helmut Köhler et al. eds., 37th ed. 2019).

160. *See* 65 BGHZ 325 (335) (Warentest II) (Ger.); Heinz-Dieter Assmann & Friedrich Kübler, *Testhaftung und Testwerbung – Die Praxis der Stiftung Warentest als Regelungsaufgabe des Privatrechts*, 142 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 413, 427 (1978); Oberlandesgericht Frankfurt [OLG Frankfurt] [Higher Regional Court of Frankfurt] Apr. 25, 2002, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 85, 2003 (Ger.).

161. *See* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 823(1), 824(1), *translation at* https://www.gesetze-im-internet.de/englisch_bgb/ (Ger.).

162. Johannes Hager, *in* JULIUS VON STAUDINGER, ECKPFEILER DES ZIVILRECHTS, S. § 4 VI. mn. 418 (2018); Jörg-Michael Günther, *Rechtlicher Spielraum bei Gastronomiebewertungen – zwischen Meinungsfreiheit und Schmähkritik*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3275, 3278 (2013).

163. GRUNDGESETZ [GG] [BASIC LAW], art. 5, *translation at* https://www.gesetze-im-internet.de/englisch_gg/.

on defamation rather than dispute about the matter at hand.[164] The same considerations also apply to credit rating agencies.[165] A duty to hear the company concerned is not necessary here because abusive criticism and formal insults are by no means protected by article 5 of the GG and may not take place per se, so that the claims for damages can be affirmed in such a case without problems.

b. Legal Consequence

If the necessary care is not observed, the statements lead to claims for damages pursuant to section 823(1) of the BGB due to their lack of objectivity, although they represent expressions of opinion.[166]

c. Transfer to Financial Analysis

The case group of product tests is partly comparable with financial analyses. While product tests report on individual characteristics of a consumer product and draw a conclusion on the quality of the product as a result, financial analyses focus on the characteristics of the company and thus, for example, evaluate the balance sheets and conclude as a result whether the shares are worth the stock exchange price. In principle, financial analysts are entitled to rate the price of a listed company as appropriate, too low, or too high and to justify this with the current price-earnings ratio, for example. The courts classified the results of the product tests as value judgments and thus opinions, which can only lead to damages according to section 823(1) of the BGB if the opinions are inappropriate.[167] For this purpose, the test result must be measured on the basis of concretely developed standards of care. If this is applied to the statements and thus opinions expressed in financial analyses, an examination of the care must be carried out, as with product tests, according to which the results of the financial analyses must appear *plausible*—that is, still justifiable and debatable. Even if the previously applicable statutory due diligence requirements of the FinAnV no longer apply, they should at least be taken into account in assessing whether there is a subjective statement.

For example, such unobjective opinions can be assumed in concrete terms if the Zatarra Research Report concludes that the correct market value at Wirecard should be EUR 0.00.[168] This financial analysis is no longer comprehensible and therefore illegal. Nor is it comprehensible if the actual

164. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 26, 1990, 82 BVERFGE 272 (284) (Ger.).

165. Mathias Habersack, *Rechtsfragen des Emittenten-Ratings*, 169 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 185, 195 (2005); Oberlandesgericht Berlin [OLG Berlin] [Higher Regional Court of Berlin] May 12, 2006, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT [WM] 1432 (1433), 2006 (Ger.).

166. *See generally* Thomas M.J. Möllers, *Marktmanipulationen durch Leerverkaufsattacken und irreführende Finanzanalysen*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 649 et seq. (2018).

167. 65 BGHZ 325 (329, 334 et seq.) (Warentest II) (Ger.).

168. ZATARRA RESEARCH & INVESTIGATIONS, *supra* note 30.

market value of Aurelius is rated at a maximum of EUR 8.56,[169] and thus 85 percent below the current market price, or if, as Viceroy Research recently accused the company ProSiebenSat.1 Media of, false balance sheets inconceivably valued the intrinsic value of the share at EUR 7.51 and thus 75 percent below the current closing price.[170] These cases do not meet the standard of due diligence as previously regulated in the FinAnV, so that the results of the financial analysis no longer appear justifiable. A corresponding application of the case law on product tests therefore leads to a claim for damages according to section 823(1) of the BGB.

3. *Obligation to Hear the Other Side in the Event of Allegations of Facts*

a. Case Law on Suspicion Reporting

Over the years, the courts developed the principles of so-called suspicion reporting in journalism. These principles are not necessary if facts are reported which are already doubtlessly untrue at the time of the statement.[171] Incorrect facts are not protected by freedom of expression or of the press and are in any case inadmissible.[172] Conversely, however, the press cannot be required to be allowed to report only undoubtedly true facts.[173] Otherwise the media could not fulfil their functions for forming public opinion guaranteed in article 5(1) of the GG.[174] The media have a control function as a "public watchdog."[175] They are supposed to help uncover illegal practices by state bodies or dubious business practices.[176] The media,

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169. AURELIUS: THE NEXT ARQUES AG OR THE NEXT PHILIP GREEN?, supra note 35, at 43.

170. *ProSieben – TV's Real House of Cards*, *supra* note 39; Press Release, ProSiebenSat.1, Statement Regarding the Short-Attack by Viceroy (March 6, 2018), https://www.prosiebensat1.de/uploads/2018/03/07/PR_P7S1_06032018.pdf; Press Release, ProSiebenSat.1, Follow-up Statement on Short-Selling Attack by Viceroy Research Group (March 7, 2018), https://www.prosiebensat1.de/uploads/2018/03/07/IR%20Release_Follow-up_statement_Viceroy.pdf.

171. Alexander Molle, *Die Verdachtsberichterstattung*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 331, 332 (2010).

172. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 23, 2000, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT ZIVILRECHT [NJW-RR] 1209 (1210), 2000 (Ger.).

173. GRUNDGESETZ [GG] [BASIC LAW], art. 5, *translation at* http://www.gesetze-im-internet.de/englisch-gg/index.html (Ger.).

174. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 14, 1998, 97 BVERFGE 125 (149) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 1999, 143 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 199 mn. 21 (Ger.); Alexander Molle, *Die Verdachtsberichterstattung*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 331, 332 (2010).

175. Helmuth Schulze-Fielitz, *in* GRUNDGESETZ KOMMENTAR art. 5 I, II mn. 25 n.31 (Horst Dreier ed., 3d ed. 2013).

176. Axel Beater Greifswald, *Informationsinteressen der Allgemeinheit und öffentlicher Meinungsbildungsprozess*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 602, 605 (2005).

through investigative journalism for example, as the de facto fourth branch,[177] play an essential role in society.

In order to resolve this tension between freedom of the press and the general right of privacy, the courts developed the principles for suspicion reporting.[178] If the press reports suspicion of a crime or any other behavior which is likely to diminish a person's public image, it must comply with special requirements for reporting to be permissible.[179] The press must take into account the facts and arguments put forward by the person concerned.[180] This requires a dispute with the other party, so that a statement from the party concerned must be obtained regularly before publication.[181] In the case of reporting suspicions, case law has thus developed a substantive obligation to consult.

In order to adopt a suspicion report, it is sufficient if the suspicion is expressed in the form of a genuine, open question.[182] If the press complies with the principles developed, the general public's interest in information takes precedence over the subject's right to privacy.[183]

Because the press is exceptionally granted the right to report on unproven facts,[184] and thus to intervene strongly in the personality rights of the person concerned by means of a pre-judgment in the press, everything must be done to avoid incorrect reporting and thus establish equality of arms. The duty to hear the other side before suspicion reporting must be regarded as an unwritten feature of a proportionality test. In order to be able to report a suspicion at all, the press must first establish a minimum body of evidence that speaks to the truth of the information.[185] The greater the damage to the reputation of the person concerned, the greater the obligation to exercise

177. Josef Franz Lindner, *in* VERFASSUNG DES FREISTAATES BAYERN art. 5 BV n.24 (Josef Franz Lindner et al. eds., 2d ed. 2017).

178. *See generally* Alexander Molle, *Die Verdachtsberichterstattung*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 331 (2010).

179. *Id.* at 332; Oberlandesgericht Hamburg [OLG] [Higher Regional Court of Hamburg] Apr. 8, 2008, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT – RECHTSPRECHUNGSDIENST [ZUM-RD] 326 (328), 2009 (Ger.).

180. 143 BGHZ 199 (203 et seq.) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGER ICHTS [BVERFGE] 202 (232) (Ger.).

181. 143 BGHZ 199 (204) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 30, 1996, 132 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BGHZ] 13 (25) (Ger.).

182. Alexander Molle, *Die Verdachtsberichterstattung*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 331, 332 (2010); Oberlandesgericht Hamburg [OLG] [Higher Regional Court of Hamburg] Apr. 8, 2008, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT – RECHTSPRECHUNGSDIENST [ZUM-RD] 326 (328), 2009 (Ger.).

183. Alexander Molle, *Die Verdachtsberichterstattung*, ZEITSCHRIFT FÜR URHEBER- UND MEDIENRECHT [ZUM] 331, 332 (2010).

184. GG art. 5 (Ger.).

185. 143 BGHZ 199 (203) (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] May 3, 1977, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1288 (1289), 1977 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], Nov. 26, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1148 (1149), 1997 (Ger.).

due diligence in determining the facts of evidence.[186] All in all, a report that contains a sensational, falsified, or deliberately one-sided presentation is inadmissible.[187] Moreover, the courts demand that the facts and arguments presented by the person concerned must be taken into account by the press.[188] This requires a dispute with the other party, so that a statement from the person concerned must be obtained regularly before publication.[189] In the case of suspicion reporting, case law has thus developed a substantive obligation to hear the other side.

b. Legal Consequence

In addition to the requirements for reporting suspicions, the courts also developed the corresponding legal consequences for compliance with or disregard of the principles. The consequences of suspicion reporting will be felt if it turns out later that a statement made by the press is untrue. In principle, the person concerned may demand injunctive relief or damages. But if the press adheres to the principles of suspicion reporting, in such a case the statement must nevertheless be regarded as legal at the time of the statement.[190] The person concerned can then no longer bring an action for revocation in the form of rectification of the original report,[191] but can only demand subsequent notification that the reported suspicion no longer exists after the facts have been clarified.[192] This restriction of the right of revocation results from a weighting between freedom of the press and the general right of privacy: the obligation to publish a correction constitutes a considerable encroachment upon article 5(1) of the GG and article 10(1) of the ECHR[193] because the press itself may decide what it wishes to report on according to journalistic criteria.[194] Consequently, a claim for damages is no longer considered, although an untrue statement exists.[195] If the press listens to the other side within the scope of the suspicion report, this leads to an opportunity for exculpation of the press because the person concerned will then be denied a comprehensive right of revocation and claim for damages.

186. 143 BGHZ 199 (203 et seq.) (Ger.).
187. 143 BGHZ 199 (203) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202 (232) (Ger.).
188. 143 BGHZ 199 (203 et seq.) (Ger.); 35 BVERFGE 202 (232) (Ger.).
189. 143 BGHZ 199 (204) (Ger.); 132 BGHZ 13 (25) (Ger.).
190. 143 BGHZ 199 (204) (Ger.).
191. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 2, 2018, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT, WERTPAPIERMITTEILUNGEN [WM] 1167 (1168), 2018 (Ger.).
192. Federal Constitutional Court, WM 1167 (1168), 2018 (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 18, 2014, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 96, 2015 (Ger.).
193. European Convention on Human Rights.
194. Federal Constitutional Court, GRUR 96 (100 et seq.), 2015 (Ger.); Federal Constitutional Court, WM 1167 (1168), 2018 (Ger.).
195. 143 BGHZ 199 (204) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1322 (1324), 1999 (Ger.).

c. Transfer to Financial Analysts

In purely practical terms, financial analysts also have a need to report on suspicions or include them in their analyses. It is not always possible for financial analysts to examine facts up to the point where they can be proven beyond doubt. Often these are internal company facts that cannot be completely verified by outsiders. If, in the context of the so-called dieselgate, it is suspected that members of the Board of Management were aware of the manipulation devices, a concrete examination of such a suspicion would require access to the internal communication and operational processes of the company. This is regularly not open to outsiders. If, however, there are justified grounds for suspicion, it must be possible to include the suspicion in an analysis in the interests of capital market transparency. In addition, the media as third parties also report on such suspicions, which can also influence the stock market price.

Several considerations can be used to explain why financial analysts must be able to report and evaluate suspicions at the outset. As *financial intermediaries*, they help small investors to channel and evaluate information.[196] They enjoy a position of trust with investors based on their expertise.[197] They help to ensure that information is made available to the public as quickly as possible, that the right price is set on the capital market accordingly, and that information asymmetries are reduced.[198] Financial intermediaries not only evaluate information, but they also determine their own information.[199] If an untrue assertion of facts exists, claims for damages are possible undersection 824, as well as under section 823, of the BGB.[200] Likewise, there is an obligation to revoke under section 1004 of the BGB analogously.[201] At the same time, an administrative offense exists according

196. *See generally* Brianna Flavin, *What Does a Financial Analyst Do? Beyond the Numbers*, RASMUSSEN COLLEGE, (March 3, 2019), https://www.rasmussen.edu/degrees/business/blog/what-does-financial-analyst-do/.

197. Jennifer Payne, *The Regulation of Short Selling and Its Reform in Europe*, 13 EUROPEAN BUS. ORG. L. REV. [EBOR] 413, 418 et seq. (2012).

198. Thomas M.J. Möllers et al., *Nationale Alleingänge und die europäische Reaktion auf ein Verbot ungedeckter Leerverkäufe*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1167, 1168 et seq. (2010); Jennifer Payne, *The Regulation of Short Selling and Its Reform in Europe*, 13 EUROPEAN BUSINESS ORGANIZATION LAW REVIEW [EBOR] 413, 418 et seq. (2012).

199. Tim Drygala, *A Step Ahead of the Crowd – Zur Selektiven Information von Finanzanalysten nach Amerikanischem und Deutschem Kapitalmarktrecht – Teil II*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT, WERTPAPIERMITTEILUNGEN [WM] 1313, 1317 (2001); Thomas M.J. Möllers, *Marktmanipulationen durch Leerverkaufsattacken und irreführende Finanzanalysen*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 649, 650 – 54 (2018).

200. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 823 – 824, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (Ger.).

201. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 1004, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (Ger.).

to the WpHG.[202] In the event of an untrue assertion of facts, therefore, the specific question arises as to the consequences of the obligation to hear the other side if claims for damages are already relevant. This is where the legal consequences of suspicion reporting developed by courts come into their own. A revocation in the form of the correction of the original reporting, as well as claims for damages, are no longer possible. It is precisely this consequence of the obligation to hear the other side that also applies to the financial analyses because even statements in their research reports contain suspicions about the company.[203] At the same time, this creates an important incentive for analysts to comply with their obligation to be heard, as it allows them to avoid any possible liability for damages. But the person concerned has been warned and can defend himself against the accusations. Overall, an equality of arms is thus established.

An obligation to hear the other side (*audiatur et altera pars*) would have major advantages. On the one hand, the analyst would become clearly aware of his obligation to be objective because he would have to relativize his view of things with the company's counterarguments. On the other hand, the company would be warned and would have time to prepare its own opinion. Finally, this would remove the element of surprise—and thus endanger the entire business model.

C. Powerful Monitoring

1. *Establishment of a Permanent "Capital Market Law Intervention Force" – The Suspension of the Share Price*

The military is familiar with the concept of a permanent intervention force.[204] The SEC has a Microcap Fraud Task Force.[205] When it comes to organized crime, the State must ensure equality of arms with the perpetrators. It is certainly not optimal if the supervision of stock exchange participants in Germany is divided between the BaFin, the trading monitoring offices of the local stock exchanges,[206] and the local public

202. Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL I at 2708, last amended by Gesetz [G], June 22, 2011, BGBL I at 1126, § 98 (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html.

203. For example, Wirecard violated the Unlawful Internet Gambling Enforcement Act. ZATARRA RESEARCH & INVESTIGATIONS, *supra* note 30, at 22.

204. Regarding the NATO Response Force (NRF), see *Media Backgrounder: The NATO Response Force*, N. ATL. TRADE ORG. (Oct. 2013), https://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2013_10/20131018_131022- MediaBackgrounder_NRF_en.pdf.

205. *See* Press Release, Sec. & Exchange Comm'n, SEC Announces Enforcement Initiatives to Combat Financial Reporting and Microcap Fraud and Enhance Risk Analysis (July 2, 2013), https://www.sec.gov/news/press-release/2013-2013-121htm.

206. In Germany, there are eight stock exchanges located in Düsseldorf, Frankfurt, Hamburg, Munich, Stuttgart, and Berlin. *See* Börsengesetz [BörsG] [The German Stock Exchange Act], June 22, 1896, RGBL at 157, last amended by Gesetz [G], July 8, 2019 at 1002, 1016, § 7, art. 4 (Ger.), https://www.gesetze-im-internet.de/b_rsg_2007/B%C3%B6rsG.pdf (establishing the stock exchanges and the accompanying procedures); Sanjaya Bara, *German Stock Exchange*,

prosecutors' offices.[207] If the authorities need years to investigate before the proceedings are closed, punishable acts are not sanctioned.[208] *In concreto*, only the company can assess to what extent the allegations made in a research report are correct or inaccurate.[209] In this respect, the supervisory authorities are also dependent on the know-how of the company concerned. Ideally, BaFin, the trading supervisory office, and the company concerned would work together so quickly that stock exchange trading could also be suspended quickly.

a. Establishment of a Germany-Wide Competent Public Prosecutor's Office

In addition, a more effective public prosecutor's office should be called for. It is unrealistic that twenty to thirty public prosecutors' offices throughout Germany[210] are building up know-how in the area of market manipulation; it would be less effective for the respective public prosecutor's office on the spot to keep such knowledge up to date if such an offense is prosecuted once every few years.[211] Several Higher Regional Courts in a federal state can already set up an Attorney General's Office.[212] It would be even better if there were only one public prosecutor's office at the largest German stock exchange in Frankfurt am Main in Germany.[213] Political attempts in this direction have not yet been successful. But when it becomes clear that the equality of arms against organized crime must be established, appropriate expertise is needed. Alternatively, the Federal Prosecutor could

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ECONOMY WATCH (Nov. 17, 2011), https://www.economywatch.com/stockexchanges/german.html.

207. However, the coordination among each other is described as good.

208. *See e.g.* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], §§ 195, 199, *translation at* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (Ger.) (violations of the Civil Code are time-barred after three years from the date that the claim arises).

209. *See, e.g.*, Eric Auchard, Jörn Poltz & Alasdair Pal, *Head of Germany's Wirecard Rejects Fraud Allegations by Short-Seller*, REUTERS (March 15, 2016), https://de.reuters.com/article/uk-wirecard-report/head-of-germanys-wirecard-rejects-fraud-allegations-by-short-seller-idUKKCN0WH1I4 (stating that Wirecard denied the allegations asserted in Zatarra's report after an internal investigation). Prosecutors later confirmed Wirecard's claims that these allegations were false. *Munich Prosecutors Seek Fine Against Publisher of Zatarra Report*, REUTERS (Dec. 10, 2018), https://www.reuters.com/article/wirecard-probe/munich-prosecutors-seek-fine-against-publisher-of-zatarra-report-idUSFWN1YF0Q1.

210. Eberhard Siegismund, *The Public Prosecution Office in Germany: Legal Status, Function, and Organization*, RESOURCE MATERIAL SERIES NO. 60 58, 60 (2001), https://www.unafei.or.jp/publications/pdf/RS_No60/No60_10VE_Siegismund2.pdf.

211. BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT [BAFIN], 2018 ANNUAL REPORT, 133– 34 (June 19, 2019), https://www.bafin.de/SharedDocs/Downloads/EN/Jahresbericht/dl_jb_2018_en.pdf?__blob=publicationFile&v=3.

212. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, BGBL I at 1077, § 143(4), last amended by Gesetz [G], Oct. 30, 2017, BGBL I at 3618, art. 10 (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.pdf.

213. For the competent public prosecutor's office in Frankfurt, see Martin Paul Waßmer, *in* WERTPAPIERHANDELSGESETZ [WPHG] KOMMENTAR vor §§ 38-40b mn. 63 (Andreas Fuchs ed., 2d ed. 2016).

be responsible and may already now take responsibility for, for example, state security offences or certain serious offences involving a foreign terrorist group.[214]

D. Effective Supervisory Measures

1. *The Public Warning Pursuant to Section 6 (2) Sentence 3 WpHG*

On March 12, 2018, six days after the short-sale attack on ProSiebenSat.1 Media, BaFin warned that the Viceroy Research Group has issued neither an activity announcement pursuant to section 86 of the WpHG nor an imprint in the investment recommendation.[215] Since January 3, 2018, BaFin has had the authority to issue warnings in accordance with section 6(2) sentence 3 of the WpHG insofar as necessary to fulfil the tasks.[216] It is very welcome that BaFin has recently reacted quickly to a short-selling attack and made use of the new instruments of warning.[217] It is also to be welcomed that the warnings are included in the BaFin Journal and that BaFin as the supervisory authority is thus showing a clear position against these activities.[218]

2. *Trading Interruption Pursuant to Section 25(1) of the BörsG and Section 6(2) Sentence 4 of the WpHG*

Pursuant to section 25(1) of the Stock Exchange Act (BörsG)[219], the Exchange Management may suspend trading on the stock exchange if this appears necessary to protect the public. This has already been done several times in the past for the "pump and dump" cases in which prices have been manipulated upwards. In addition, BaFin has the right to suspend trading on the stock exchange in accordance with section 6(2) sentence 4 of the WpHG in order to enforce the MAR's prohibitions.[220] These are the cases at issue here. However, trading interruption is not unproblematic as a measure. On the one hand, trading disruption would be an effective means

214. Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], May 9, 1975, BGBl I at 1077, last amended by Gezets [G], October 30, 2017, BGBl I at 3618, §§ 120, 142a (Ger.), *translation at* https://www.gesetze-im-internet.de/englisch_gvg/englisch_gvg.pdf.

215. For more facts on this matter, see *ProSieben – TV's Real House of Cards*, *supra* note 38.

216. Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBl I at 2708, last amended by Gesetz [G], June 22, 2011, BGBl I at 1126, § 6(2), sent. 3 (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html.

217. *See, e.g.*, *ProSieben – TV's Real House of Cards*, *supra* note 38 (BaFin issued a warning to Viceroy Research Group).

218. *Wertpapiere: Kauf- und Tauschangebote: Hinweise für Anleger [Securities: Purchase and Exchange Offers: Information for Investors]*, BaFin Journal 26 (Mar. 2018), https://www.bafin.de/SharedDocs/Downloads/DE/BaFinJournal/2018/bj_1803.pdf?__blob=publicationFile&v=5.

219. Börsengesetz [BörsG] [The German Stock Exchange Act], June 22, 1896, BGBl I at 1330, last amended by Gesetz [G], July 8, 2019, BGBl I at 1002, 1016, § 25(1) (Ger.), https://www.gesetze-im-internet.de/b_rsg_2007/B%C3%B6rsG.pdf.

220. Peter O. Mülbert, *Rechtsschutzlücken bei Short Seller-Attacken – und wenn ja, welche?*, 182 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht [ZHR] 105, 112 (2018).

of curbing short-selling attacks. The company would have time to respond to the allegations. In addition, the profit of the short seller could be limited.[221] In the future, the "trash and cash" cases, in which prices are manipulated downwards, should also allow trading to be suspended.[222] On the other hand, "tradability on the financial markets" is an essential element of the security.[223] The trading interruption thus has a strong impact on the legal positions of market participants and can destroy the confidence of exchange participants.

The trading interruption is therefore a double-edged sword. With regard to the earlier law, it was emphasized that it is to be used only as an *ultima ratio*.[224] It should only be used if the company can react clearly to the incorrect report after the interruption.[225] In the event of clear violations, such as the failure to name the author of the study[226] or easily verifiable untruths,[227] the companies concerned should be able to promptly encourage and enforce the suspension of trading against the BaFin or the management of the stock exchange.

IV. Proposals *De Lege Ferenda* at European Level

A. Amendments to Delegated Regulations 2016/522 and 2016/958 – Limits on Permissible Investment Recommendations

However, responsibility for market abuse law lies with the European legislator. The issuer guideline has no binding effect in the area of market abuse law. It is therefore ultimately up to the Commission and ESMA to make the necessary clarifications. Because the Commission must report to the European Parliament on the MAR by July 3, 2019,[228] it should take the opportunity to make the necessary additions. At the European level, the Delegated Regulations (EU) 2016/522 and (EU) 2016/958, which regulate

221. If the trading interruption would take effect after a ten percent price loss, the short seller could collect only ten percent of the profit instead of thirty percent.

222. Commission Regulation 2016/522, Annex II, § 1(4), 2016 O.J. (L 88) 15.

223. According to section 2(1) of the WpHG. *See* Gregor Roth, *in* Kölner Kommentar zum WpHG, § 2 mn. 24 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

224. Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 15/3174, at 30, http://dip21.bundestag.de/dip21/btd/15/031/1503174.pdf (Ger.); Timo Holzborn & Alexander Israel, *Das Anlegerschutzverbesserungsgesetz - Die Veränderungen im WpHG, VerkProspG und BörsG und ihre Auswirkungen in der Praxis*, Zeitschrift für Wirtschafts- und Bankrecht, Wertpapiermitteilungen [WM] 1948, 1949 & n.20 (2004); Ludger Giesberts, *in* Kölner Kommentar zum WpHG, § 4 mn. 106 (Heribert Hirte & Thomas M.J. Möllers eds., 2d ed. 2014).

225. Regierungsentwurf [Cabinet Draft], Deutscher Budestag: Drucksachen [BT] 15/3174, http://dip21.bundestag.de/dip21/btd/15/031/1503171.pdf (Ger.).

226. *See* discussion, *supra* Section I.C.2.

227. *See, e.g.*, *supra* notes 87 – 90 and accompanying text.

228. Market Abuse Regulation 596/2014, *supra* note 54, art. 38, at 53.

the tension between market abuse,[229] investment advice, and the right to freedom of the press and opinion, together with the journalistic professional rules and ethics,[230] are to be supplemented by *de lege ferenda*, thus substantiating article 12(1) lit. a) and c); article 20(1); and article 21 of the MAR.[231] Terms must be defined, and the incorrect or misleading signals, as well as the "objective presentation" of an investment recommendation within the framework of article 20 of the MAR, must be addressed.[232] In addition, certain obligations, such as the obligation to search, must be specified. The above explanations can be used here.[233] Finally, it must be examined to what extent journalistic standards strengthen or limit these obligations. Ideally, case groups could also be formed.

B. More Effective Means of Sanctions

1. *The Conditionally Harmonized Criminal Law at the European Level*

One cannot accuse the European legislator of not having tackled the problems of market manipulation so far. The penalties have been significantly tightened within the framework of the Market Abuse Directive (MAD),[234] and a short sale regulation prohibits unsecured short sales and creates transparency.[235] In the case of insider trading or market abuse, it is sufficient that the market abuse has an effect in Europe.[236] The principle of effect applies, previously pursuant to section 1(2) of the WpHG, today pursuant to article 2(3) and (4) of the MAR.[237] Such a principle of effect is also known in European antitrust law[238] and in European data protection

229. *See generally* Commission Delegated Regulation 2016/522, 2015 O.J. (L 88) 1; Commission Delegated Regulation 2016/958, 2016 O.J. (L 160) 15.

230. *See generally* Presserat (German Press Council), German Press Code Guidelines for Journalistic Work as Recommended by the German Press Council 2 – 10 (2017), https://www.presserat.de/fileadmin/user_upload/Downloads_Dateien/Pressekodex2017english.pdf.

231. *See* Market Abuse Regulation 596/2014, *supra* note 54, arts. 12(1), 20(1), 21, at 29 – 30, 41.

232. *See* Market Abuse Regulation 596/2014, *supra* note 54, art. 20, at 41.

233. *See* discussion, *supra* Section I.C.2.

234. Directive 2014/57/EU, 2014 O.J. (L 173) 179.

235. Regulation 236/2012, 2012 O.J. (L 86) 1.

236. Matthias Lehmann, *Teil 12, Internationales Finanzmarktrecht*, *in* Münchener Kommentar zum Bürgerlichen Gesetzbuch, Volume 12, at 482 (Franz J. Säcker et al. eds., 7th ed. 2018).

237. *See* Stefan Grundmann, *Kreditwesen und Organisation*, *in* HGB, Bankvertragsrecht, Investment Banking Teil 1, mn. 546 (Claus-Wilhelm Canaris & Hermann Staub eds., 5th ed. 2017); Sebastian Mock, *in* Market Abuse Regulation, § B.2.09 et seq. (Marco Ventoruzzo & Sebastian Mock eds., 2017).

238. While the ECJ originally followed the territoriality principle, the principal of impact is now the prevailing view. Jürgen Basedow, *Entwicklungslinien des internationalen Kartellrechts - Ausbau und Differenzierung des Auswirkungsprinzips*, Neue Juristische Wochenschrift [NJW] 627, 634 (1989); Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 Antitrust L.J. 159, 186 et seq. (1999); Heike Schweitzer, *Das binnenmarktliche Kartellverbot und Freistellungsrecht*, *in* Enzyklopädie Europarecht: Europäisches

law.[239] But this clearly shows the disadvantages of a regulation as a legal source. As long as no clear, comprehensible law is guaranteed, the advantages of a regulation being directly applicable in each Member State are quickly outweighed by high transaction costs. As has been shown, European law today is less precise than before.

With the MAD, however, European law has only inadequately harmonized criminal law at the European level. Under current law, the supervisory authority in Germany must hand over the criminal proceedings to the public prosecutor's office.[240] Other countries are more flexible.[241] However, as long as there is no uniform standard in the Member States, it does not seem to make much sense to refer to them.[242] According to the experiences above, it is not very convincing whether this is the ideal solution.

2. *Administrative Offense Law as a Means of Sanction*

Instead, the powers of the supervisory authority should be strengthened.[243] Specifically, consideration could be given to granting the supervisory authority the right to implement regulatory sanctions instead of handing over the procedure to the public prosecutor's office. Then the powers of intervention that BaFin already has could also be better used.[244] After implementation of the MAD, the WpHG allows heavy fines for market manipulation: amounts of up to 15 million euros and fifteen percent of total sales.[245] If large fines were imposed on companies in accordance with section 130 of the German Administrative Offences Act (OWiG), the short selling industry could be contained.

WIRTSCHAFTSORDNUNGSRECHT, Volume 4, § 8 mn. 50 (Peter-Christian Müller-Graff ed., 2015).

239. Council Regulation 2016/679, art. 3, 2016 O.J. (L 119) 32 – 33.

240. *Enforcement Relating to Unauthorised Business*, BAFIN (Dec. 6, 2016), https://www.bafin.de/EN/Aufsicht/Uebergreifend/UnerlaubteGeschaefte/unerlaubtegeschaefte_node_en.html.

241. For example, unlike Germany, the United Kingdom's Financial Conduct Authority may bring criminal prosecutions itself for financial crimes such as insider dealing, unauthorized business, and false claims. *See* Financial Services and Markets Act 2000, c. 8, § 402 (U.K.).

242. Thomas M.J. Möllers, *Europäische Gesetzgebungslehre 2.0: Die dynamische Rechtsharmonisierung im Kapitalmarktrecht am Beispiel von MiFID II und PRIIP*, ZEuP, 325, 352 et seq. (2016); *but see* Dirk Zetzsche & David Eckner, *Europäisches Kapitalmarktrecht*, *in* EUROPÄISCHES PRIVAT- UND UNTERNEHMENSRECHT, Volume 6, § 7 mn. 134 (Martin Gebauer & Christoph Teichmann eds., 2016).

243. This is also the conclusion of Philipp Maume, *Staatliche Rechtsdurchsetzung im Deutschen Kapitalmarktrecht: eine Kritische Bestandsaufnahme*, 180 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 385, 394 (2016).

244. *See* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL I at 1002, last amended by Gesetz [G], June 22, 2011, BGBL I at 1126, § 6 (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html. *See also* discussion, *supra* Section III.B.3.

245. *See* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL I at 1002, last amended by Gesetz [G], June 22, 2011, BGBL I at 1126, § 120(15) No. 2, (18) No. 1 (Ger.), https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html. *See also* discussion, *supra* Section III.B.3.

3. *For an Effective European Task Force of Directorate-General Capital Markets*

Even if Germany were to become more effective with an intervention force and a central public prosecutor, this would only be an important first step. With twenty-eight Member States, however, short sellers would still have an easy time avoiding stock exchanges in other Member States. European action is therefore needed. Cooperation between national supervisory authorities and ESMA was indeed regulated in article 22 through 29 of the MAR.[246] BaFin reports that it cooperates with twenty-four foreign supervisory authorities.[247] Nevertheless, requests for mutual assistance are time-consuming, cumbersome, and rarely successful.[248] However, the question is whether this is sufficient and thus establishes the necessary equality of arms between the perpetrator and the controller.

The requirements of the subsidiarity test in accordance with article 5(3) of the TEU are clearly available: negatively examined, the national authority cannot take sufficient action against these forms of market manipulation.[249] If market manipulation is rightly penalized, the sanction must also be possible. The inaction or ineffectiveness of the previous legislation damages confidence in the capital markets.[250] Ultimately, article 12 of the MAR, the former section 20a of the WpHG, and the former section 88 of the BörsG remain largely ineffective with regard to misleading research reports in cross-border situations.

European antitrust law shows that it can be effective. Over the last sixty years, it has also proved very effective against foreign companies operating illegally on the European market.[251] Famous lawsuits have been filed against Microsoft, Google, and most recently Qualcomm.[252] As in competition law,

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246. *See* ALEXANDER THIELE, FINANZAUFSICHT 531 et seq. (2014); Stefan Grundmann, *Kreditwesen und Organisation*, *in* HGB, BANKVERTRAGSRECHT, INVESTMENT BANKING TEIL 1, at 330 (Claus-Wilhelm Canaris & Hermann Staub eds., 5th ed. 2017); Johannes Zollner, *in* MARKET ABUSE REGULATION, § B.24.01 et seq. (Marco Ventoruzzo & Sebastian Mock eds., 2017).

247. BUNDESANSTALT FÜR FINANZDIENSTLEISTUNGSAUFSICHT [BAFIN], JAHRESBERICHT 2016 177 (2017), https://www.bafin.de/SharedDocs/Downloads/DE/Jahresbericht/dl_jb_2016.html?nn=9142322.

248. ANTONELLA GALETTA ET AL., PHAEDRA II, COOPERATION AMONG DATA PRIVACY SUPERVISORY AUTHORITIES BY ANALOGY: LESSONS FROM PARALLEL EUROPEAN MECHANISMS 14 (2016), http://www.phaedra-project.eu/wp-content/uploads/PHAEDRA2_D21_final_20160416.pdf.

249. Consolidated Version of the Treaty on European Union art. 5(3), May 9, 2008, 2008 O.J. (C 115) 18.

250. *See* discussion, *supra* Section I.A.1.

251. Larry Bumgardner, *Antitrust Law in the European Union*, GRAZIADO BUS. REV. (Sep. 30, 2019, 9:38 PM), gbr.pepperdine.edu/2010/08/antitrust-law-in-the-european-union/.

252. Press Release, Eur. Comm'n, Antitrust: Commission Fines Qualcomm € 997 Million for Abuse of Dominant Market Position (Jan. 24, 2018) (IP/18/421).

legislative power should always exist for cross-border cases[253] because the internal market is affected here. *In concreto*, market participants enrich themselves through unlawful actions at the expense of others when the stock market price falls. The company is damaged by a lower stock market price, but also by numerous—and possibly also professional—market participants if, for example, stop-loss prices are triggered. The reliability and truth of pricing is disturbed and confidence in integrity impaired.[254]

If European law is to be finally regulated by European regulations, appropriate powers of intervention are also required, at least in cross-border cases, in order to establish the necessary equality of arms against this form of organized crime. As a first step, ESMA's competencies would have to be significantly expanded. So far, ESMA has already been responsible to rating agencies,[255] exceptionally also in the area of short selling[256] and benchmarks.[257] The SEC, which takes effective action against market manipulation, shows that things can be different.[258] Effective supervision is also illustrated by the Volkswagen diesel scandal in the United States.[259] The U.S. Department of Justice ordered the companies Bilfinger, Daimler, Siemens, and Volkswagen to have a monitor that supervises the companies and reports to the U.S. Department of Justice.[260]

Such an intervention force would require further development of competences at the European level for such serious cases. There is already a Directorate-General (DG) for Financial Stability, Financial Services, and Capital Markets Union.[261] Also, for reasons of general prevention,

253. *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 101(1), 102(1), May 9, 2008, 2008 O.J. (C 115) 88 – 89.

254. *See* discussion, *supra* Section I.A.1.

255. Art. 5b of the consolidated version of Rating Regulation 1060/2009, of the European Parliament and of the Council of 19 Sept. 2009, 2009 O.J. (L 302) 1 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02009R1060-20150621&from=EN (last visited Dec. 11, 2019).

256. Council Regulation 236/2012, art. 28, 2012 O.J. (L 186) 19 – 20.

257. Council Regulation 2016/1011, art. 37 et seq., 2016 O.J. (L 171) 44 et seq.; *see generally* ISABELLA BROSIG, BENCHMARK-MANIPULATION, EINE ÖKONOMISCHE UND REGULATORISCHE ANALYSE DES LIBOR MANIPULATIONSSKANDALS (2018).

258. *See* discussion, *supra* Section II.A.1.

259. Press Release, U.S. Dep't of Justice, Volkswagen AG Agrees to Plead Guilty & Pay $4.3 Billion in Criminal & Civil Penalties; Six Volkswagen Executives & Emps. are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests (Jan. 11, 2017), https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six.

260. *See* Sebastian Zwiebel & Markus Lohmeier, *Corporate Monitoring: Eine Chance für Deutschland?*, COMPLIANCE-BERATER, July 2016, at 250 et seq.; Olaf Schneider, *Step-by-step: Das neue Compliance-System bei Bilfinger*, COMPLIANCE-BERATER, Dec. 2017, at 441 et seq.; Bernd Freytag, *Am Gängelband der amerikanischen Justiz*, FRANKFURTER ALLGEMEINE ZEITUNG [FAZ] 26 (Feb. 10, 2018).

261. For their responsibilities, see *Financial Stability, Financial Services and Capital Markets Union*, EUROPEAN COMM'N, https://ec.europa.eu/info/departments/financial-stability-financial-services-and-capital-markets-union_de#responsibilities (last visited Sept. 21, 2019).

consideration should be given to extending competence, namely how DG Competition could get the means to intervene. A European Ministry of Justice would probably be more effective than a local public prosecutor's office. In a third step, the third branch could also be extended, namely by establishing of a Court of First Instance for competition matters and a Court of First Instance for capital markets.

V. Outlook

Against hostile takeovers, many textbooks contain clear instructions on how the target company can attempt to ward off the hostile takeover.[262] There is no such thing for the short-selling attacks so far. The range of instruments must therefore be extended in favor of the companies concerned. In the future, it should be ensured that the short-seller business model no longer pays off. An intervention group at BaFin, which would have to be staffed accordingly, should be able to react quickly to the short-selling attack, for example by examining formal violations of current law.[263] Secondly, however, substantive law must also be made more specific. This includes a clear statement that untrue facts are illegal and that action must be taken against them. Research obligations must be specified; incomprehensible evaluations must also be classified as illegal. Thirdly, the possibility of trading interruption should be available. And fourthly, the standard of due diligence of financial analyses could be substantiated by referring to the case law on product testing when expressing opinions and to the reporting of suspicious facts by journalists when asserting facts. Whether criminal law is the best solution may be doubted.

There is a need for better law and better law enforcement in the European Union. Because these short-selling attacks take place worldwide, however, a worldwide standardized law would be even better. This was successful for rating agencies after 2008 when IOSCO[264] suggested regulations for the supervision of rating agencies worldwide for the first time, and these were subsequently introduced in the United States[265] and the EU.[266] Much would

262. *See generally, e.g.*, Klaus J. Hopt, *Verhaltenspflichten des Vorstands der Zielgesellschaft bei feindlichen Übernahmen, in* FESTSCHRIFT FÜR MARCUS LUTTER ZUM 70. GEBURTSTAG 1361, 1378 et seq., 1386 et seq. (Uwe H. Schneider et al. eds., 2000); Lena Nordman, *Cross-Border Takeovers and Takeover Defenses, in* COMPARATIVE COMPANY LAW 125 (Mathias Siems & David Cabrelli eds., 2013); Rainer Süßmann, *Unerwünschte Übernahmen*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT [NZG] 1281 et seq. (2011); CHRISTINE WINDBICHLER, GESELLSCHAFTSRECHT, § 33 mn. 8 (24th ed. 2017).

263. *See* discussion, *supra* Section III.D.1. The warning issued by BaFin on Mar. 12, 2018, against the report by Viceroy Research Group about Pro SiebenSat1 was an important first step in the right direction. *See* discussion, *supra* Section I.A.2.

264. THE TECHNICAL COMMITTEE OF THE IOSCO, CODE OF CONDUCT FUNDAMENTALS FOR CREDIT RATING AGENCIES, §§ 1.6, 1.7 (May 2008), http://www.iosco.org/library/pubdocs/pdf/IOSCOPD271.pdf.

265. Amendments to Rules for Nationally Recognized Statistical Rating Organizations, S.E.C. Release No. 34-59342, 2009 WL 233865 (Feb. 2, 2009).

be gained if the supervisory authorities worldwide cooperated even more intensively.

Short selling attacks and incorrect financial analyses are insufficiently regulated and are therefore classified as part of the grey market; indeed, they are an example of organized crime in this form. Cyber attacks nowadays influence elections or attack the Bundestag or the federal administration. Organized crime not only sells weapons or drugs but is nowadays often active in financial transactions. The anti-money laundering laws enacted worldwide have had their first effect. With the same energy, policymakers in Europe and around the world should take action against market manipulation because it is much easier to earn money to the detriment of third parties with a simple mouse click than with the rather tedious sale of weapons and drugs.

266. Council Regulation 1060/2009, 2009 O.J. (L 302) 1 (EC); *see also* Thomas M.J. Möllers, *Regulating Credit Rating Agencies: the New US and EU law—Important Steps or Much Ado About Nothing?*, 4 CAP. MKTS. L.J. 477, 477 – 500 (2009) (discussing the IOSCO implementation in the U.S. and EU).