

XI. The de Larosière Report (2009)

- 33 The financial crisis revealed serious deficiencies of global financial markets law. In Europe, regulatory deficiencies and deficiencies in the implementation of existing provisions became apparent.⁸⁰ In October 2008 the European Commission therefore instructed a group of outstanding experts to submit recommendations on the future regulation and supervision of the European capital markets. On 29 February 2009 this group, chaired by Jacques de Larosière,⁸¹ published a report of close to 100 pages.⁸²
- 34 Most of their recommendations, such as those for the reinforcement of financial stability on a global level, refer to topics that are not covered by this book. However, group's recommendations for a European financial supervisory system are of special interest for the securities markets. The group suggested promoting the previous Level 3 committees of the Lamfalussy process, especially the CESR, to public authorities.⁸³ The existing national supervisory authorities were to continue the current supervision, keeping most of their powers, while the European authorities would coordinate the application of high uniform supervisory standards and guarantee intensive cooperation with the other supervisory authorities.

XII. Phase 4: Towards a European Supervision (since 2009)

- 35 On 23 September 2009 the Commission communicated a comprehensive bundle of legislative measures on the basis of the de Larosière Report. It contained measures for recognising and preventing systematic risks for Europe's entire financial system ("macro-prudential supervision") as well as measures to improve the supervision of individual financial service providers and capital market participants ("micro-prudential supervision").⁸⁴ The latter was intended to create a European System of Financial Supervisors (ESFS), consisting of three European authorities with legal personality.⁸⁵
- 36 These plans were accomplished in 2010, when the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA) were established.⁸⁶ Since 1 January 2011 the ESMA has participated in the legislative procedures and is responsible for supervising the securities markets together with the national authorities.

⁸⁰ The legislative response to the financial crisis in the USA is the Dodd-Frank Wall Street Reform and Consumer Protection Act; on this reform cf. D. Skeel, *The New Financial Deal. Understanding the Dodd-Frank Act and its (Unintended) Consequences* (2011).

⁸¹ Further members of the group were L. Balcerowicz, O. Issing, R. Masera, C. Mc Carthy, L. Nyberg, J. Pérez und O. Ruding.

⁸² Cf. de Larosière, *The High-Level Group on Financial Supervision in the EU*, Report (2009).

⁸³ Cf. *Ibid.*, p. 53.

⁸⁴ Cf. Communication from the Commission on European financial supervision, 27 May 2009, COM(2009) 252 final.

⁸⁵ COM(2009) 503 final, Art. 3(1).

⁸⁶ See in more detail § 11 para. 37–78.

XIII. Phase 5: Regulation of Credit Rating Agencies (2009–2012)

- 37 Phase 5 partly coincides with phase 4 of the legislative procedure beginning with the plan to introduce regulation for credit rating agencies. The European Commission first addressed this question in April 2002. In April 2006 it reached the conclusion that no legislative initiatives were needed.⁸⁷ It was suggested by the International Organization of Securities Commissions (IOSCO) that rating agencies should regulate themselves—and by many this was regarded as sufficient. The European Commission supported this understanding. It was only the outbreak of the financial crisis that led to a change of thinking as people realised that the credit rating agencies were partly to blame for the incorrect evaluation of credit risks. Due to their important role on global securities and banking markets, the European legislature now wanted to ensure that credit rating activities were conducted in accordance with the principles of integrity, transparency, responsibility and good governance in order to ensure that resulting credit ratings used in the Community are independent, objective and of adequate quality.⁸⁸
- 38 On 16 September 2009 the European Parliament and the Council enacted Regulation (EC) No. 1060/2009 on credit rating agencies.⁸⁹ It mainly contains prudential rules for ratings and subjects the credit rating agencies to supervision. In June 2010, in the course of its plans for preventing a future financial crisis and strengthening the financial system, the European Commission presented amendments to the Regulation. These aimed at attaining a more effective and centralised supervision of the agencies at a European level by the ESMA and more transparency regarding issuers. The European Parliament adopted the Commission's proposal on 15 December 2010.⁹⁰ In November 2011 the Commission presented a further amendment to the regulation, introducing a civil liability for incorrect credit ratings and stricter disclosure obligations for rating agencies.⁹¹

XIV. Continuation of Phase 5: Revision of the Framework Directives (since 2009)

- 39 Only a few years after the enactment of the four framework directives the European Commission initiated several consultations in order to assess the implementation of the directives and find possibilities of simplifying and improving them.⁹² These consultations were addressed to all financial market participants as well as the gov-

⁸⁷ Cf. Communication from the Commission on Credit Rating Agencies, 11 March 2006 (2006/C 59/02).

⁸⁸ Cf. Recital 1 Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.

⁸⁹ Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, OJ L302, 17 November 2009.

⁹⁰ Regulation (EU) No. 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies, OJ L145, 31 May 2011, p. 30–56.

⁹¹ Commission, Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 1060/2009 on credit rating agencies, COM(2011) 742/2.

⁹² For an overview of the various activities see the “news” on the Commission's website, http://ec.europa.eu/internal_market/securities/news_en.htm.

ernments and supervisory authorities in the Member States and other interested persons. The main aspects were regulatory deficiencies and the investigative and sanctioning powers of the supervisory authorities which continued to differ greatly between the Member States. The consultations were preceded by talks between the Commission and the CESR as well as the Commission and the European Securities Markets Expert Group (ESME). Both the CESR and the Expert Group published statements on some of the topics.

- 40 The consultations soon led to first results: In 2010 the European Parliament and the Council of the European Union enacted Directive 2010/73/EU on amendments to the PD and the TD, based on the Commission's proposal.⁹³ According to the Commission's proposal the main aim of the amendments is to improve investor protection. The Member States had to implement the directive by July 2012.
- 41 More recently the Commission presented a proposal with extensive alterations to the regulatory approach to market abuse, particularly with regard to the impact of administrative and criminal sanctions. The existing MAD 2003/6/EC is to be replaced by the Regulation on insider dealing and market manipulation (market abuse)⁹⁴ and the Directive on criminal sanctions for insider dealing and market manipulation.^{95,96} The Commission hopes the new approach will "send a message to the public and potential offenders that these [manipulative behaviours] are taken very seriously."⁹⁷ Even if the proposal is accepted by the Parliament and the Council, it will not enter into force before 2015.
- 42 A second proposal,⁹⁸ submitted only five days later, concerns the TD, which aims to reduce the administrative burden for small and medium-sized issuers and to harmonise the regime for notification of major holdings. As with regard to market abuse the Commission further wants to introduce stricter sanctions, such as obligatory rules on naming and shaming, harsh administrative pecuniary sanctions and a loss of voting rights.⁹⁹ Due to the necessary implementation of the directive in the Member States actual changes to the legal situation are not to be expected before 2014.

⁹³ Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, OJ L327, 11 December 2010, p. 1.

⁹⁴ Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) of 20 October 2011, COM(2011) 651 final.

⁹⁵ Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation of 20 October 2011, COM(2011) 654 final.

⁹⁶ For further information see Commission, Commission Staff Working Paper Impact Assessment, 20 October 2011, SEC(2011) 1217 final; N. Rontchevsky, Bull. Joly Bourse (2012), p. 139–142; K. Segarkis, Bull. Joly Bourse (2012), p. 118–121; R. Veil and P. Koch, *Towards a Uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse* (2012); S. Willey, 93 COB (2010), p. 1, 7–15.

⁹⁷ Recital 6 Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation of 20 October 2011, COM(2011) 654 final.

⁹⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 25 October 2011, COM(2011) 683/2.

⁹⁹ For further information see Commission, Commission Staff Working Paper Impact Assessment, 25 October 2011, SEC(2011) 1279 final.

43 The Commission further plans to reform the MiFID 2004/39/EC. It justifies its proposals for a Directive on markets in financial instruments repealing Directive 2004/39/EC¹⁰⁰ and for a Regulation on markets in financial instruments¹⁰¹ largely with the argument that the financial crisis revealed weaknesses regarding the regulation of derivatives. The increasing complexity of these financial instruments requires an increased investor protection. The Commission further claims reforms to be necessary due to the fact that developments on the markets and in technology have led to a number of provisions in the MiFID being outdated.¹⁰²

XV. Continuation of Phase 5: Regulation on Short Sales (2012)

44 Legislative activity also became apparent regarding the topic of short sales. On 15 September 2010 the European Commission accepted a draft proposal for a Regulation on short sales and certain aspects of credit default swaps (CDSs), the aim of which was to improve transparency and reduce risks.¹⁰³ It was the experience gained from the financial crisis that led to these measures. The new regulation¹⁰⁴ entered into force in November 2012. Its main aim is to prevent the development of systemic risks by introducing transparency requirements.

XVI. Continuation of Phase 5: Regulation on OTC Derivatives (2012)

45 Derivatives are playing an increasingly important role on the financial markets, the most relevant being over-the-counter (OTC) derivatives, which make up about 80% of all derivatives. The nominal value of the entire OTC derivative market was almost US\$615bn in December 2009.¹⁰⁵ The financial crisis in general, and especially the insolvency of Lehman Brothers and the bail-out of AIG, revealed a number of deficiencies in the markets for OTC derivatives that provided the incentive for the Commission to introduce a number of regulatory measures. The proposal for the amended MiFID,¹⁰⁶ for example, aims to subject derivatives to the rules of trading on

¹⁰⁰ Proposal for a Directive of the European Parliament and of the Council on Markets in Financial Instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, 20 October 2011, COM(2011) 656 final; for further information see B. Bréhier and P. Pailler, *Bull. Joly Bourse* (2012), p. 122–128; R. Veil and M.P. Lerch, *WM* (2012), p. 1557–1565 and 1605–1613.

¹⁰¹ Proposal for a Regulation of the European Parliament and of the Council on Markets in Financial Instruments and amending Regulation [EMIR] on OTC Derivatives, Central Counterparties and Trade Repositories, 20 October 2011, COM(2011) 652 final.

¹⁰² Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, 20 October 2011 COM(2011) 656 final, p. 2.

¹⁰³ See § 15 para. 9.

¹⁰⁴ Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L86, 24 March 2012, p. 1.

¹⁰⁵ Commission, *Making Derivatives Markets in Europe Safer and More Transparent*, 15 September 2010.

¹⁰⁶ See para. 43.

a regulated market.¹⁰⁷ The new Regulation on OTC derivatives¹⁰⁸ aims to make the European derivatives markets safer and more transparent, particularly by addressing counterparty credit risks. All transactions with OTC derivatives in the EU are now to be registered. Standardised OTC derivatives are further to be cleared by central counterparties.

XVII. Conclusion

- 46 Looking back on the historical developments in European capital markets law over the last fifty years, it becomes apparent that all steps in EU legislation were preceded by impressive reports written by independent experts: The Segré Report in 1966, the Lamfalussy Report from 2000 and the de Larosière Report published in 2009 significantly influenced European legislation on capital markets law. The Segré Report pointedly described deficiencies and the problem of limited and illiquid markets. The de Larosière Report criticised the shortcomings of the supervisory system. These expert opinions were all the legislative bodies needed to be convinced that a regulation in these areas had become necessary. However, there were no preliminary conceptual considerations regarding the regulation of capital markets to which they could have referred. While the reports contained various reasons for a regulation, none of the expert committees had actually drafted a theory on how to regulate capital markets. The current legal situation and future amendments must therefore be seen as the Commission's own attempt to create a regulatory system. The process is ongoing; in particular, the recent financial crisis has required adjustments. At the same time it has offered the opportunity to build a coherent European capital markets law.

¹⁰⁷ Cf. R. Veil and M.P. Lerch, WM (2012), p. 1557, 1561–1565.

¹⁰⁸ Regulation (EU) No. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L201, 27 July 2012, p. 1.

(cc) Evaluation

25 The Lamfalussy Process was revised and evaluated⁴⁷ in 2007 and found not to be in urgent need of reform.⁴⁸ The aim of a more efficient, flexible and faster legislative process largely appears to have been achieved.⁴⁹

26 The use of expert knowledge and a faster and more flexible legislative process are essential in an area subject to such continual changes as capital markets. The downside of this is that the legislative process in capital markets law still lacks democratic legitimacy⁵⁰—despite the European Parliament now being more involved in the legislative process on Level 2.⁵¹

(b) *The Lamfalussy II Process*

27 The four levels of legislation in the Lamfalussy Process continue to exist, although the legislative procedure has been subject to a number of changes through the Treaty of Lisbon and the formation of the ESMA.⁵² The Commission has declared its intention “to continue to consult experts appointed by the Member States in the preparation of draft delegated acts in the financial services area, in accordance with its established practice”.⁵³ The new procedures have not changed the fact that framework acts, enacted in the ordinary legislative procedure by the European Parliament and the Council, still constitute the foundation of the European legislation in this field. On Level 3 and 4 the ESMA has taken over from the CESR, enacting non-binding guidelines and recommendations on the interpretation of the European legislative acts and supervising the implementation of the European requirements in the Member States together with the Commission.⁵⁴ Substantial changes can be found on Level 2 of the procedures with regard to the measures for rendering the framework legislation more precise. In order to understand the Lamfalussy II Process one must consider the important new distinction introduced by the Treaty of Lisbon between legal acts such as the non-legislative delegated acts described in Article 290(1) TFEU and the implementation of legally binding acts as described in

⁴⁷ Commission, *Review of the Lamfalussy process strengthening supervisory convergence* (November 2007); Inter-Institutional Monitoring Group, *Final Report Monitoring the Lamfalussy Process* (October 2007).

⁴⁸ N. Moloney, in: M. Tison et al. (eds.), *Perspectives in Company Law and Financial Regulation*, p. 449, 472; similarly N. Moloney, *The Financial Crisis and EU Securities Law-Making: A Challenge Met?*, in: S. Grundmann et al. (eds.), *Festschrift für Klaus J. Hopt*, p. 2264, 2281. For an overview of the points of criticism, especially of the work of the committees on Level 3, see I. Leixner, *Komitologie und Lamfalussyverfahren im Finanzdienstleistungsbereich*, p. 24 ff.

⁴⁹ T.M.J. Möllers, ZEuP (2008), p. 480, 502 ff.; K.-U. Schmolke, NZG (2005), p. 912, 918. See also the various reports published by the Inter-Institutional Monitoring Group (IIMG), established by the Commission. With regard to this, the criticism expressed in the literature at the outset of this procedure is unsubstantiated. On this see G. Hertig and R. Lee, 3 J. Corp. L. Stud. (2003), p. 359, 364 ff.

⁵⁰ S. Kalss et al., *Kapitalmarktrecht*, Vol. I, § 1 para. 50; K. Langenbacher, ZEuP (2002), p. 265, 283 ff.; B. Scheel, ZEuS (2006), p. 521 ff.; K.-U. Schmolke, EuR (2006), p. 432, 443. Cf. also K. von Wogau, ZEuP (2002), p. 695, 699–700 for a summary of the European Parliament’s doubt at the time. The fact that the Lamfalussy Process conforms with European primary law can, however, not be doubted, cf. K.-U. Schmolke, EuR (2006), p. 432, 441.

⁵¹ See above para. 17.

⁵² Similarly I. Leixner, *Komitologie und Lamfalussyverfahren im Finanzdienstleistungsbereich*, p. 32.

⁵³ Declaration No. 39 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, OJ C115, 9 May 2008, p. 350. The details, however, remain unclear.

⁵⁴ See under § 11 para. 64–65.

Article 291(1) TFEU.⁵⁵ The distinction between the two categories from the perspective of primary law remains unclear.⁵⁶

- 28 In 2011, the Commission presented extensive proposals for amendments to the MAD, the MiFID and the TD.⁵⁷ The MAD is to be replaced by a Market Abuse Regulation,⁵⁸ and the MiFID by a regulation (MiFIR) and a MiFID II Directive,⁵⁹ whilst the TD is to remain in force but be revised comprehensively.⁶⁰ These reforms in European capital markets law are to be implemented on the basis of the Lamfalussy II Process.
- (aa) The New Level 2
- 29 Pursuant to the new procedure, Level 2 requires the distinction between acts by the Commission and those drafted by the ESMA. The Commission adopts delegated acts, under consultation with the ESMA. These are complemented by regulatory technical standards that are drafted by the ESMA and are also classed as delegated acts under Article 290 TFEU, requiring endorsement by the Commission as confirmation.⁶¹ Regulatory Technical Standards must thus be seen as a special form of delegated act.⁶² The Commission can adopt delegated acts as directives, regulations or decisions. Generally, regulations are most recommendable.
- 30 The provisions and the requirements for their applicability are then put into more concrete terms by implementing acts as described in Article 291 TFEU. These must also be divided into implementing acts adopted by the Commission and the ESC as Comitology Committee in the sense of the Comitology Regulation, and technical implementing standards drafted by the ESMA that require endorsement by the Commission.
- 31 On these grounds Level 2 of the Lamfalussy II Process can be seen as a multi-stage process with regard to precision of the legislative acts. The Commission's delegated acts put the framework provisions on Level 1 into more concrete terms. Whilst

⁵⁵ Cf. I. Leixner, *Komitologie und Lamfalussyverfahren im Finanzdienstleistungsbereich*, p. 35 ff. The Commission's legislation is often referred to as "tertiary legislation", cf. T. von Danwitz, in: M.A. Dausen (ed.), *Handbuch EU-Wirtschaftsrecht*, R.T. para. 72. The distinction between the two is not without problems, cf. R. Streinz et al., *Vertrag von Lissabon*, § 10 sec. 3

⁵⁶ Cf. A. Kahl, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 55, 71.

⁵⁷ Cf. F. Walla, BB (2012), p. 1358 ff.

⁵⁸ Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM(2011), 651 final. See R. Veil and P. Koch, WM (2011), p. 2297 ff.; A. Merkner and M. Sustmann, AG (2012), p. 315 ff.; L. Teigelack, BB (2012), p. 1361 ff.; P. Koch, BB (2012), p. 1365 ff.

⁵⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, COM(2011), 683 final. For details see R. Veil, WM (2012), p. 52 ff.; C.H. Seibt and B. Wollenschläger, AG (2012), p. 305 ff.; R. Veil, BB (2012), p. 1374 ff.

⁶⁰ Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011), 656 final and Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, KOM(2011), 652 final. On the reform see R. Veil and M.P. Lerch, WM (2012), p. 1557–1565 and 1605–1613.

⁶¹ For more details see § 11 para. 66–72. Cf. also N. Moloney, in: S. Grundmann et al. (eds.), *Festschrift für Klaus J. Hopt*, p. 2265, 2271–2272.

⁶² Similarly A. Kahl, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 55, 57.

Article 290 TFEU only allows them to “supplement or amend certain non-essential elements of the legislative act”, the Commission is granted a certain creative power in fact, allowing it to exert significant influence through its delegated acts. Similarly, the ESMA’s regulatory technical standards are also not to “imply strategic decisions or policy choices” pursuant to Article 15 ESMA Regulation, but in practice also grant a certain legislative discretion, albeit not to the same extent as the Commission is supposed to have.

- 32 *Examples:* The Commission can adopt delegated acts for the purpose of defining the identities and the reasons for persons to be included on an insider list (Article 13(4) Proposal for a Market Abuse Regulation) or as to the financial instruments to be taken into account when calculating the number of voting rights that determine the transparency requirements (Article 13 Proposal for a Transparency Directive). The ESMA is to adopt regulatory technical standards on the procedures to be followed by market operators to prevent market abuse (Article 11(7) Proposal for a Market Abuse Regulation) and to render more precise the provisions on exemptions from the rules on transparency regarding major shareholdings (Article 9(4), (6) Proposal for a Transparency Directive).
- 33 Implementing acts by the Commission and technical implementing standards by the ESMA which mainly concern procedural requirements also put the requirements for the applicability of a provision into more concrete terms on the next level.
- 34 *Examples:* The Commission is to adopt implementing measures regarding the specific procedures for reports of breaches (Article 29(3) Proposal for a Market Abuse Regulation).⁶³ The ESMA is to draft technical implementing standards with regard to the disclosure procedure for inside information (Article 12(9) Proposal for a Market Abuse Directive).⁶⁴
- 35 The relationship between the different legislative acts on Level 2 of the Lamfalussy II Process is not always reflected, however, on the respective authoritative basis in the reformed framework legislation: Article 14(6) Proposal for a Market Abuse Regulation, for example, allows the Commission to adopt delegated acts specifying the persons who are required to disclose Directors’ dealings. As opposed to this, the same legislative act requires the ESMA to develop draft regulatory technical standards to determine the exact duties for financial analysts. This constitutes a further-reaching power than that granted to the Commission in Article 14 of the proposal. The European legislator, despite its intention, has thus not fully achieved the development of a hierarchical relationship between the two forms of Level 2 measures.

(bb) Criticism

- 36 The new procedure must be regarded positively with regard to the role of the ESMA, enabling the use of its specific expertise. It is further generally wise to allow the Commission and the ESMA—as far as permissible under primary law—to develop delegated acts, in order to reduce the necessity of the tedious European legislative procedures. At the same time, the variety of legal sources in European law together

⁶³ Draft as of the Presidency compromise of 2 May 2012.

⁶⁴ Ibid.

with abundant national provisions will lead to an extremely complex and partially opaque regulatory system. It therefore appears critical to require the further distinction between technical regulatory standards and delegated acts by the Commission. Ultimately, only the enactment of the proposed legislation can show whether the new legislative mechanism is viable in practice.

(cc) Graph: Lamfalussy II Process



37 Figure 1 shows a schematic of the Lamfalussy II process.

II. Strategies of Capital Markets Regulation

1. Minimum and Maximum Harmonisation

38 European capital markets law is characterised by “unity and diversity”.⁶⁵ This is a result of the fact that European legislation in this area consists of a combination of minimum and maximum harmonisation.⁶⁶

⁶⁵ R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, p. 1; R. Veil and F. Walla, *Schwedisches Kapitalmarktrecht*, p. 1; R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 1; see also C. Gerne-Beuerle, 7 CMLJ (2012), p. 317–342.

⁶⁶ On the legal foundations in primary law see M. Gruber, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 1, 4 ff.

(a) *Definitions*

- 39 Maximum harmonisation describes the concept under which the legislative order of a provision is exclusive, i.e. allowing no deviations from its content in the Member States' national laws.⁶⁷ As opposed to this, minimum harmonisation may be assumed in cases in which the provision only contains minimum requirements that must be met by the Member States and may be exceeded.⁶⁸ The two concepts can be inherent in both directives and regulations. Whilst regulations will usually aim at a maximum harmonisation, it may in some cases also be possible that a regulation only requires minimum harmonisation.⁶⁹ Directives are equally open to both concepts.⁷⁰
- 40 In order to determine whether a provision is minimally or maximally harmonising, one must interpret the provision, thus determining the underlying interests of the European legislator.⁷¹ If a conclusion cannot be reached simply by interpretation of the legislative act's provisions, reference can often be made to the recitals.
- 41 An analysis of the Lamfalussy directives currently in force reveals that the MiFID follows the concept of maximum harmonisation,⁷² whilst the TD is an example of minimum harmonisation.⁷³ The concept adhered to in the Prospectus and MAD is unclear and a matter of controversy.⁷⁴ The Commission's proposal for a regulation on insider trading and market manipulation and its proposal for amendments to the TD⁷⁵ now follow a concept of maximum harmonisation to a large extent.⁷⁶
- 42 The Commission plans to develop fully harmonised rules on the transparency with regard to major shareholdings in the course of the revision of the TD, Article 3(1) Proposal for a Transparency Directive explicitly stating that a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, may not be made subject to requirements more stringent than those laid down in the Directive. Regarding periodic disclosure, the Commission still follows the concept of minimum harmonisation, as becomes apparent in Article 3(1) which declares that the home Member State may make an issuer subject to require-

⁶⁷ H.-H. Hernfeld, in: J. Schwarze (ed.), *EU-Kommentar*, Art. 95 EGV para. 49; C. Tietje, in: E. Grabitz and M. Hilf (eds.), *Recht der europäischen Union*, Vorb. Art. 94–97 para. 39; J. Steiner and L. Woods, *EU Law*, 16.3.1.

⁶⁸ C. Tietje, in: E. Grabitz and M. Hilf (eds.), *Recht der Europäischen Union*, Vorb. Art. 94–97 para. 41; in detail M. Dougan, 37 *CML Rev.* (2000), p. 853 ff. Gold plating is permitted in these cases, cf. para. 49.

⁶⁹ H.-W. Micklitz and P. Rott, in: M.A. Dausen (ed.), *Handbuch des EU-Wirtschaftsrechts*, H. V. para. 40.

⁷⁰ H.-H. Hernfeld, in: J. Schwarze (ed.), *EU-Kommentar*, Art. 95 EGV para. 39; M. Nettesheim, in: E. Grabitz and M. Hilf (eds.), *Recht der Europäischen Union*, Art. 249 EGV para. 133.

⁷¹ Cf. ECJ of 14 October 1987, Case 278/85 (*Commission/Denmark*) [1987] ECR 4069 para. 16–17. On the methods of interpretation applied in European law see § 5 para. 34–55.

⁷² A. Fuchs, in: A. Fuchs (ed.), *WpHG Kommentar*, § 31 para. 18; K. Rothenhöfer, in: E. Schwark and D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar*, § 31 para. 16; N. Moloney, *EC Securities Regulation*, p. 35; T.M.J. Möllers, *WM* (2008), p. 93, 98. In Germany the term *Vollharmonisierung*, i.e. “full harmonisation” is most commonly applied. P.O. Mülbart, *WM* (2007), p. 1149, 1157, seemingly follows the English terminology, speaking of *Maximalharmonisierung*. Cf. also M. Gruber, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 1, 2.

⁷³ Cf. Recital 7 TD.

⁷⁴ For a maximum harmonisation: T.M.J. Möllers, *ZEuP* (2008), p. 480, 499, who deduces this from the nature of the directive as framework directive in the Lamfalussy-process (with the exception of the Transparency Directive). For a minimum harmonisation: N. Moloney, *EC Securities Regulation*, p. 35.

⁷⁵ Cf. § 1 para. 41–42.

⁷⁶ Explicitly Art. 3 Directive amending Directive 2004/109/EC (proposal); for the Regulation on insider trading and market manipulation cf. R. Veil and P. Koch, *WM* (2010), p. 2297 ff.

ments more stringent than those laid down in the Directive.⁷⁷ In this context it is unclear whether the maximum harmonisation also refers to the rules on the attribution of voting rights.⁷⁸ This question must be answered by interpreting the directive. The fact that a regulation can also be minimally harmonising can be seen in the rules on sanctions contained in the Proposal for a Market Abuse Regulation, which states in Article 26(2) that it only aims to achieve minimum harmonisation.

(b) *Advantages and Disadvantages*

43 Neither concept of harmonisation comes without disadvantages. The advantage of a maximum harmonisation lies in the fact that it prevents a legal fragmentation, thereby reducing the transaction costs for market participants.⁷⁹ As opposed to this, a minimum harmonisation furthers the competition between the different legal systems in the Member States,⁸⁰ thus presenting incentives for regulatory innovations and preventing the law from stagnation.⁸¹ A minimum harmonisation also ensures that the Member States preserve their “national identity” to a certain degree.⁸² This complies with the principle of subsidiarity.⁸³

(c) *Tendency towards Maximum Harmonisation*

44 On the basis of the Financial Services Action Plan, the Commission is encouraging a shift from minimum to maximum harmonisation which is becoming increasingly apparent.⁸⁴ It is meanwhile being discussed that areas that were so far dominated by minimum harmonisation—such as transparency of major shareholdings—should also be subjected to maximum harmonisation.⁸⁵ The CRA Regulation,⁸⁶ the short-selling regulation,⁸⁷ the development from directive to regulation with regard to market abuse and MiFID all indicate that, additionally, there is a tendency towards regulations which generally follow the concept of maximum harmonisation instead of directives, which by nature usually allow the Member States a certain leeway.

⁷⁷ Cf. R. Veil, WM (2012), p. 53, 54.

⁷⁸ Cf. C. H. Seibt and B. Wollenschläger, AG (2012), p. 305, 310.

⁷⁹ Summarised in H. Fleischer and K.-U. Schmolke, NZG (2009), p. 401, 408; H. Fleischer and K.-U. Schmolke, NZG (2010), p. 1241, 1245; N. Moloney, *EC Securities Regulation*, p. 34.

⁸⁰ N. Moloney, *EC Securities Regulation*, p. 10.

⁸¹ H. Fleischer and K.-U. Schmolke, NZG (2009), p. 401, 408; H. Fleischer and K.-U. Schmolke, NZG (2010), p. 1241, 1245–1246.

⁸² Cf. also M. Gruber, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 1, 14. On the values of heterogeneity in the national legal systems in Europe see M. Tamm, *EuZW* (2007), p. 756, 758.

⁸³ Cf. M. Gruber, in: Braumüller et al. (eds.), *Die neue Europäische Finanzmarktaufsicht—ZFR Jahrestagung 2011*, p. 1, 13.

⁸⁴ H. Fleischer and K.-U. Schmolke, NZG (2010), p. 1241, 1243; N. Moloney, *EC Securities Regulation*, p. 31 ff.; T.M.J. Möllers, *ZEUP* (2008), p. 480, 499 ff.; T.M.J. Möllers, in: B. Gsell and C. Herresthal, *Vollharmonisierung im Privatrecht*, p. 235, 250 ff.

⁸⁵ See in detail H. Fleischer and K.-U. Schmolke, NZG (2010), p. 1241 ff.

⁸⁶ See § 27 para. 11 ff. On the maximally harmonising effects of this regulation cf. also T.M.J. Möllers, NZG (2010), p. 1241 ff.

⁸⁷ See § 1 para. 44 and in detail in § 15 para. 9.

2. Regulatory Concepts in the Member States

45 The Member States have to implement the European directives into their national laws. Therefore national capital markets law is primarily “European law”. Additionally, however, a number of Member States have enacted their own national provisions which address additional aspects of capital markets law or put the means of enforcement into more concrete terms. The fact that there are thus two coexisting systems of capital markets law is a phenomenon existing only in the European Union.

(a) Transformation of European Law

46 The Member States are obliged to transpose the directives that were enacted on Level 1 and 2 of the Lamfalussy Process into their national laws.⁸⁸ Unless the respective directive follows the concept of maximum harmonisation,⁸⁹ the Member States have a large margin of appreciation concerning the exact form of transposition and may orientate themselves by their national traditions and concepts.⁹⁰ This margin of appreciation is reflected in a comparative examination of the different methods of implementation in the Member States regarding capital markets law.

47 Several Member States—France,⁹¹ the United Kingdom⁹² and Spain⁹³ among others—often implement the provisions of directives into their national law “one-to-one”, as this procedure, which one could graphically call “copy-out”, eliminates the danger of the national provisions violating EU law and prevents difficulties in interpretation. From a European perspective this type of transposition is to be welcomed as it achieves a high level of harmonisation.

48 Other Member States, such as Germany, often deviate from the directive’s wording,⁹⁴ adapting the provisions to the particularities of their national capital markets law.⁹⁵ In Sweden the transposition is sometimes only fragmentary—conformity with European law only being achieved by an interpretation that relies on the help of the legislative materials.⁹⁶

⁸⁸ See para. 13–35.

⁸⁹ On the concepts of minimum and maximum harmonisation see para. 38–44.

⁹⁰ M. Nettesheim, in: E. Grabitz and M. Hilf (eds.), *Recht der Europäischen Union*, Art. 249 EGV para. 140; G. Schmidt, in: H. von der Groeben and J. Schwarze (eds.), *EU/EG-Vertrag*, Art. 249 EGV para. 40.

⁹¹ Cf. for example on the MiFID transposition R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, p. 106.

⁹² Cf. R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 14 f.

⁹³ Cf. J. Guitard Marín, in: F.F. Uría, *Régimen jurídico de los mercados de valores y de las instituciones de inversión colectiva*, p. 301, 306.

⁹⁴ The copy-out approach is becoming more and more popular in Germany. The German federal government explicitly stated that it was following a one-to-one implementation of the MiFID. Cf. on this R. Veil, WM (2008), p. 1093, 1094.

⁹⁵ The provisions of the MAD, the TD and the MiFID are largely implemented in the Wertpapierhandelsgesetz (WpHG), which can be regarded as the “constitution” of capital markets law. Only the transposition of the Prospectus Directive, which was mainly implemented in the Wertpapierprospektgesetz (WpPG) and the Börsengesetz (BörsG), can be seen as an exception from this approach.

⁹⁶ This can especially be seen with regard to the transposition of the MAD. On this see F. Walla, in: M. Schultz, *Stockholm Centre for Commercial Law Årsbok II*, p. 427, 432 ff. On the question whether this complies with European law ECJ of 7 May 2002, Case C-478/99 (*Commission/Sweden*) [2002] ECR I-4147.

2. *Homo oeconomicus* or Behavioural Finance?

(a) *Basic Assumption: Rationality*

20 Capital market legislation aims to influence the market participants' behaviour. It must therefore apply certain concepts that aim to predict the reactions of market participants to certain rules. The economic analysis of law refers to the concept of a *Homo oeconomicus*,⁵¹ thereby assuming that a model person acts rationally and aims to maximise his own economic benefits.⁵² It will always choose the alternative most suited to his preferences, whilst the benefits for others will not play any role in his decision. The underlying premise of the economic analysis of law is that the *Homo oeconomicus* can obtain and process all relevant information available.⁵³

(b) *Behavioural Anomalies*

21 The assumption of rationality does not coincide with reality. The behavioural finance-research⁵⁴ of the past decades has shown numerous behavioural anomalies, which have unsettled the economic behavioural model. Even though these empirical studies do not always explicitly examine the behaviour of capital market participants, the conclusions must nonetheless lead to a critical examination of the concept of a *Homo oeconomicus*.

(aa) Bounded Rationality

22 The assumption of rationality assumes that man has unlimited possibilities to take in and process information. Often one will, however, be confronted with decisions that were made quickly, without having had the possibility to process all the information available. In these cases, man works with rules of thumb, so-called heuristics. In a complex situation that requires a decision, he will search for an anchor which he will use as a starting point to evaluate the possible alternatives. This anchor value will have a disproportionate influence on the decision.⁵⁵ Decisions can thus be manipulated by directing the decision-maker towards a certain anchor value.

(bb) Overconfidence

23 A rational person should be able to determine correctly his knowledge and skills. Empirical studies have, however, proven that people systematically tend towards overconfidence. Most car drivers, for example, maintain they are better and safer

⁵¹ G. Becker, *Der ökonomische Ansatz zur Erklärung menschlichen Verhaltens*, p. 15; on the criticism regarding New Institutional Economics cf. R. Richter and E. Furubotn, *Neue Institutionenökonomik*, p. 3–4.

⁵² According to the so-called "expected utility theory" individuals will always opt for the alternative that maximises their expected utility. It can be determined by multiplication of the benefits of the option and its probability. Cf. L. Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance*, p. 86 ff. with further references.

⁵³ H. Eidenmüller, *JZ* (2005), p. 216, 217.

⁵⁴ Cf. the literature listed in the bibliography and cited below: D. Kahneman and A. Tversky; A. Shleifer, *Inefficient Markets. An Introduction to Behavioural Finance* (2000); H. Shefrin, *Beyond Greed and Fear. Understanding Behavioural Finance and the Psychology of Investment* (2000); R. Shiller, *Irrational Exuberance*, 2nd ed. (2005); J. Goldberg and R. von Nitzsch, *Behavioral Finance*, 4th ed. (2004); on the discussion regarding the possibilities of taking into account these insights when interpreting the law see L. Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance*, p. 80 ff.; L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 88 ff.

⁵⁵ Cf. A. Tversky and D. Kahneman, 185 *Science* (1974), p. 1124.

drivers than their passengers.⁵⁶ Statistically, however, only 50% of all drivers can actually be better than average. Overconfidence is more pronounced with men than with women.⁵⁷ The problem of overconfidence must particularly be taken into account for provisions that aim to warn market participants, as an overconfident person will tend to ignore the warning.

(cc) Fairness

24 According to the concept of rational behaviour a person will only be interested in maximising his own economic benefits. Participants in numerous studies, however, showed behaviour in which they were prepared to accept personal economic losses, in order to punish others for their behaviour if this was felt to be unfair (ultimatum game).⁵⁸ If a statute determines that certain facts are “relevant” for human decisions, aspects of fairness may also have to play a role.

(dd) Prospect Theory/Framing/Risk Aversity

25 The concept of rationality assumes that individuals will distinguish between alternatives according to the expected utility, the model person always choosing the alternative with the highest expected utility. As opposed to this, the *prospect theory* assumes that a decision will always depart from a certain reference point. Outcomes lower than this reference point will be considered as losses, higher outcomes as gains.

26 *Framing* means presenting the same option with equal expected utility in different formats to make it appear either as a loss or as a gain, thus proving that people's decisions can be influenced. Depending on the type of framing the participants of different study groups developed different risk attitudes. Small but certain gains are usually preferred as opposed to the possibility of larger (or no) gains, showing a certain aversion to risk. As opposed to this, in the scenario of a certain loss or the possibility of an even higher (or no) loss, people will usually opt for the possibility of preventing the loss.⁵⁹ By manipulating the point of reference, decisions can therefore be influenced.

(ee) Hindsight Bias

27 Events that have already occurred tend to be seen as more probable than before they took place. The evaluation of a certain decision depends on how the respective person processed the information available to him before the event. The actual result, not known at the time, plays a role in this process. However, for most people it is difficult to separate out actual developments, creating the impression the result had actually been foreseen. In these cases the person who made the wrong decision is blamed for not having foreseen the result.

⁵⁶ Cf. O. Svenson, 77 *Acta Psychologica* (1981), p. 143.

⁵⁷ B. Fischhoff, P. Slovic and S. Lichtenstein, 3 *J. Exp. Psych., Hum. Perception & Performance* (1977), p. 552; on the phenomenon of overconfidence on the capital market see T. Odean, *Volume, Volatility, Price and Profit When All Traders Are Above Average*, 53 *J. Fin.* (1998), p. 1887; on gender-specific overconfidence on the capital markets see B. Barber and T. Odean, *Boys Will Be Boys*, *Q. J. Econ.* (2001), p. 261.

⁵⁸ Cf. D. Kahneman, J. L. Knetsch and R. H. Thaler, 59 *J. Bus.* (1986), p. 285.

⁵⁹ Cf. A. Tversky and D. Kahneman, *Econometrica* (1979), p. 263.

- 28 This behavioural anomaly is of legal relevance in cases where the question of a liability based on negligence has arisen,⁶⁰ the most prominent example being the introduction of the business judgment rule for management liability, in order to meet hindsight bias.⁶¹
- (ff) Representativeness/Availability/Salience
- 29 Whether the occurrence of an event is regarded as probable depends strongly on the information that was available to the respective person. With information that is easily accessible or salient, such as newspaper reports on shark attacks and aeroplane crashes, the probability of an occurrence is overestimated.⁶² Contrary to the model of the rationally acting person, people tend to not make use of all the information to which they would have access, rather relying only on the information easily available to them.⁶³
- (c) *Relevance of the Results of Behavioural Economics for Capital Markets Law*
- 30 The results of the research on behavioural finance can be of legal use on two levels. Firstly it appears possible to take the results into account when interpreting the law. This is especially so with regard to the concept of a “reasonable investor”,⁶⁴ as used in rules on inside information and disclosure,⁶⁵ and the general terms of care and conscientiousness in the provisions on financial intermediaries such as financial analysts and rating agencies.⁶⁶ Courts are already making use of this possibility, the Bundesgerichtshof, for example, having stated that a reasonable investor must take into account the fact that market participants behave irrationally.⁶⁷
- 31 Secondly the results of behavioural economics studies could provide an incentive for the legislature to amend the rules of capital markets law in order to take certain anomalies into account. It could, for example, develop a new system of liability including a liability for financial analysts who distort the results of a financial analysis,⁶⁸ introduce new measures, such as trade prohibitions, protecting investors of their own or the analyst’s behavioural anomalies,⁶⁹ or introduce investment licenses in order to raise investor awareness of irrational behaviour and achieve more rational decisions.⁷⁰

⁶⁰ Cf. K. Kamin and J. Rachlinski, *Law & Hum Behav.* (1995), p. 89.

⁶¹ Cf. H. Fleischer, *Handbuch des Vorstandsrechts*, § 7 para. 45 ff.; T. Raiser and R. Veil, *Recht der Kapitalgesellschaften*, § 14 para. 66; H. Merkt and S. Göthel, *US-amerikanisches Gesellschaftsrecht*, para. 843 ff.

⁶² Cf. C.R. Sunstein, 97 *Nw. U. L. Rev.* (2003), p. 1295 ff.

⁶³ Cf. A. Tversky and D. Kahneman, 185 *Science* (1974), p. 1124, 1127.

⁶⁴ L. Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance*, p. 210 f., 247–248; L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 162 ff.; see also § 16 para. 26.

⁶⁵ See § 13 para. 61.

⁶⁶ See § 14 para. 20–24; § 26 para. 29.

⁶⁷ Cf. BGH, ZIP (2012), p. 318, 323.

⁶⁸ Cf. L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 287 ff.

⁶⁹ Cf. *ibid.*, p. 294 ff.; on the discussion regarding the introduction of black out or quiet periods see M. Findeisen, *Über die Regulierung und die Rechtsfolgen von Interessenkonflikten in der Aktienanalyse von Investmentbanken*, p. 205; U.L. Göres, *Interessenkonflikte von Wertpapierdienstleistern und -analysten bei der Wertpapieranalyse*, p. 95.

⁷⁰ Cf. L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 270 ff.; on the discussion regarding the different categories of investors and the introduction of investor tests see S. Choi, 88 *Cal. L. Rev.* (2000), p. 279 ff.

- 32 The legal discussion on taking the results of behavioural finance studies for interpreting capital markets law into account is still in the early stages.⁷¹ The problem that anomalies do not occur with all market participants remains to be solved. Their behaviour has furthermore not yet been studied in its entirety. One must further keep in mind that the main aim of capital markets law is to ensure the functioning of the markets as a whole. A financial analysis, for example, is made public to an unlimited number of people. In such a scenario it appears justifiable, or even necessary, to accept certain deviations from the model behaviour of a *Homo oeconomicus* without adapting the concept when developing rules on the construction, presentation and distribution of a financial analysis. This may be seen differently regarding the provisions regulating the relationship between individual investors (customers) and their banks. One will also have to ask the question as to how far legal rules on capital markets are allowed to be paternalistic.⁷² The legal discussion has as yet not found an answer to this question.⁷³

II. The Relevance of Capital Markets Law for University Teaching in Europe

- 33 The growing importance of capital markets law has had a strong influence in law faculties in Germany in the past ten years. Most of them, meanwhile, offer courses on capital markets law as an individual field of law.⁷⁴ However, legal literature on capital markets law remains scarce.⁷⁵ As yet, there is no literature on European capital markets law by a German author.⁷⁶ As opposed to this, numerous handbooks⁷⁷ and legal commentaries,⁷⁸ intended for the legal practice have been published. Various

⁷¹ Cf. H. Fleischer, in A. Fuchs et al. (eds.), *Festschrift für Ulrich Immenga*, p. 575 ff.; L. Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance*, p. 153; L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 161 ff.; L. Klöhn, in: H. Fleischer and D. Zimmer, (eds.), *ZHR Beiheft 75* (2011), p. 83–99.

⁷² On the different concepts of paternalism see C.R. Sunstein and R.H. Thaler, *70 U Chi. L. Rev.* (2003), p. 1159 ff.; S. Choi and A. Pritchard, *56 Stan. L. Rev.* (2003), p. 1 ff.; L. Klöhn, *Kapitalmarkt, Spekulation und Behavioral Finance*, p. 150 ff.

⁷³ For a solution following the principle of proportionality see L. Teigelack, *Finanzanalysen und Behavioral Finance*, p. 237 ff.

⁷⁴ See the introduction for students of the specialised subject courses at universities H. Merkt and O. Rossbach, *JuS* (2003), p. 217 ff. and H. Merkt and J.-H. Binder, *JURA* (2006), p. 683.

⁷⁵ Only two publications entirely on capital markets law exist as yet: Buck-Heeb, Petra, *Kapitalmarktrecht*, 5th ed. (2011); Grunewald, Barbara and Schlitt, Michael (eds.), *Einführung in das Kapitalmarktrecht*, 2nd ed. (2009). Other publications combine descriptions of capital markets law with company law: Langenbacher, Katja, *Aktien- und Kapitalmarktrecht*, 2nd ed. (2008); Kübler, Friedrich and Assmann, Heinz-Dieter, *Gesellschaftsrecht*, 6th ed. (2006); Raiser, Thomas and Veil, Rüdiger, *Recht der Kapitalgesellschaften*, 5th ed. (2010).

⁷⁶ Grundmann, Stefan, *Europäisches Gesellschaftsrecht*, 2nd ed. (2011) also covers certain aspects of capital markets law, especially prospectus liability and takeover law.

⁷⁷ Cf. Assmann, Heinz-Dieter and Schütze, Rolf A. (eds.), *Handbuch des Kapitalanlagerechts*, 3rd ed. (2007); Habersack, Mathias, Mühlert, Peter O. and Schlitt, Michael (eds.), *Unternehmensfinanzierung am Kapitalmarkt*, 2nd ed. (2008); Kümpel, Siegfried and Wittig, Arne (eds.), *Bank- und Kapitalmarktrecht*, 4th ed. (2011); Lenenbach, Markus, *Kapitalmarktrecht*, 2nd ed. (2010).

⁷⁸ Cf. Assmann, Heinz-Dieter and Schneider, Uwe H. (eds.), *Kommentar zum WpHG*, 6th ed. (2012); Hirte, Heribert and Möllers, Thomas M.J. (eds.), *Kölner Kommentar zum WpHG* (2007); Schäfer, Frank A. and Hamann, Uwe (eds.), *Kapitalmarktgesetze*, looseleaf; Schwark, Eberhardt and Zimmer, Daniel (eds.), *Kapitalmarktrechts-Kommentar*, 4th ed. (2010).

- legal journals, amongst others two peer-reviewed journals on company and business law,⁷⁹ regularly publish articles on capital markets law.⁸⁰
- 34 Capital markets law has also found its way into the lecture rooms of other Member States. Italian law faculties offer lectures exclusively on capital markets law (*diritto di valori mobiliari*) and a number of textbooks have been published on this matter,⁸¹ resulting in a lively academic discussion.
- 35 Austrian law faculties also offer lectures on capital markets law. There are sufficient publications both for educational and practical interests, including a large textbook⁸² and legal commentaries on the Austrian capital markets law provisions.⁸³ Legal journals are the basis for discussions on current legal problems.⁸⁴
- 36 In France, universities offer lectures on French capital markets law, textbooks provide additional sources for research⁸⁵ and questions relevant in legal practice are discussed in French legal journals.⁸⁶ It must further be mentioned that France has very extensive commentaries on important judgments.
- 37 In Sweden capital markets law is commonly taught in combination with banking law under the more general title “financial market law”.⁸⁷ Little legal literature can be found, only one title being of interest to students.⁸⁷ A number of legal commentaries, however, enable easy access to Swedish capital markets law.⁸⁸ There are also numerous doctoral theses on practical aspects of capital markets law, such as on prospectus liability and disclosure obligations.

⁷⁹ Both journals—*Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* (ZHR) and *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR)—mainly publish articles on company law, regularly, however, including articles on capital markets law. Especially K.J. Hopt is known for numerous key publications in both ZHR and ZGR on the development of capital markets law disclosure regime in Germany (cf. 140 ZHR (1976), p. 201; 140 ZHR (1977), p. 389; ZGR (1980), p. 225; ZGR (1991), p. 17; 159 ZHR (1995), p. 135; ZGR (1997), p. 1; 166 ZHR (2002), p. 375).

⁸⁰ The most important journals are *Wertpapiermitteilungen* (WM), *Zeitschrift für Bank- und Börsenrecht* (ZBB) and *Zeitschrift für Bank- und Kapitalmarktrecht* (BKR), as well as *Zeitschrift für Wirtschaftsrecht* (ZIP), *Neue Zeitschrift für Gesellschaftsrecht* (NZG), *Betriebsberater* (BB) and *Der Betrieb* (DB). Capital markets law is also being examined from the perspective of criminal law, the most relevant journal for publications in this area being *Zeitschrift für Wirtschafts- und Steuerstrafrecht* (wistra).

⁸¹ Cf. Annunziata, Filippo, *La disciplina del mercato mobiliare*, 4th ed. (2008); Costi, Renzo, *Il mercato mobiliare* (2010).

⁸² Cf. Kals, Susanne, Oppitz, Martin and Zollner, Johannes (eds.), *Kapitalmarktrecht I* (2005).

⁸³ Cf. Brandl, Ernst and Saria, Gerhard (eds.), *Praxiskommentar zum WAG* (2008); Zib, Christian, Russ, Alexander and Lorenz, Heinrich (eds.), *Kapitalmarktgesetz Kommentar* (2008); on WAG see the statutes and materials compiled by Winternitz, Christian P. and Aigner, Lukas (eds.), *Wertpapieraufsichtsgesetz* (2007).

⁸⁴ The following are the most important journals: *ecolex* (Fachzeitschrift für Wirtschaftsrecht); *GesRZ* (Der Gesellschafter); *ÖBA* (Österreichisches Bankarchiv); *ÖZW* (Österreichische Zeitschrift für Wirtschaftsrecht).

⁸⁵ Cf. Couret, Alain and Le Nabasque, Hervé (eds.), *Droit financier*, 2nd ed. (2012); Bonneau, Thierry and Drumond, France (eds.), *Droit des marchés financiers*, 2nd ed. (2005); Valette, Jean-Paul, *Droit de la régulation des marchés financiers* (2005).

⁸⁶ Capital markets law publications can mainly be found in *Revue trimestrielle de droit financier* (RTDF), *Revue de droit bancaire et financier* (RDBF) and *Bulletin Joly Bourse* (Bull. Joly Bourse).

⁸⁷ Afrell, Lars, *Lärobok i kapitalmarknadsrätt*, 2nd ed. (1998).

⁸⁸ Andersson, Sten, Johansson, Svante and Skog, Rolf (eds.), *Aktiebolagslagen. En kommentar på Internet* (2009); Beckman, Mats, *Lagarna på värdepappersområdet. En kommentar till insiderstrafflagen m. fl. lagar* (2002); Bergmann, Cecilia, Bogdan, Michael and Eriksson, Anders (eds.), *Karnov Lagkommentar på Internet, Lag (2007:528) om värdepappersmarknaden* (2009); Bergmann, Cecilia, Bogdan, Michael and Eriksson, Anders (eds.), *Karnov Lagkommentar på Internet, Lag (1991:980) om handel med finansiella instrument* (2009); Bergmann, Cecilia, Bogdan, Michael and Eriksson, Anders (eds.), *Karnov Lagkommentar på Internet, Lag (2006:451) om offentliga uppköpserbjudanden på aktiemarknaden* (2009); Samuelsson, Per, Afrell, Lars and Cavallin, Samuel (eds.), *Lagen om marknadsmissbruk och lagen om anmälningsskyldighet. En kommentar* (2005).

- 38 In Spain, capital markets law is usually still taught in combination with commercial and company law. Equally, legal literature still centres around these topics, only offering individual chapters on capital markets law.⁸⁹
- 39 The situation is similar in England, where capital markets law plays almost no role in legal training and where no textbooks on this matter exist. This field of law is only referred to in a few textbooks on company law.⁹⁰ There are, however, some handbooks, legal commentaries⁹¹ and journals⁹² on aspects of capital markets law. One of the most important textbooks on European capital markets law is the publication of an English legal academic.⁹³

III. Outlook

- 40 Capital markets law in Europe is still mainly regulated under the national laws of the Member States, merely being influenced by European law. It is, however, becoming apparent that the development of a fully unified European capital markets law is only a matter of time. European legislation is going to play an ever-larger role, the latest measures on rating agencies and short sellings already having been enacted by way of regulation instead of directive.⁹⁴ The upcoming reforms regarding three of the four framework directives⁹⁵ will probably also lead to a change from directives to regulations and from minimum to maximum harmonisation, detailed provisions prohibiting the Member States from enacting their own, stricter rules, rather requiring them to adopt the directives' provisions into their national law on a one-to-one basis.
- 41 A similar prognosis is possible concerning legal enforcement: the ESMA is not empowered to supervise the Europe-wide trading of securities. It does, however, already have considerable powers, such as the release of recommendations and guidelines and the preparation of technical regulatory standards. This enables the

⁸⁹ Cf. Menéndez, Aurelio, *Lecciones de Derecho Mercantil*, 6th ed. (2008); Tapia Hermida, Alberto J., *Derecho del Mercado de Valores*, 2nd ed. (2003); Zunzunegui, Fernando, *Derecho del Mercado Financiero*, 3rd ed. (2005).

⁹⁰ Prospectus liability and takeover law, market abuse and disclosure are all examined in the publications Boyle, Anthony J. and Birds, John (eds.), *Boyle & Birds' Company Law*, 7th ed. (2009); Davies, Paul L., *Gower and Davies' Principles of Modern Company Law*, 8th ed. (2008); Mayson, Stephen W., French, Derek and Ryan, Christopher, *Mayson, French & Ryan on Company Law*, 27th ed. (2010); Sealy, Len and Worthington, Sarah, *Cases and Materials in Company Law*, 9th ed. (2010).

⁹¹ Blair, Michael, Walker, George and Purves, Robert (eds.), *Financial Services Law*, 2nd ed. (2009); Lord Millett, Todd, Michael and Alcock, Alistair (eds.), *Gore-Browne on Companies*, looseleaf, 44th ed. (2012); Lomnicka, Eva Z. and Powell, John L. (eds.), *Encyclopedia of Financial Services Law*, looseleaf (2011); Morse, Geoffrey, *Palmer's Company Law*, looseleaf (2011); Haynes, Andrew, *Financial Services Law Guide*, 3rd ed. (2006); Blair, Michael et al. (eds.), *Annotated Guide to the Financial Services and Markets Act 2000*, 2nd ed. (2005); MacNeil, Ian, *The Law on Financial Investment*, 2nd ed. (2005). Cf. also Blair, Michael, *Blackstone's Guide to the Financial Services & Markets Act 2000*, 2nd ed. (2010), (overview over all main areas regulated by the FSMA).

⁹² For example the following journals: *Capital Markets Law Journal*; *Law and Financial Markets Review*; *Company Lawyer*.

⁹³ N. Moloney, *EC Securities Regulation*, 2nd ed. (2008); the publication Panasar, Raj and Boeckman, Philip, *European Securities Law* (2010) also cited in this book, examines capital markets law from the perspective of a legal practitioner and is restricted to a description of the legal situation in 14 Member States.

⁹⁴ On the Rating Regulation see § 1 para. 37 and § 27 para. 11; on the Regulation on Short Sellings see § 1 para. 44 and § 15 para.9.

⁹⁵ See § 1 para. 39–43.

Eddy, *European Insider Dealing* (1991); Iragüen, Jesús Ibarra/Jiminéz-Blanco, Gonzalo, *Abuso de Mercado: Una Panorámica de su Normativa Administrativa y Penal Vigente*, 126 RDBB (2012), p. 49–104; Iribarren Blanco, Miguel, *Responsabilidad civil por la información divulgada por las sociedades cotizadas*, Monografía No. 2 (2008), asociada a la Revista de Mercado de Valores (2008); Kemnitz, Lukas, *Due Diligence und neues Insiderrecht* (2007); Klöhn, Lars, *Der “gestreckte Geschehensablauf” vor dem EUGH*, NZG (2011), p. 166–171; Klöhn, Lars, *The European Insider Trading Regulation after Spector Photo Group*, ECFR (2010), p. 347–366; Kretschmer, Werner and Oppitz, Martin, *Essentialia der Börsegesetznovelle*, ÖBA (1994), p. 610–619; Lahmann, Kai, *Insiderhandel. Ökonomische Analyse eines ordnungspolitischen Dilemmas* (1994); Lasserre Capdeville, Jérôme, *Le délit de communication d’une information privilégiée: vingt ans après*, Bull. Joly Bourse (2009), p. 69–76; Loke, Alexander F., *From Fiduciary Theory to Information Abuse: The Changing Fabric of Insider Trading Law in the UK, Australia and Singapore*, American Journal of Comparative Law (2006), p. 123; Madrazo, Regina, *Información no pública en las sociedades cotizadas españolas. Tipología y tratamiento en los reglamentos internos de conducta*, RMV No. 2 (2008), p. 471–481; Manne, Henry G., *Insider Trading and the Stock Market* (1966); Marsh, Jonathan, *Handling Price Sensitive Information: A Guide to the Legal and Regulatory Obligations*, 23 COB (2005), p. 1–39; Mayhew, David and Anderson, Karen, *Whither Market Abuse (in a More Principles-based Regulatory World)*, 22 JIBLR (2007), p. 515–531; Mehringer, Christoph, *Das allgemeine kapitalmarktrechtliche Gleichbehandlungsprinzip* (2007); Mennicke, Petra R., *Sanktionen gegen Insiderhandel—Eine rechtsvergleichende Untersuchung unter Berücksichtigung des US-amerikanischen und britischen Rechts* (1996); Moalem, David and Hansen, Jesper Lau, *Insider Dealing and Parity of Information—Is ‘Georgakis’ Still Valid?*, 9 EBLR (2008), p. 949–984; Moosmayer, Klaus, *Straf- und bußgeldrechtliche Regelungen im Entwurf eines Vierten Finanzmarktförderungsgesetzes*, wistra (2002), p. 161–170; Nietsch, Michael, *Die Verwendung der Insiderinformation*, ZHR 174 (2010), p. 556–592; Rider, Barry, Alexander, Kern, Licklater, Lisa and Bazley, Stuart, *Market Abuse and Insider Dealing*, 2nd ed. (2009); Russen, Jonathan, *Financial Services: Authorisation, Supervision and Enforcement* (2006); Schulz, Stephan, *Das Insiderhandelsverbot nach § 14 Abs 1 Nr. 1 WpHG im Lichte der Spector-Rechtsprechung des EuGH*, ZIP (2010), p. 609–613; Sethe, Rolf, *Die Verschärfung des insiderrechtlichen Weitergabeverbots*, ZBB (2006), p. 243–257; Singhof, Bernd, *Zur Weitergabe von Insiderinformationen im Unterordnungskonzern*, ZGR (2001), p. 146–174; Staikouras, Panagiotis K., *Four Years of MADness?—The New Market Abuse Prohibition Revisited: Integrated Implementation Through the Lens of a Critical, Comparative Analysis*, 9 EBLR (2008), p. 775–809; Steinberg, Marc I., *Insider Trading, Selective Disclosure and Prompt Disclosure: A Comparative Analysis* (2001) U. Pa. J. Int’l. Econ. Law 635; Veil, Rüdiger, *Der Schutz des verständigen Anlegers durch Publizität und Haftung im europäischen und nationalen Kapitalmarktrecht*, ZBB (2006), p. 162–171; Veil, Rüdiger, *Weitergabe von Informationen: durch den Aufsichtsrat an Aktionäre und Dritte. Ein Lehrstück zum Verhältnis zwischen Gesellschafts- und Kapitalmarktrecht*, ZHR 172 (2008), p. 239–273; Veil, Rüdiger, *Concepts of Supervisory Legislation and Enforcement in European Capital Markets Law—Observations from a Civil Law Country*, 11 EBOR (2010), p. 409–422; Villeda, Gisella Victoria, *Prävention und Repression von Insiderhandel* (2010); Wang, William K.S. and Steinberg, Marc. I., *Insider Trading* (1996); Willey, Stuart, *Market Abuse Update*, 93 COB (2012), p. 1–28; Ziehl, Katrin, *Kapitalmarktprognosen und Insider-Trading* (2006).

I. Introduction

- 1 In the United States, legislation on capital markets law, including aspects of market abuse, was already on the agenda in 1934, when the federal legislature enacted the Securities Exchange Act and the Securities and Exchange Commission laid down the SEC Rules. Both the US Supreme Court and lower courts extended the provisions—especially Rule 10b-5—thus developing a powerful regime, based on the

notion that all insider dealings are disadvantageous for the market in the longer term.¹ In the 1960s and 1970s, however, debates flared up in the United States² and Europe³ as to whether insider dealings might after all have a positive effect and ought therefore to be legalised. It was argued that an investor who concludes a securities transaction with an insider will generally not suffer any damage as the investor would in any case have carried out the transaction. It was furthermore claimed that insider dealings allow inside information to access the capital markets, thus ensuring an appropriate pricing of securities. Additionally, legalising insider dealings was assumed to solve conflicts arising between principals and agents. This theory was based on the understanding that the possibility of abusing inside information has to be seen as a form of manager remuneration. Due to the fact that inside information is only produced when risks are taken, legalising insider dealings would encourage the managers' willingness to take such risks.

- 2 Yet these arguments purported by the critics of a regulation restricting insider dealings are not convincing. Whilst it is true that an investor concluding a security transaction will mostly not suffer any damage as it would also have concluded the same transaction with another person, market makers will react to a possible risk of losses with larger margins of sales and purchases. Thus insiders cause higher transaction costs that must be carried by all market participants. The second argument must also be rejected: it has been proven that an issuer's obligation to disclose information immediately⁴ is more likely to ensure efficiency of the capital markets than dealings on the basis of inside information. The opinion that the legalisation of insider dealing would serve as an incentive for the management to take risks and thus be advantageous for the company and its shareholders can also not prevail. By using put options the management could easily gain financial advantages from negative information, thus not necessarily maximising company value. A further problem of legalised insider dealings is the fact that third parties would also be able to profit from inside information, resulting in the so-called "free rider problem".
- 3 Despite all these arguments various Member States were sceptical towards regulations on insider dealings, some not introducing the first provisions until well into the 1980s. In Germany, the prevailing opinion was that voluntary rules were sufficient. The Federal Minister for Economics engaged an expert committee which published "Recommendations on the Solution of the Insider Problem" in 1970. The report included guidelines on insider dealings, prohibiting members of the management board and supervisory board, major shareholders and employees of a stock corporation from dealing in shares and bonds of the corporation by using inside information.⁶ This self-regulatory approach, however, did not prove successful.
- 4 The legal situation in Europe changed with the enactment of Directive 89/592/

¹ Cf. S.M. Bainbridge, *Securities Law: Insider Trading* (1999); W.K.S. Wang and M.I. Steinberg, *Insider Trading* (1996).

² Cf. H.G. Manne, *Insider Trading and the Stock Market* (1966), p. 131 ff.

³ Cf. K.J. Hopt and E. Wymeersch, *European Insider Dealing* (1991).

⁴ For more details on this obligation see § 19 para. 25–51.

⁵ Cf. K. Lahmann, *Insiderhandel*, p. 169.

⁶ For the last version of the recommendations see WM (1998), p. 1105. An analysis of the sanction for breaches of these obligations is made by G.V. Villeda, *Prävention und Repression im Insiderhandel*, p. 46 ff.

EEC of 13 November 1989 coordinating regulations on insider dealings.⁷ The European legislature justified the introduction of a European directive with the fact that investor confidence was based mainly on the assurance that all investors are placed on an equal footing and are protected against the improper use of inside information. The smooth operation of markets depends to a large extent on the confidence it inspires in investors. By benefiting certain investors as opposed to others, insider dealing is likely to undermine that confidence and may therefore prejudice the smooth operation of the market.⁸ In the mid-1990s insider dealings were thus prohibited in Europe.⁹

- 5 Only eleven years later the changes on the financial markets and in European Community law caused the European legislature to carry out fundamental reforms of the regime in order to be able to prevent insider dealings and market manipulations more effectively.¹⁰ To this end the Market Abuse Directive (MAD)¹¹ was enacted, replacing the Insider Directive.
- 6 The MAD's objective is to ensure the integrity of the Community's financial markets and to enhance investor confidence in those markets.¹² The directive conceives the prohibition of insider dealings as a prerequisite for achieving "full and proper market transparency".¹³ The prohibition is thus justified by the necessity of organising markets and ensuring their proper functioning¹⁴. The underlying principle is that of informational equality of all investors,¹⁵ whilst the aspect of managers breaching their duty of loyalty by taking advantage of inside information, which plays an important role in the US discussion,¹⁶ is not referred to by European capital markets law.

II. Regulatory Concepts

1. Requirements under European Law

(a) Prohibitions Laid Down by the Market Abuse Directive

- 7 The MAD and its Implementing Directives 2003/124/EC¹⁷ and 2004/72/EC¹⁸ con-

⁷ See § 1 para. 11.

⁸ Recitals of Directive 89/592/EEC.

⁹ Pursuant to Art. 14(1), the Insider Directive was to be transposed by 1 June 1992.

¹⁰ A reason for the directive was also the aim of combating the financing of terrorist activities; cf. Recital 14 MAD.

¹¹ See § 1 para. 22.

¹² Cf. Recital 12 MAD.

¹³ Cf. Recital 15 MAD.

¹⁴ On this regulatory aim see § 2 para. 3.

¹⁵ Cf. C. Mehringer, *Das allgemeine kapitalmarktrechtliche Gleichbehandlungsprinzip*, p. 102 ff.

¹⁶ Cf. *Chiarella v. US*, 445 US 222 (1980); cf. on the misappropriation theory M.A. Snyder, *The Supreme Court and the Misappropriation Theory of Securities Fraud and Insider Trading: Clarification or Confusion?*, Capital Univ. L. Rev. 27 (1999), p. 419–447.

¹⁷ Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, OJ L339, 24 December 2003, p. 70.

¹⁸ Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in rela-

tain detailed dispositions for the Member States regarding prohibitions on insider dealings. The directive begins with a definition of the term “inside information”, this being “information of a precise nature which has not been made public, relating directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments”¹⁹. The Committee of European Securities Regulators (CESR) has developed “Guidelines”²⁰ on the individual elements of this concept, explaining these²¹ and giving details on the requirement to keep insider lists.²²

- 8 Subsequently, the MAD defines which behaviour the Member States must prohibit with regard to inside information, namely (i) acquiring and disposing of shares to which the information relates, (ii) disclosing inside information to any other person and (iii) recommending or inducing another person, on the basis of this information, to acquire or dispose of the respective shares. The Member States must ensure that all three prohibitions apply to so-called primary insiders, i.e. persons who have direct access to this information “by virtue of their membership of the administrative, management or supervisory bodies of the issuer, by virtue of their holding in the capital of the issuer, by virtue of his having access to the information through the exercise of his employment, profession or duties or by virtue of criminal activities”²³. The Member States must further ensure that the prohibitions also apply to any other person who possesses inside information, provided this person knows or ought to have known that it is inside information.²⁴ The MAD contents itself with a minimum harmonisation in this field, allowing the Member States to exceed the European provisions and introduce a higher level of protection. Some Member States have availed themselves of this possibility.²⁵
- 9 The MAD contains no provisions on possible sanctions for breaches of the prohibitions. The Member States can therefore decide individually whether they wish to impose criminal sanctions.²⁶ They must, however, ensure that “in conformity with their national law, the appropriate administrative measures can be taken or administrative sanctions be imposed”²⁷. The details are once again left to the national legislatures: “The Member States shall ensure that these measures are effective, proportionate and dissuasive.”²⁸ This demand, also to be found in the other framework

tion to derivatives on commodities, the drawing up of lists of insiders, the notification of managers’ transactions and the notification of suspicious transactions, OJ L162, 30 April 2004, p. 70.

¹⁹ Art. 1(1) MAD.

²⁰ On their legal quality and relevance for interpretation see § 5 para. 39–40.

²¹ CESR, *Level 3—Second Set of CESR Guidance and Information on the Common Operation of the Directive to the Market*, CESR/06-562b, July 2007.

²² CESR, *Level 3—Third Set of CESR Guidance and Information on the Common Operation of the Directive to the Market*, CESR/09-219, May 2009.

²³ Art. 2(1) MAD.

²⁴ Art. 4 MAD.

²⁵ On the more strict regulatory concept pursued in the United Kingdom see below para. 27–31.

²⁶ Cf. Art. 14(1) MAD: “Without prejudice to the right of Member States to impose criminal sanctions ...”.

²⁷ Art. 14(1) MAD.

²⁸ Art. 14(1) MAD.

directives,²⁹ is to ensure that the European legal framework against market abuse is sufficient.³⁰

(b) *Accompanying Rules*

- 10 The prohibition of insider dealings is accompanied by numerous other rules in the MAD, the Transparency Directive (TD) and the Markets in Financial Instruments Directive (MiFID), such as the issuer's obligation to make public inside information without delay.³¹ The European legislature's aim was to ensure that all investors gain access to price-sensitive information as soon as possible and to counteract the dangers of insider dealings. The provisions on insider dealings and ad hoc disclosure therefore both operate with the concept of inside information. Other transparency rules, such as the obligation to notify and make public directors' dealings³² and the TD's provisions on the notification and publication of changes in major shareholdings³³ are also aimed at preventing the misuse of inside information. The MiFID's rules of conduct for investment firms also pursue the goal of preventing prohibited insider dealings,³⁴ especially by demanding the introduction of compliance structures,³⁵ such as Chinese walls.

(c) *Reform*

- 11 On 20 October 2011 the European Commission made public two proposals³⁶ regarding amendments to the rules on market abuse.³⁷ The worldwide economic and financial crises made clear the importance of market integrity, and the CESR's study³⁸ and the de Larosière report³⁹ underlined the fact that the legal situation in the Member States regarding criminal and administrative sanctions was disparate and hardly provided incentives to act lawfully.⁴⁰ The European Commission therefore regarded it as necessary to extend the rules on market abuse to other markets and develop stricter rules on supervision and sanctions.
- 12 Pursuant to the proposal for a new regulation, the rules on insider dealing are also to apply to financial instruments traded on multilateral trading facilities (MTFs) or

²⁹ See § 1 para. 21 ff.

³⁰ Recital 38 MAD.

³¹ See § 31 para. 25 ff.

³² See § 21 para. 2.

³³ See § 20 para. 17 ff.

³⁴ See § 29 para. 1.

³⁵ See § 43 para. 43.

³⁶ Proposal for a Regulation of the European Parliament and of the Council on Insider Dealing and Market Manipulation (Market Abuse) of 20 October 2011 COM(2011) 651 final; Proposal for a Directive of the European Parliament and of the Council on Criminal Sanctions for Insider Dealing and Market Manipulation of 20 October 2011, COM(2011), 654 final. Cf. on this reform R. Veil and P. Koch, *Towards a Uniform European Capital Markets Law: Proposals of the Commission to Reform Market Abuse* (2012); S. Willey, 93 COB (2012), p. 1, 12–15.

³⁷ Furthermore, the European Commission has published a Working Paper as an accompanying document to the two proposals (Commission Staff Working Paper Impact Assessment, 20.10.2011, SEC(2011) 1217 final).

³⁸ Cf. CESR, *Report on administrative measures and sanctions as well as the criminal sanctions available in Member States under the market abuse directive (MAD)*, CESR/08-099, February 2008.

³⁹ Cf. J. de Larosière, *The High-Level Group on Financial Supervision in the EU*, Report, 25.2.2009.

⁴⁰ Cf. Recital 34 MAR Draft.

organised trading facilities (OTFs).⁴¹ Over-the-counter (OTC) trading has also been included in the scope of the regulation.⁴² The Commission further plans to prohibit insider dealings for share derivatives, traded exclusively OTC.⁴³

- 13 The proposal for a Market Abuse Regulation further contains a number of provisions that have the aim to strengthen the powers of the national supervisory authorities.⁴⁴ The unification and intensification of the sanctions are to increase the dissuasiveness of sanctions in the future.⁴⁵ The draft Market Abuse Regulation focuses on the administrative measures and sanctions. In Chapter 5 it contains regulatory requirements for the Member States,⁴⁶ obliging them to implement provisions on the imposition of fines⁴⁷ into their national laws. The regulation's respective provisions are thus not to apply directly. According to the draft of a new MAD, the Member States are further to prohibit certain forms of behaviour by criminal law. Rules on criminal sanctions are assumed to demonstrate "social disapproval of a qualitatively different nature compared to administrative sanctions or compensation mechanisms under civil law".⁴⁸

2. Implementation in the Member States

- 14 The Member States have transposed the MAD's provisions in different ways, some only recurring to criminal provisions, whilst others implementing administrative as well as criminal prohibitions. The administrative prohibitions generally have lower prerequisites—partly letting negligence suffice—and are therefore more easily enforceable in practice. Not all Member States have transposed the MAD's and the implementing directives' provisions one-to-one.

(a) Austria

- 15 In Austria, it was the European provisions that gave the incentive for introducing statutory provisions on insider dealings.⁴⁹ Since 1 October 1993 the BörseG (Austrian Stock Exchange Trading Act) contains insider provisions, all of which are of a criminal nature.⁵⁰ They so far do not, however, appear to be of any great importance in judicial practice.⁵¹
- 16 § 48a BörseG defines the concept of inside information, which corresponds strongly with that in MAD, the only difference being the understanding of the information as *genau* (i.e. exact) instead of *präzise* (i.e. precise).⁵² § 48b BörseG contains a number

⁴¹ Cf. Art. 2(1)(b) MAR Draft.

⁴² Cf. Art. 2(1)(c) MAR Draft.

⁴³ Cf. Art. 2(2) MAR Draft (as yet derivatives only fall within the scope of Art. 9(2) MAD in exceptional cases).

⁴⁴ Cf. Art. 17 MAR Draft.

⁴⁵ Cf. Recital 34 MAR Draft: "equal, strong and deterrent sanctions regimes".

⁴⁶ Cf. Art. 24 (1) MAR Draft.

⁴⁷ Cf. Art. 25–29 MAR Draft; see also para. 127–129.

⁴⁸ Cf. Explanatory Memorandum, p. 3–4.

⁴⁹ Cf. S. Kalss, M. Oppitz and J. Zollner, *Kapitalmarktrecht*, § 20 para. 7; in more detail W. Kretschmer and M. Oppitz, *ÖBA* (1994), p. 610 ff.

⁵⁰ The criminal sanctions are seen critically by C. Hausmaninger, *ÖBA* (2003), p. 637–638.

⁵¹ Cf. R. Brandstetter, *ecolex* (1998), p. 803.

⁵² Cf. S. Kalss, M. Oppitz and J. Zollner, *Kapitalmarktrecht*, § 20 para. 15.

sell, without more information on the circumstances, was not sufficiently precise to be regarded as inside information.

- 69 Irrespective of the problem of inside information, an issuer must decide on how to react to rumours. CESR has issued a statement on this question, recommending a “no comment-policy”¹⁶⁵ and stating that, in general, as opposed to in exceptional circumstances, issuers are under no obligation to respond to speculation or market rumours which are without substance.¹⁶⁶

IV. Prohibitions

1. Overview

- 70 The MAD obliges EU Member States to introduce provisions according to which recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which the information relates, is prohibited.¹⁶⁷ The directive does not, however, describe how breaches of this rule are to be sanctioned. It is therefore not surprising that Member States have developed different sanctioning regimes, some opting for criminal prohibitions whilst others developed administrative sanctions and others again combined both possibilities, in most cases subjecting them to very different prerequisites. Some Member States have left their existing criminal prohibitions unaltered even after the enactment of the Insider Directive, only adapting the supervisory provisions to the requirements of European law.¹⁶⁸ To go into more detail regarding the national implementations would go beyond the scope of this book. Rather, the supervisory rules included in the MAD itself will be examined, the ECJ having defined the requirements that have to be met by the Member States when implementing these provisions in a number of cases.

2. Prohibition of the Acquisition or Disposal of Financial Instruments

(a) *European Requirements*

- 71 Member States must prohibit any person who possesses inside information from using that information by acquiring or disposing of, or by trying to acquire or dispose of, financial instruments to which that information relates for his own account or for the account of a third party, either directly or indirectly.¹⁶⁹ This prohibition is to ensure the integrity of the financial markets and enhance investor confidence, at the same time ensuring more equality between contracting parties in market transactions.¹⁷⁰

¹⁶⁵ CESR, *Level 3—third set of CESR guidance and information on the common operation of the Directive to the market*, CESR/09-219, May 2007, No. 4.1.

¹⁶⁶ See § 19 para. 93.

¹⁶⁷ Art. 3(b) MAD.

¹⁶⁸ See above para. 15–31.

¹⁶⁹ Art. 2(1) MAD.

¹⁷⁰ Cf. ECJ of 10 May 2007, Case C-391/04 [2007] ECR I-3741 on Art. 2 of the former Insider Directive 89/592/EEC.

72 In the above-mentioned case *Georgakis*¹⁷¹ all contracting parties of the transactions had access to the same information and no one had been able to benefit from having more information than the others. The ECJ therefore correctly ruled that Georgakis and the members of his family had not breached the rules prohibiting the use of inside information by acquiring or disposing of financial instruments.¹⁷²

(b) *Legal Practice in the Member States*

73 Some Member States have transposed the European provisions prohibiting the use of inside information by acquiring or disposing of financial instruments one-to-one, whereas others have developed deviating prohibitions, especially regarding the aspect of the use of inside information. English law, for example, requires causation (“on the basis of”),¹⁷³ whereas the German WpHG prohibits “making use of inside information to acquire or dispose of insider securities for own account or for the account or on behalf of a third party”,¹⁷⁴ and Austrian law speaks of “taking advantage of inside information”.¹⁷⁵

74 The term “making use of” was chosen by the German legislature in order to express that a purposeful behaviour of the offender, such as the intent of making profits, is not necessary under German law.¹⁷⁶ At the same time, however, the term implies that there must—at least additionally to other factors—be a chain of causation between the acquisition or disposal of the financial instruments to the inside information.¹⁷⁷ This can become relevant if the target company passes on inside information to an investor in the course of a due diligence proceeding.

75 If the investor is only strengthened in his decision to acquire a financial instrument of the respective company a breach of the prohibition of acquisitions of financial instruments cannot be assumed under German law.¹⁷⁸ As opposed to this, the rules prohibiting the use of inside information are breached if the investor makes additional purchases on the stock market.¹⁷⁹

76 A further question is whether an investor makes use of inside information when it gains knowledge of the inside fact during an OTC acquisition of share packages and thereupon decides to acquire them. In Germany, this is negated, even if the investor took the information into account when assessing the price.¹⁸⁰ The functioning of the market is only affected if the inside information puts individual market participants at an advantage compared to others. OTC acquisi-

¹⁷¹ See above para. 45.

¹⁷² The aim was to fix artificially and simultaneously the prices of certain securities. This constitutes a type of market manipulation as prohibited by the MAD. See § 14 para. 25–30.

¹⁷³ Cf. R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 63–64.

¹⁷⁴ Cf. § 14(1) No. 1 WpHG.

¹⁷⁵ Cf. Art. 48b(1) BörseG.

¹⁷⁶ Cf. Begr. RegE Anlegerschutzverbesserungsgesetz, BT-Drucks. 15/3174, p. 34 (explanatory notes).

¹⁷⁷ Cf. P. Mennicke, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 14 para. 52, 55.

¹⁷⁸ Cf. H.D. Assmann, in: H.D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 14 para. 45; P. Mennicke, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 14 para. 75; from a European perspective M. Kemnitz, *Due Diligence und neues Insiderrecht*, p. 67 ff.

¹⁷⁹ Cf. BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 37–38; H. Diekmann and M. Sustmann, NZG (2004), p. 929, 931; on Austrian law S. Kalss, M. Oppitz and J. Zollner, *Kapitalmarktrecht*, § 20 para. 27; dissenting opinion: P. Mennicke, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 14 para. 75.

¹⁸⁰ Cf. BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 37–38.

tions are, however, restricted to a specific package, for which the buyer and seller will have the same amount of information once the due diligence procedure has taken place. Such an acquisition is thus not subject to the prohibition even if the investor obtained inside information in the course of it.

77 The prohibition of the use of inside information plays an important role in French mergers and acquisitions (M&A) transactions. In 2003 the supervisory authority published a recommendation (*procédures dites de data room*)¹⁸¹ with “rules” which were to ensure an equal access for all investors to information and prevent insider dealings (not, however, the disclosure of inside information to others).

78 According to the recommendation, a due diligence is only permitted with regard to the acquisition of a major holding. Investor and issuer must furthermore conclude a non-disclosure agreement. During the due diligence the parties are not permitted to trade with the issuer’s financial instruments and must not pass on inside information to third parties. The investor must submit a letter of intent, in order to prove it is serious about the acquisition and to present his financing options. The information that is disclosed in the course of the due diligence must only be such as is necessary to confirm the investor’s acquisition interest and to put the details of the transaction into more concrete terms. The information is not to be decisive for the investor’s decision to invest in the company. If the investor does not make an offer pursuant to the due diligence, the issuer must disclose all the relevant and potentially price-sensitive information from the due diligence.

(c) *The ECJ’s Interpretation and Conclusions for the Legal Practice in the Member States*

79 Some of the Member States’ rules regarding the prohibition of acquisitions or disposals of financial instruments may need to be revised due to the ECJ’s ruling in *Spector*¹⁸² in which the court examined the prohibition closely and gave concrete details on how the Member States’ national rules are to be interpreted.

80 *Facts (abridged)*: Spector, a listed company under Belgian law, offered a programme via which employees could acquire shares in the company, which Spector planned to acquire on the market. On 21 May 2003 Spector informed Euronext Brussels of its plan to acquire a certain number of its own shares. On 11 and 13 August 2003 board member van Raemdonck acquired 19,773 shares at an average price of €9.97 for Spector. The price for exercising the acquisition option laid at €10.45. Subsequently Spector disclosed the company’s business results and company policy, leading to a price increase up to €12.50. The Belgian supervisory authority (CBFA) imposed fines of €80,000 and €20,000 on Spector and van Raemdonck, respectively, for the acquisition of the shares. The court, having to decide on the legality of the fines, submitted a number of questions to

¹⁸¹ Cf. COB, Publication de la recommandation no 2003-01 relative à la transmission d’informations privilégiées préalablement à des opérations de cessions de participations significatives dans des sociétés cotées sur un marché réglementé.

¹⁸² ECJ of 23 December 2009, Case C-45/08 (*Spector*) [2009] ECR I-12073.

the ECJ for a preliminary ruling, especially regarding the requirement of making use of inside information.

- 81 The ECJ ruled that the fact that a *primary insider* “in possession of inside information, acquires or disposes of, or tries to acquire or dispose of, for his own account or for the account of a third party, either directly or indirectly, the *financial instruments* to which that information relates *implies* that that person has ‘used that information’ within the *meaning of that provision*, but without prejudice to the rights of the defence and, in particular, to the right to be able to rebut that presumption. The question whether that person has infringed the prohibition on insider dealing must be analysed in the light of the purpose of that directive, which is to protect the integrity of the financial markets and to enhance investor confidence, which is based, in particular, on the assurance that investors will be placed on an equal footing and protected from the misuse of inside information.”¹⁸³
- 82 The ECJ lists a number of examples for which the assumption will not apply—the most practically relevant being the constellations of a public takeover bid and a merger proposal. In these cases the use of the inside information “should not in itself be deemed to constitute insider dealing. The operation whereby an undertaking, after obtaining inside information concerning a specific company, subsequently launches a public take-over bid for the capital of that company at a rate higher than the market rate cannot, in principle, be regarded as prohibited insider dealing since it does not infringe on the interests protected by that directive.”¹⁸⁴
- 83 The ECJ did not refer to the question whether the prohibition as laid down in the MAD requires causation of the inside information for the offender’s behaviour. Therefore the most important cases regarding M&A transactions do not have to be interpreted differently in the light of the *Spector* decision.¹⁸⁵ It also remains as yet unclear what the ECJ’s description of the prohibition as “objective”, i.e. without any requirements regarding wilfulness or negligence, means for the Member States.¹⁸⁶ So far this has constituted an additional element in the prohibition in all national laws, which had to be proven by the supervisory authorities or courts with regard to the offender. It is not to be assumed that the ECJ’s interpretation intended to make this proof superfluous.

3. Disclosure to another Person

(a) European Requirements

- 84 The Member States must prohibit any person with inside information from disclosing inside information to any other person unless such disclosure is made in the normal course of the exercise of his employment, profession or duties.¹⁸⁷ This rule was refined by the ECJ’s decision in *Grøngaard/Bang*.¹⁸⁸ Whilst the decision relates

¹⁸³ *Ibid.*, para. 62.

¹⁸⁴ *Ibid.*, para. 59.

¹⁸⁵ Similarly S. Schulz, ZIP (2010), p. 609, 611 and C. Cascante and A. Bingel, NZG (2010), p. 61, 162.

¹⁸⁶ Cf. M. Nietsch, ZHR 174 (2010), p. 557, 567.

¹⁸⁷ Art. 3(a) MAD.

¹⁸⁸ ECJ of 22 November 2005, Case C-384/02 [2005] ECR I-9939.

to the former Insider Directive, the court's interpretation is also applicable to the identical provision in the MAD.¹⁸⁹

- 85 *Facts (abridged)*: Bang was chairman of the Finansforbund, a trade union in the financial sector. Grøngaard, who had been appointed by the employees, was a member of the administrative board of the company RealDanmark, a relatively large listed financial institution. Subsequent to an extraordinary administrative board meeting of RealDanmark, Grøngaard passed on information to Bang on 28 August 2000, regarding the planned merger negotiations with the Danske Bank, another large Danish financial institution. Between 28 August and 4 September 2009 Bang consulted with his two deputies and one of his employees in the administration of the Finansforbund and passed the information he had received from Grøngaard on to them. On 2 October 2000 the merger between RealDanmark and Danske Bank was made public and RealDanmark's shares price rose by 65%. Grøngaard and Bang were criminally prosecuted under section 36(1) of the Danish Securities Trading Act (vædipapirhandelslov) for disclosing inside information. The Københavns Byret decided to stay the proceedings and made reference to the ECJ for a preliminary ruling.
- 86 The ECJ examined in particular the fact that the prohibition of disclosing inside information does not apply unconditionally. The provision is not applicable if the insider passes on the information in the normal course of the exercise of his employment, profession or duties. According to the ECJ, this exemption clause must be treated restrictively, and can only be justified if there is a close link between the disclosure and the exercise of the employment, profession or duties and the disclosure of such information is strictly necessary for the exercise thereof.¹⁹⁰ Particular care is required with regard to sensitive information. In these cases, the disclosure is manifestly capable of significantly affecting the price of the transferrable securities in question. The ECJ stated that inside information relating to a merger between two companies quoted on the stock exchange is an example of such particularly sensitive information.
- 87 Whether the exception from the prohibition can be assumed must, according to the ECJ, be determined by the national court in the light of the applicable national laws. What is to be regarded as coming within the normal ambit of the exercise of an employment, profession or duties, depends to a large extent, in the absence of harmonisation in that respect, on the rules governing those questions in the various national legal systems.¹⁹¹ In particular, the underlying legal concepts in national labour and company law must therefore be taken into account in order to determine whether a member of the board of directors or the supervisory board was permitted to pass on inside information on the company to a major shareholder or whether a representative of the employees on the supervisory board may pass on information to "his" union.

¹⁸⁹ R. Sethe, ZBB (2006), p. 243, 250.

¹⁹⁰ ECJ of 22 November 2005, Case C-384/02 [2005] ECR I-9939. The High Court of Denmark ruled that a member nominated by the employees has the possibility to discuss a merger that would have a considerable effect on the employees with the chair of his union. The defendants in *Grøngaard/Bang* were therefore exempted from liability. Cf. Højesteret København, ZIP (2009), p. 1526, 1527.

¹⁹¹ ECJ of 22 November 2005, Case C-384/02 [2005] ECR I-9939, para. 39–40.

88 Under consideration of these facts, as part of its examination, “a national court must, in the light of the applicable national rules, take particular account of: the fact that that exception to the prohibition of disclosure of inside information must be interpreted strictly, the fact that each additional disclosure is liable to increase the risk of that information being exploited for a purpose contrary to Directive 89/592, and the sensitivity of the inside information”.¹⁹²

(b) *Legal Practice in the Member States*

89 The Member States have implemented the prohibition into their national laws one-to-one or following the wording of the Directive very closely. In the United Kingdom, for example, the supervisory prohibition to disclose inside information does not apply if it takes place “in the proper course of the exercise of [the insider’s] employment, profession or duties”.¹⁹³ The FSA Handbook contains extensive explanations and interpretational details on this exemption. It is of particular importance to determine whether the insider had the obligation to maintain confidentiality. The FSA’s further interpretational remarks all refer to specific cases, such as the disclosure of information to support a hostile takeover bid.¹⁹⁴ As opposed to this, the interpretational rules developed by the ECJ do not seem to be taken into account in Britain’s supervisory practice.

90 France introduced a prohibition to disclose inside information, also called *délit de dîner en ville*, in 1989,¹⁹⁵ which meanwhile applies equally to primary, secondary and tertiary insiders. It plays an unimportant role in legal practice, difficulties in proving the offence often preventing a conviction under criminal law.¹⁹⁶

91 Contrary to this, the supervisory practice in Germany has dealt extensively with the prohibition to disclose inside information. In the BaFin’s opinion the disclosure of information in a due diligence procedure cannot be regarded as prohibited if it was to ensure a specific acquisition of a share package or control. Especially in cases of an acquisition of major holdings the economic interests of both issuer and investor would justify a stronger transparency than for the usual acquisition of shares on stock markets. Therefore, the disclosure of information in these cases would be permitted in the course of due diligence proceedings.¹⁹⁷ The exact cases to which this rule applies as yet remain unclear. Based on a consideration of the statutory notification thresholds,¹⁹⁸ German legal literature suggests shareholdings of between 2 and 5%.¹⁹⁹

92 This interpretation of the prohibition to disclose inside information does not appear entirely convincing, as the BaFin does not explain why its interpretation deviates

¹⁹² Cf. *ibid.*, para. 48.

¹⁹³ Sec. 118(3) FSMA.

¹⁹⁴ Cf. R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 65.

¹⁹⁵ Art. L. 465-1 C. mon. fin. In the version of the statute no. 89-531 of 2 August 1989.

¹⁹⁶ Cf. J. Lasserre Capdeville, *Bull. Joly Bourse* (Jan/Feb 2009), p. 69, 75: one single judgment since 1989 (acquittal).

¹⁹⁷ BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 41.

¹⁹⁸ The thresholds commence at 5% of the voting rights under the TD II. Some Member States, e.g. Germany, Italy and the UK, however, have introduced lower thresholds, starting at 2 or 3%. On this see § 20 para. 20–26.

¹⁹⁹ For 5% T. O. Brandi and R. Süßmann, *AG* (2004), p. 642, 648; for 2% in cases of a high market capitalisation K. Hasselbach, *NZG* (2004), p. 1087, 1089.

from the stricter understanding of the prohibition purported by the ECJ.²⁰⁰ The ECJ requires a case-to-case examination regarding the sensitivity of the information. Even in cases of 20% shareholdings the board of directors of the issuer must ask itself whether the disclosure of the information to the investor is really necessary.

- 93 Certain cases, in which the disclosure will generally be permitted, however, still exist. They include the possibility for members of the supervisory board to disclose inside information to a major shareholder outside the general shareholders' meeting if this may heighten the chances of a certain measure, such as a capital increase, being adopted by the shareholders' meeting. As opposed to this, the members of the supervisory board are not permitted to disclose inside information regarding upcoming business and personnel policy measures to individual shareholders. These cases may again have to be treated differently when the issuer is a subsidiary of a parent company. The members of the supervisory board must in these constellations take the controlling company's interest in a unified management of the whole group into consideration. The disclosure of inside information to the controlling company can therefore be permissible.²⁰¹

4. Recommending or Inducing

(a) *European Requirements*

- 94 The Member States must prohibit any person with inside information from recommending or inducing another person, on the basis of inside information, to acquire or dispose of financial instruments to which that information relates.²⁰² This prohibition is a catch-all clause, to which the ECJ has not yet referred to.

(b) *Legal Practice in the Member States*

- 95 The Member States have all transposed the prohibition into their national laws. In Germany, for example, it is prohibited "to recommend, on the basis of inside information, that a third party acquire or dispose of insider securities, or to otherwise induce a third party to do so".²⁰³ The prohibition to recommend or induce has the aim of preventing an insider from using a third party or acting collusively with him, in order to circumvent the prohibitions applying to the insider dealing himself by recommending the deals to the third party.²⁰⁴ "Induce" is defined as any means of influencing the will of a third party.²⁰⁵ It is sufficient if the insider suggests a specific transaction to a third party, irrespective of whether or not it explicitly discloses his inside information. The prohibition requires causation between the insider's information and the offender's recommendation, i.e. the offender must recommend the acquisition or disposal of shares based on his inside knowledge.

²⁰⁰ Seen critically by G. Bachmann, ZHR 172 (2008), p. 597, 623.

²⁰¹ Cf. B. Singhof, ZGR (2001), p. 146, 162; R. Veil, ZHR 172 (2008), p. 239, 268.

²⁰² Art. 3(b) MAD.

²⁰³ Cf. § 14(1) No. 3 WpHG.

²⁰⁴ Cf. Begr. RegE Zweites Finanzmarktförderungsgesetz, BT-Drucks. 12/6679, p. 47–48 (explanatory notes).

²⁰⁵ Cf. Begr. RegE Anlegerschutzverbesserungsgesetz, BT-Drucks. 15/3174, p. 34 (explanatory notes).

I. Introduction

1. Dual Function of Ad Hoc Disclosure Obligations

- 1 Once inside information has been made public, insiders lose their trading advantage. Disclosure obligations are therefore essential to curtailing insider dealings. The effectiveness of these measures has been proven in the United States over many years.¹ Additionally, the disclosure of price-sensitive information improves transparency and thereby ensures more equal chances for market participants. The combination of periodic disclosure obligations and the disclosure obligations for inside information enables the market to obtain the necessary information on an issuer. Ad hoc disclosure obligations must thus be seen as having a dual function—as a disclosure measure and a preventive measure.²
- 2 If one focuses on the preventive nature of disclosure obligations regarding insider dealings, it appears reasonable to require the same conditions when prohibiting insider trading³ and when requiring disclosure. Both concepts can then apply the same notion of inside information. This was taken into account by the European legislator who understood the disclosure obligations as a complement to the prohibitions on insider trading;⁴ this understanding is reflected in the MAD and its implementing measures.⁵
- 3 Yet transparency does not always require disclosure obligations and prohibitions of insider dealings to run parallel: not all information that may enable insider dealings must necessarily be disclosed. Disclosure might in some cases mislead the public, e.g. if the information refers to future events. In these cases disclosure obligations could be counterproductive, as the public might not be able to assess the information correctly, whilst prohibiting insider dealings may already be advisable at this time. Additionally, the issuer may have a legitimate interest in not immediately disclosing the inside information to the public.⁶ The issuer may further not be informed from the outset about information by which it is only indirectly affected. When consid-

¹ Cf. H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 32 with further references; for recent data on Germany see R. Baule and C. Tallau, *Market Response to Ad Hoc Disclosures and Periodic Financial Reports: Evidence from Germany*; cf. also R. Veil, 167 ZHR (2003), p. 365, 375 ff.

² Cf. H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 2, 6; M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 34 ff.; T. Raiser and R. Veil, *Recht der Kapitalgesellschaften*, § 12 para. 29.

³ See above § 13 para. 70–95.

⁴ See below para. 11.

⁵ Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the definition and public disclosure of inside information and the definition of market manipulation, OJ L339, 24 December 2003, p. 70; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest, OJ L339, 24 December 2003, p. 73; Commission Directive 2004/72/EC of 29 April 2004 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards accepted market practices, the definition of inside information in relation to derivatives on commodities, the drawing up of lists of insiders, the notification of managers' transactions and the notification of suspicious transactions, OJ L162, 30 April 2004, p. 70; Commission Regulation (EC) No. 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC of the European Parliament and of the Council as regards exemptions for buy-back programmes and stabilisation of financial instruments, OJ L336, 23 December 2003, p. 33.

⁶ See below para. 62 ff.

ering the disclosure of inside information under the concept of transparency, one must further determine its relationship to the other disclosure obligations on the secondary markets, especially the rules on periodic disclosure;⁷ the obligation to make public inside information constitutes an essential element of the disclosure obligations on the secondary markets.⁸

- 4 Both functions of the disclosure obligations complement each other in their aim of achieving an efficient price structure on the capital markets. Nevertheless, the differences in the underlying concepts are still reflected in the Member States' individual implementations: in Germany, the rules on the disclosure of inside information directly follow the rules on the prohibition of insider dealings, whilst France has implemented the rules in conjunction with the rules on periodic disclosure. There is a general tendency towards understanding the disclosure obligations as an element of the transparency regime, which, however, simultaneously takes into account the aim of preventing insider trading.
- 5 The respective rules are therefore entitled "*information permanente*" in France and "*publicación de hechos relevantes*" in Spain. As opposed to this, the United Kingdom and Germany emphasise a combination of these rules with a number of further obligations, speaking of "*episodic or ad hoc reporting requirements*" and "*Ad-hoc-Publizität*", respectively. Spain additionally distinguishes between inside information ("*información privilegiada*") and (price-) sensitive information ("*hechos relevantes*"), only the latter being subject to the disclosure obligations. Sweden has implemented the rules prohibiting insider dealings in a separate statute on market abuse, whilst the disclosure obligations are integrated in the LVM (Swedish Securities Market Act).
- 6 In our opinion, the disclosure obligations for inside information must primarily be classified as rules on transparency for systematic reasons, requiring their incorporation in the further rules on transparency and disclosure. We therefore examine the disclosure of inside information in the context of the other disclosure obligations and not in the chapter on market integrity.

2. Practical Relevance

- 7 The obligation to disclose inside information plays an important role in legal practice. In most Member States, the number of disclosures published has been continually rising or at least stable over the last years: in Austria, for example, the highest number of disclosures was achieved in 2009, when 653 disclosures took place, compared to 569 disclosures of inside information in 2010 and 539 in 2011.⁹ In Spain, the high total of 11,502 disclosures in 2011, and 11,033 in 2010,¹⁰ is probably the result of the fact that the disclosure obligation was extended to further information.¹¹

⁷ See below para. 52–53.

⁸ N. Moloney, *EC Securities Regulation*, p. 969; T. Raiser and R. Veil, *Recht der Kapitalgesellschaften*, § 12 para. 29.

⁹ Cf. FMA, *Jahresbericht 2011* (annual report), p. 112.

¹⁰ Cf. CNMV, *Annual Report 2011*, p. 144.

¹¹ See also para. 35.

- 8 Germany, however, has experienced a continued decrease in disclosures, only 2,002 disclosures taking place in 2011, after 2,207 in 2010 and 2,657 in 2009.¹² In the years before, the number of disclosures had risen to 5,421 in 2001.¹³ This exorbitant number of disclosures made it difficult for investors to determine what information was actually relevant. This was mainly due to the fact that in many cases disclosure would not even have been required and companies appeared to be using ad hoc notification as a means of advertising and public relations.¹⁴ The German legislator has finally reacted to this tendency by introducing § 15(2)1 WpHG (German Securities Trading Act)¹⁵. The decreased number of disclosures since 2002 is additionally assumed to be the result of the negative developments on the stock markets since 2001.
- 9 There is not yet much data on the use of the possibility of delaying disclosure.¹⁶ With 202 cases in Germany in 2011, after 177 delayed disclosures in 2010 (2009: 240; 2008: 209), there does not yet exist a clear tendency.¹⁷ In 2002 issuers only applied for a delay of disclosure in 26 cases, 18 of which were granted.¹⁸ In Austria, there were only 12 delayed disclosures in 2011.¹⁹
- 10 It is further noteworthy how different informal agreements between issuers and the supervisory authorities are treated in the different Member States. Whilst this practice is relatively unknown to the BaFin, informal agreements on disclosure obligations are common practice in Italy, France and Spain.²⁰ In Sweden, informal agreements are common between the issuers and the stock management.²¹ In ensuing legal disputes, the courts are obviously not bound by the supervisory authorities' prior judgments and decisions regarding a disclosure obligation.

II. Regulatory Concepts

1. Requirements under European Law

- 11 The obligation to disclose inside information is laid down in Article 6(1) MAD.²² The European legislator thus primarily understands the obligation to disclose inside information as an instrument to prevent insider dealings,²³ the MAD's aim being to ensure the integrity of Community financial markets and to enhance investor con-

¹² Cf. BaFin, *Jahresbericht 2011* (annual report), p. 211.

¹³ Cf. BaFin, *Jahresbericht 2002* (annual report), p. 75.

¹⁴ Cf. M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 14.

¹⁵ See below para. 61.

¹⁶ See below para. 63 ff.

¹⁷ Cf. BaFin, *Jahresbericht 2011* (annual report), p. 210, and BaFin, *Jahresbericht 2009* (annual report), p. 189.

¹⁸ Cf. BaFin, *Jahresbericht 2002* (annual report), p. 75.

¹⁹ Cf. FMA, *Jahresbericht 2011* (annual report), p. 112.

²⁰ These insights are based on a number of intense interviews the authors conducted with legal practitioners and academics in the respective Member States (see also § 12 para. 9).

²¹ Cf. R. Veil and F. Walla, *Schwedisches Kapitalmarktrecht*, p. 14.

²² On the preceding provisions see D. Zimmer and H. Kruse, in: E. Schwark and D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar*, § 15 WpHG para. 1–2.

²³ L. Gullifer and J. Payne, *Corporate Finance Law*, p. 484. The regulatory approach taken by the European Unions is seen critically by M. Brellachs, *Publizität und Haftung*, p. 38; S. Grundmann, *European Company Law*, p. 470; N. Moloney, *EC Securities Regulation*, p. 970–971.

these rules is most certainly illegal¹¹⁹ and benchmark data of an envisaged offer will have to be published pursuant to § 15 WpHG, even if not pursuant to § 10 WpÜG.¹²⁰

3. No Offsetting of Information

58 In the United Kingdom issuers have occasionally argued that negative information could be cancelled out by positive information. If the market expectations are not changed by the information as a whole, disclosure should not be necessary. The FSA ultimately refuted this approach in its ruling in the case of *Wolfson Microelectronics plc*:

59 *Facts (abridged)*:¹²¹ Wolfson Microelectronics plc was a listed company that produced semiconductors for consumer electronics. On 10 March 2008 a major customer, formerly generating approximately 18% of Wolfson's revenue, told Wolfson that they would not be ordering parts for future editions of products A and B, two of the major customer's products. For Wolfson this represented a loss of 8% of its forecast revenue for the year. At the same time Wolfson was informed that the same major customer would increase its demand for the supply of parts for product C, making Wolfson's overall revenues from the major customer in 2008 equivalent to those of the previous year. On the recommendation of external consultants, Wolfson disclosed the information on the loss of the order for products A and B on 27 March 2008, subsequently suffering an 18% fall in its share price.

60 The FSA ruled that the delay in disclosing information breached the obligation to disclose inside information as soon as possible to conform with DTR 2.2.1 and Listing Principle 4. Offsetting negative and positive news is not acceptable. Rather, companies should disclose both types of information and allow the market to determine whether, and to what degree, the positive information compensates for the negative information. Additionally, Wolfson's calculations failed to take the implications for revenues post 2008 into account although the previously anticipated level of 2008 revenues could be achieved. The information was significant for investors with regard to its implications for Wolfson's future status vis-à-vis the major customer.

4. Prohibition to Disclose Other Information

61 Transparency can be affected not only by price-sensitive information which remains undisclosed but also by a flood of information, impairing the processing of information important for investment decisions.¹²² In Spain, the disclosure of future circumstances, which are not yet entirely certain, is understood as the most severe

¹¹⁹ Cf. P. Versteegen, in: H. Hirte and T.M.J. Möllers (eds.), *Kölner Kommentar zum WpHG*, § 15 para. 134; D. Zimmer and H. Kruse, in: E. Schwark and D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar*, § 15 WpHG para. 14.

¹²⁰ H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 38; Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 195 ff.

¹²¹ FSA, *Final Notice*, 19 January 2009; cf. B. McDonnell, 88 COB (2011), p. 1, 13–14; R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 117–118.

¹²² Cf. H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 53.

risk to transparency regarding inside information.¹²³ Other issuers can use the disclosure as an instrument towards investor relations. The German legislator reacted to this by introducing § 15(2)1 WpHG, which prohibits the disclosure of information that “obviously fails to meet the [disclosure] requirement”.¹²⁴ The provision is complemented by § 4(1)2 WpAIV which requires that the publication be kept short.¹²⁵ In Spain similar rules are being demanded,¹²⁶ whilst the Italian Consob tolerates issuers’ far-reaching disclosures.¹²⁷

5. Publication Procedure

62 The TD has amended the MAD’s rules on the procedure according to which inside information must be made public.¹²⁸ According to Articles 19 and 21 TD, disclosure consists of two elements. Firstly, the issuer must file the information by electronic means via his website and such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Community. Secondly, it must submit the information to the central national storage system for regulated information.¹²⁹ In Germany, the issuer must additionally inform the BaFin and the stock exchange management pursuant to § 15(4)1 Nos. 1–3 WpHG.

IV. Delay in Disclosure

1. Foundations

63 The far-reaching disclosure obligation laid down in Article 6(1)1 MAD, which also extends to future circumstances, requires correction.¹³⁰ In some cases, such as mergers or squeeze-outs, the early disclosure of this intent may endanger its success. Article 6(2)1 MAD therefore permits the issuer to delay the public disclosure of inside information under his own responsibility, if (i) the disclosure would prejudice his legitimate interests, (ii) the omission is not likely to mislead the public and (iii) the issuer is able to ensure the confidentiality of the information. Most Member States have remained close to this wording in their implementations,¹³¹ an exception being Sweden, which allows the disclosure to be delayed if it is based on objec-

¹²³ As maintained by our Spanish interview partners (see fn. 20).

¹²⁴ Cf. H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 199 ff.; M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 15–16; see also para. 8.

¹²⁵ Cf. further P. Versteegen, in: H. Hirte and T.M.J. Möllers (eds.), *Kölner Kommentar zum WpHG*, § 15 para. 255 ff.

¹²⁶ Cf. M. Iribarren Blanco, *Responsabilidad civil por la información divulgada por las sociedades cotizadas*, p. 22–23.

¹²⁷ As maintained by our Italian interview partners (see fn. 20).

¹²⁸ See above para. 14.

¹²⁹ See § 22 for further details.

¹³⁰ M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 355; S.H. Schneider, BB (2005), p. 897, 897, recommending a large scope of application for delay; similarly G. Bachmann, 172 ZHR (2008), p. 597, 608. See also S. Gilotta, 13 EBOR (2012), p. 45 ff. emphasising the issuer’s need for secrecy.

¹³¹ For Germany: § 15(3) WpHG. For Austria: § 48d(2) BörseG. For the United Kingdom: DTR 2.5 FSA Handbook; in more detail: R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 113 ff. For Italy: Art. 114(3) TUF. For Spain: Art. 82.4 LMV. For France: Art. 223-2-II RG AMF, in more detail: R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, p. 77–78.

tive criteria, the public is not misled and the confidentiality of the information is ensured.¹³² The importance of this possibility of delay in the disclosure regime for inside information cannot be emphasised enough.¹³³

- 64 Article 6(2)2 MAD enables the Member States to require that an issuer must immediately inform the competent authority of the decision to delay the public disclosure of inside information. Some Member States have made use of this possibility.¹³⁴ In legal practice, the issuers often do not only inform the supervisory authority but rather consult with it informally. In Spain this is so common that contrary to Article 82.4 LMV it is often assumed that the CNMV must grant the delay.¹³⁵ In Sweden, the FI is only rarely involved, but issuers consult with the stock exchange management, which is in effect the only authority responsible for the supervision of the disclosure of inside information.¹³⁶ The cooperation between the issuers and the authorities may be the reason why these Member States provide almost no material on the legal practice of the courts and supervisory authorities.
- 65 Germany and France do not require the issuer to inform the competent authority of the decision to delay the disclosure. In Germany, it is sufficient if the issuer informs the BaFin subsequently. The legislator's aim was to achieve a deregulation and reduce the BaFin's obligations. Otherwise the BaFin would have had to supervise the decision to delay disclosure pursuant to its general supervisory obligations under § 4 WpHG. This would have corresponded with the legal situation before the implementation of the MAD where, pursuant to § 15(1)5 WpHG in its former version, the issuer had to apply for an administrative act granting him the delay.¹³⁷ This form of indirect control now exists in Austria, which formerly also required an application for the delay.¹³⁸ In the legislative procedures concerning the MAD Germany took the former legal situation and the risk of a liability of the authorities for damages into consideration and explicitly recommended a conception of Article 6(2) MAD according to which the issuer alone is responsible for the delay.¹³⁹ For the issuer this deregulation results in a great risk: a delay that does not comply with the requirements is now no longer authorised by the authority's binding decision which even protected the issuer from liability before the civil law courts.¹⁴⁰
- 66 The—short—period necessary for determining whether a disclosure obligation exists is not regarded as a delay as in these cases the disclosure takes place “as

¹³² Cf. Kapitel 15, § 7 LVM which also the practically relevant stock exchange rules refer to.

¹³³ Cf. D. Zimmer and H. Kruse, in: E. Schwark and D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar*, § 15 WpHG para. 52.

¹³⁴ For Italy: Art. 66-bis (4) RE. For Spain cf. Art. 82.4 2 LMV. For Austria: § 48d(2) BörseG.

¹³⁵ Cf. R. Palá Laguna, in: Artigas et al. (eds.), *Derecho de Sociedades Anónimas Cotizadas*, p. 1291, 1311, 1313; L. Cortés, in: A. Menéndez, *Lecciones de Derecho Mercantil*, p. 755.

¹³⁶ R. Veil and F. Walla, *Schwedisches Kapitalmarktrecht*, p. 87.

¹³⁷ Cf. M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 342, 347; H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 131–132.

¹³⁸ Cf. S. Kals et al. (eds.), *Kapitalmarktrecht I*, § 14 para. 31.

¹³⁹ S.H. Schneider, BB (2005), p. 897, 897; H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 131; cf. T.M.J. Möllers, WM (2005), p. 1393, 1395; D. Zimmer and H. Kruse, in: E. Schwark and D. Zimmer (eds.), *Kapitalmarktrechts-Kommentar*, § 15 WpHG para. 52.

¹⁴⁰ For Germany: M. Pfüller, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 15 para. 348. For Austria: S. Kals et al. (eds.), *Kapitalmarktrecht I*, § 14 para. 45.

soon as possible¹⁴¹. After this period a delay is only possible provided the above-mentioned prerequisites are given; in the case that a requirement ceases to exist, the information must be disclosed immediately. The issuer must therefore check continually whether all the requirements for the delay are still given.¹⁴² This means that disclosure may in some cases be delayed indefinitely, as the MAD contains no maximum duration for the delay.

67 The issuer will then have to disclose the information without undue delay. The relevant date for assessing which information must be disclosed is the time at which the requirements for the delay cease to exist. If by this time the information has lost its character as inside information it need not be disclosed. This is, for example, conceivable, if the issuer has meanwhile abandoned his plans to take certain measures.¹⁴³

2. Legitimate Interests

68 The issuer's "legitimate interests" that may justify a delay in disclosure are a key element of the disclosure regime. It is therefore essential to put this abstract concept into more concrete terms.

(a) Requirements under European Law

69 Whilst the European legislator does not define the term "legitimate interests", Article 3(1) of Directive 2003/124/EC lists two "non-exhaustive circumstances" to which the legitimate interests may relate. These are:

70 (i) negotiations in course, or related elements, where the outcome or normal pattern of those negotiations would be likely to be affected by public disclosure. In particular, in the event that the financial viability of the issuer is in grave and imminent danger;

71 (ii) decisions taken or contracts made by the management body of an issuer which need the approval of another body of the issuer in order to become effective, where the organisation of such an issuer requires the separation between these bodies, provided that a public disclosure of the information before such approval together with the simultaneous announcement that this approval is still pending would jeopardise the correct assessment of the information by the public ("multi-stage decision-making processes").

72 The CESR has put both constellations into more concrete terms and given examples which mainly include the acquisition or disposal of shares, product development and patents. The CESR refrained from providing a list of further circumstances, in order to prevent this from counteracting the delay's nature as an exception. Nevertheless

¹⁴¹ Cf. on the German implementation BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 66; S.H. Schneider, BB (2005), p. 897, 901.

¹⁴² Cf. CESR, *Market Abuse Directive Level 3—second set of CESR guidance and information on the common operation of the Directive to the market*, CESR/06–562b, July 2007, p. 11.

¹⁴³ For Germany: § 15(3)2 WpHG and BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 65; H.-D. Assmann, in: H.-D. Assmann and U.H. Schneider (eds.), *Kommentar zum WpHG*, § 15 para. 173; J. Stoppel, in: B. Grunewald and M. Schlitt (eds.), *Einführung in das Kapitalmarktrecht*, p. 265–266 with further references on dissenting opinions.

Rüdiger, *Wie viel "Enforcement" ist notwendig? Zur Reform des Instrumentenmix bei der Sanktionierung kapitalmarktrechtlicher Mitteilungspflichten gemäß §§ 21 ff. WpHG*, ZHR 175 (2011), p. 83–109; Witt, Carl-Heinz, *Übernahmen von Aktiengesellschaften und Transparenz der Beteiligungsverhältnisse* (1998); Zabala, Erasun, *Urteilsanmerkung zu CA Paris, 1re ch., sect. H, 24 juin 2008, no 2007/21048, Gecina SA*, Bull. Joly Bourse (2008), p. 389; Zetzsche, Dirk A., *Hidden Ownership in Europe: BAFin's Decision in Schaeffler v. Continental*, 10 EBOR (2009), p. 115–147; Zetzsche, Dirk A., *Against Mandatory Disclosure of Economic—Only Positions Referenced to Shares of European Issuers—Twenty Arguments against CESR Proposal*, 11 EBOR (2010), p. 231–252; Zimmermann, Martin, *Die kapitalmarktrechtliche Beteiligungstransparenz nach dem Risikobegrenzungsgesetz*, ZIP (2009), p. 57–64.

I. Introduction

- 1 The transparency regarding major holdings was high on the agenda of the European legislature from a very early point in time. It was regarded as necessary in order to ensure an equal level of investor protection throughout the Community and to make for greater interpenetration of the Member States' transferrable securities markets, thus helping to establish a true European capital market.¹ The TD from 1988 therefore obliged Member States to develop rules on disclosure and information to be published when a major holding in a listed company is acquired or disposed of.² However, it only contained a non-cohesive collection of thresholds, obliging the Member States to ensure that a person or legal entity notifies the company and the competent authority if, following the acquisition or disposal of a holding in a company, the proportion of voting rights held by them reaches, exceeds or falls below the thresholds of 10%, 20%, 1/3, 50% and 2/3.
- 2 Most of the Member States at that time did not regard this level of information as sufficient and provided additional thresholds in their national laws.³ It was therefore not surprising that the European legislature saw the need to amend the former European provisions by adopting Directive 2004/106/EC⁴ and establishing a "more securities market directed transparency regime".⁵ The directive obliged Member

¹ Cf. Recitals of Council Directive 88/627/EEC of 12 December 1988 (Transparency Directive I); on its historical background see § 1 para. 9.

² The first directive to contain provisions on this was the Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to an official stock exchange listing (cf. § 1 para. 6), obligating companies to inform the public by including information in the prospectus on changes in the structure of major holdings (ownership and shares) of its capital compared to former publications.

³ Cf. Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 18. (only three out of 15 Member States limited themselves to the level of transparency provided for by the Transparency Directive I).

⁴ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading in a regulated market and amending Directive 2001/34/EC (Transparency Directive II), hereafter simply referred to as Transparency Directive (TD) most recently amended by Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010, OJ L331, 15 December 2010, p. 120.

⁵ Cf. Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 18.

States to introduce additional thresholds and to provide transparency rules for financial instruments resulting in an entitlement to acquire shares to which voting rights are attached. These rules were intended to enhance investor protection and market efficiency by enabling shareholders to have full knowledge of changes in the voting structure when acquiring or disposing of shares.⁶ Furthermore, this was to “ensure an effective control of share issuers”.⁷

- 3 The regulatory aims of the directive are only described in an abstract way and are therefore unsuitable as an interpretational help.⁸ The considerations of the German legislature when it implemented the TD into German law are more helpful in this respect.⁹ It underlined the importance of the criteria of shareholder composition and the changes regarding major holdings for the investors’ decisions, especially for domestic and foreign institutional investors, and the large influence these criteria have on the price of shares.¹⁰ Knowing the identity of major shareholders provides investors with important information such as allowing them to assess the possibility of conflicts of interest.¹¹ A high level of transparency regarding major holdings also prevents investors from creeping in on issuers.¹² These considerations show that the main aim of notification and disclosure obligations is to inform investors of shareholders acquiring larger stakes and imminent takeovers.¹³
- 4 Additionally, offering market participants, and especially investors, the latest and the most extensive information provides a transparency that counteracts the abuse of inside information. The general knowledge of the volume of shares freely negotiable and the identity of major shareholders reduces information asymmetries.¹⁴ Thus, the system of disclosure of major shareholdings—similar to the obligation of disclosure of inside information¹⁵—reinforces the provisions on market abuse.¹⁶
- 5 The TD only dictates a minimum harmonisation¹⁷ regarding the disclosure of major shareholdings.¹⁸ The Member States may therefore enact provisions that are more

⁶ Cf. Recital 1 TD.

⁷ Cf. Recital 18 TD.

⁸ Cf. F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 27.

⁹ Cf. Begr. RegE 2. Finanzmarktförderungsgesetz, BT-Drucks. 12/6679, p. 52 (explanatory notes).

¹⁰ The price relevance of information on changes in major shareholdings has been proven in empirical studies. On US-American capital markets law see W.H. Mikkelson and R. Ruback, 14 J. Fin. Econ. (1985), p. 523, 532–543: price increase of 2.88% after the disclosure of Schedule 13D; J.P. Reburn, 21(3) J. Bus. Fin. & Account (1994), p. 445: 2.46%; F.C. Scherr et al., 32(4) Quarterly J. Bus. & Econ. (1993), p. 66, 72–73: 2.49%; D. Choi, 26(3) J. Fin. Quant. Analysis (1991), p. 391, 396: 2.2%; J. Brav et al., 63 J. Fin. (2008), p. 1729, 1755: 2%.

¹¹ Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 21; also F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 31.

¹² Cf. Begr. RegE TUG, BT-Drucks. 16/2498, p. 28 (explanatory notes).

¹³ Cf. L. Burn, in: R. Panasar and P. Boeckman (eds.), *European Securities Law*, para. 1.274; F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 33; C.-H. Witt, *Übernahmen von Aktiengesellschaften und Transparenz der Beteiligungsverhältnisse*, p. 69 ff.

¹⁴ Begr. RegE 2. Finanzmarktförderungsgesetz, BT-Drucks. 12/6679, p. 52 (explanatory notes).

¹⁵ See § 19 para. 1–6.

¹⁶ S. Kalls et al., *Kapitalmarktrecht I*, § 17 para. 5; F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 32; R. Veil, in: K. Schmidt and M. Lutter (eds.), *Kommentar zum AktG*, Vor §§ 21 ff. WpHG para. 5.

¹⁷ On the concept of minimum harmonisation see § 4 para. 38–44.

¹⁸ Cf. F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 22; R. Veil, in: *Festschrift für Karsten Schmidt*, p. 1645, 1664.

stricter than those provided for in the directive.¹⁹ Some Member States have taken advantage of this possibility, introducing thresholds as low as 2% and reducing the intervals between the thresholds provided for by the TD. They have also developed stricter provisions on the attribution of voting rights attached to shares belonging to a third party. Some of these measures, such as the introduction of stricter national provisions on acting in concert, are aimed in particular at disclosing the influence of financial investors. These measures have been criticised by some as they raise the price of takeovers, thus allegedly restricting the market for corporate control.²⁰

- 6 A further element of capital markets law concerning transparency of major holdings is the regime on the obligation to disclose the aims underlying the purchase of voting rights. Some EU Member States, such as Germany and France, followed the example of the United States²¹ and introduced a respective obligation. The issuer then has to publish this information. European law so far does not oblige the Member States to introduce such provisions.

II. European Concepts of Regulation

1. Requirements under European Law

(a) Foundations

- 7 The TD—one of the four framework directives in capital markets law²²—defines the general principles underlying the harmonisation of transparency obligations. The European Commission enacted an implementing directive on Level 2 of the Lamfalussy Process in order to ensure a uniform application of these provisions, mainly containing procedural rules.²³ So far, neither the CESR nor the ESMA has published “Guidelines” that could be used as a necessary interpretational help regarding abstract legal concepts, as was the case in those that the CESR published regarding the M.A.D.²⁴ In particular, the provisions on the attribution of voting rights attached to shares belonging to a third party contain various problems regarding their interpretation. As several Member States have adopted some of the attribution rules one-to-one in their national laws, recommendations on the interpretation would prove very helpful. The CESR has, however, only published a document on

¹⁹ Cf. Art. 3(1) TD. H. Fleischer and K.U. Schmolke NZG (2010), p. 1241, 1244 ff. recommend a maximum harmonisation of the disclosure regime de lege ferenda.

²⁰ Cf. N. Elster, *Europäisches Kapitalmarktrecht*, p. 22.

²¹ In US-American law the investor’s obligation to disclose and make public his intents play a central role. The legal foundation for an investors’ disclosure obligation regarding major shareholdings are contained in sec. 13(d) SEA. The provisions were introduced in the Williams Act of 1968 (Act of July 29, 1968, Pub. L. No. 90-439, 82 Stat. 454). The SEC further developed Rules 13d-1 to 13d-7 and facilitated disclosure by supplying a form (Schedule 13D). Item 4 requires the reporting person to state the purpose of his transaction and describe any plans or proposals it has with regard to changes in the company. For more details on the US-American law see T. Hazen, *The Law of Securities Regulation*, p. 381 ff.

²² Cf. § 1 para. 26.

²³ Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

²⁴ Cf. § 13 para. 7.

frequently asked questions regarding the TD which does not contain standards, guidelines or recommendations.²⁵

(b) *Scope of Application and Regulatory Powers*

8 The TD “establishes requirements in relation to the disclosure of periodic and ongoing information about issuers whose securities are already admitted to trading on a regulated market situated or operating within a Member State”.²⁶ It follows that the directive’s scope of application is restricted to securities trading on *regulated markets*.²⁷ The Member States need not apply these provisions to their non-regulated markets, an example being the open market (*Freiverkehr*) in Germany or the Alternative Investment Market in the United Kingdom.²⁸

9 The TD is addressed to the “home Member States”. These must ensure that a notification on the acquisition or disposal of major holdings takes place and the information contained in the notification is then published. The term “home Member State” is defined in the directive. For issuers of shares incorporated in the Community the term refers to the Member State where the issuer has its registered office.²⁹ The location of the head office is irrelevant.³⁰ The notification obligations regarding changes in major holdings also apply to third-country investors as the TD makes no restrictions regarding the origin of the person acquiring or disposing of shares with voting rights.³¹ An investor from China or the United States must therefore notify the issuer as must an investor from an EU Member State.

10 *Example:* For a French public limited company (*Société Anonyme*) that has its registered office in France the home Member State is therefore France. Any shareholder thus has to fulfil the French provisions on disclosure when acquiring or disposing of shares—irrespective of from where it may come. These will even apply if the issuer has transferred its administrative head office to Belgium—provided this is permissible under French company law.

11 Where the issuer is incorporated in a third country, the home Member State is the country in which the company is required to file the annual information³² with the competent authority.³³

(c) *Disclosure Obligations*

12 The TD requires “information about major holdings”, such as the provision on the “notification of the acquisition or disposal of major holdings” in Article 9 which can be regarded as the core of the disclosure system for major holdings. The provi-

²⁵ CESR, *Frequently Asked Questions Regarding the TD: Common Positions Agreed by CESR members*, CESR/09-168, May 2009.

²⁶ Cf. Art. 1(1) TD.

²⁷ The term “regulated market” is defined in Art. 2(1)(c) TD. For more details see § 7 para. 24–31.

²⁸ See § 7 para. 20.

²⁹ Cf. Art. 2(1)(i) first indent TD.

³⁰ Cf. W.-G. Ringe, AG (2007), p. 810–811; F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 20–21.

³¹ Cf. F. Precht, *Kapitalmarktrechtliche Beteiligungspublizität*, p. 19.

³² Cf. Art. 10 PD.

³³ Cf. Art. 2(1)(i) second indent TD; seen critically by L. Burn, in: R. Panasar and P. Boeckman (eds.), *European Securities Law*, para. 1.171.

sion defines to whom the notification obligation applies and which procedures are subject to notification. Article 10 TD extends the notification obligations of Article 9 to further cases in which the obligation “shall apply”, i.e. cases in which someone is not owner of the shares but is nonetheless entitled to acquire or to dispose of the shares or may exercise voting rights belonging to a third party. Without this addition the general rules on notification could easily be avoided. Hereafter the provisions in Articles 9 and 10 will therefore be regarded as an entity. Both articles aim to ensure transparency regarding any changes in major holdings. A further notification obligation introduced by the TD concerns situations in which a person has the possibility of influencing voting rights. According to Article 13 TD, however, this obligation only applies to such financial instruments that result in an entitlement to acquire, on such holder’s initiative alone, shares to which voting rights are attached. According to the European Commission, a rule like this is necessary as influence in a company can be indirectly exercised through financial instruments when these reach the extent of major holdings.³⁴

(d) *Further Disclosure Requirements*

13 The underlying understanding for the rules regarding the major shareholding notifications is that changes in the voting rights are of relevance for the shareholders’ decisions to invest or divest. Therefore, the issuer must be notified of this information in order that it can make it public. This can also be required by other provisions, such as the provisions of the MAD which oblige the issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns them.³⁵ Whether this ad hoc disclosure obligation also applies to changes in major holdings was not decided by the European legislature. The TD does not define its relationship to the MAD. This question can therefore only be answered by an interpretation of the respective provisions and is much discussed in Germany. With respect to their divergent purposes, it is assumed that neither the regime on transparency of major holdings nor the regime on ad hoc disclosure generally has priority over the other.³⁶ An issuer can therefore be obliged to publish immediately the acquisition or disposal of major shareholdings if this fact should be regarded as price sensitive and therefore has to be considered as inside information.³⁷

(e) *Reform*

14 On 25 October 2011 the European Commission published a proposal for a directive amending the TD.³⁸ The primary aim is to introduce extended disclosure obligations

³⁴ Cf. Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 19.

³⁵ See § 19 para. 25–51.

³⁶ Cf. for example H. Hirte, in: H. Hirte and C. von Bülow (eds.), in *Kölner Kommentar zum WpHG*, § 21 para. 56 f.; K.-D. Dehlinger and M. Zimmermann, in: A. Fuchs (ed.), *Kommentar zum WpHG*, Vor §§ 21 bis 30 WpHG para. 33.

³⁷ This can only be determined for the individual case, in particular by examining whether the acquisition or disposal of a major shareholding may considerably influence the price of the shares. On this aspect of inside information see § 13 para. 42–43.

³⁸ Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC

for the holders of financial instruments. According to the proposal, the Member States are no longer to be permitted to “make a holder of shares, or a natural person or legal entity referred to in Articles 10 or 13, subject to requirements more stringent than those laid down in this Directive”.³⁹ The Commission justifies this maximum harmonisation with three arguments: it is to ensure legal certainty, increase transparency and reduce administrative burdens for cross-border investors.⁴⁰

- 15 The Commission further aims to enhance the sanctioning powers of the competent authorities, making the system more effective.⁴¹ The draft therefore contains detailed rules on the sanctions to be introduced into the national laws of the Member States. The Member States are further to be obliged to empower the competent authorities to suspend the exercise of voting rights for holders of shares and financial instruments who do not comply with the notification requirements. It is further to be possible to impose additional pecuniary sanctions. According to the proposal, administrative pecuniary sanctions against legal persons of up to 10% of the total annual turnover in the preceding business year may be imposed; administrative pecuniary sanctions in the case of a natural person are limited to €5,000,000.⁴² The proposed amendments also include precise criteria for the national supervisory authorities to take into account when imposing sanctions. This is supposed to ensure a more uniform sanctioning practice than was common in the past.

2. Implementation in the Member States

- 16 The transposition of the TD’s provisions in the Member States was achieved in various ways. The German,⁴³ French,⁴⁴ Austrian⁴⁵ and Swedish⁴⁶ legislatures chose not to copy the provisions one-to-one but rather to develop their own provisions meeting the directive’s purposes. In this respect, Germany and France in particular have exceeded the level of information required by European law. Both states have more extensive rules on the attribution of voting rights. Italian law⁴⁷ also contains features

on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 25.10.2011, COM(2011) 683/2. For further information see Commission Staff Working Paper, Impact Assessment, SEC(2011) 1279 final, Brussels, 25 October 2011.

³⁹ Cf. Art. 3(1)2 TD Draft.

⁴⁰ Cf. Recital 10 TD Draft (COM(2011) 683 final).

⁴¹ Cf. Recital 14 TD Draft; see also Commission Staff Working Paper, Impact Assessment, SEC(2011) 1279 final, Brussels, 25 October 2011, p. 84–85.

⁴² Cf. Art. 28a(2)(d) and (e) TD Draft.

⁴³ The German legislature implemented the Transparency Directive’s provisions into the §§ 21 ff. WpHG and the WpAIV.

⁴⁴ The provisions on transparency of major holdings (*franchissements de seuils*) are contained in Art. L. 233-7 ff. C. com. and in Art. 223-11 ff. RG AMF. Cf. R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, p. 79, 146 ff.

⁴⁵ In Austria, the obligation to disclose changes in major holdings is defined in §§ 91–94 BörseG. Cf. S. Kalls et al., *Kapitalmarktrecht I*, § 17 para. 3.

⁴⁶ The Swedish provisions on the transparency of major holdings can be found in Kapitel 4 LHF. Cf. R. Veil and F. Walla, *Schwedisches Kapitalmarktrecht*, p. 89.

⁴⁷ Italy introduced the first provisions on the transparency of major holdings in 1974 in Art. 120 ff. TUF and the Regolamento Emittenti (RE).

The home Member State may exempt issuers from this requirement if the information contained in the notification is made public by its competent supervisory authority.⁸¹ France has exercised this possibility, now requiring that the information on changes of major holdings be filed with the AMF no later than four days after the shareholding threshold has been crossed.⁸² The AMF must ensure that the information is made public within an additional three trading days.⁸³

- 33 The disclosure must take place in a manner that guarantees easy access to the regulatory information on a non-discriminatory basis. In particular, the home Member State must ensure that the issuer uses such media as may reasonably be relied upon for the effective dissemination of information to the public throughout the Community,⁸⁴ such as news agencies, print media and Internet pages regarding the financial market.⁸⁵

3. Attribution of Voting Rights

(a) Regulatory Concepts

- 34 In accordance with Article 10 TD the notification requirements defined in Article 9 also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the constellations laid out in lit. (a)–(h). These constellations are described relatively precisely.⁸⁶ They are not all based on common ground but rather constitute borderline cases, such as voting rights attached to shares in which that person or entity has the life interest (usufruct), where it is unclear who holds the voting rights and who is thus required to notify the issuer. Other constellations described refer to cases in which a person has a legally secured influence on the voting rights.

- 35 Most of the constellations described in Article 10 TD refer to cases in which a person is attributed the voting rights attached to shares belonging to a third party.⁸⁷

- 36 *Example:* If a person holds 5% of the shares with voting rights attached to them and is additionally entitled to exercise voting rights as described in Article 10(a) TD to the extent of 5%, both voting rights have to be totalled, thus obliging the person to notify the issuer that his proportion of the voting rights has reached the 10% threshold. The German legislature clarified this by making the notification requirement dependant on whether a shareholder reaches, exceeds or falls below the thresholds by purchase, sale or “*by any other means*”. The threshold is affected “*by any other means*” if voting rights of third party shares are attributed

⁸¹ Art. 12(7) TD.

⁸² Cf. Art. R. 233-1 C. com. and Art. 223-14.1 RG AMF.

⁸³ Cf. Art. 223-14.3 RG AMF.

⁸⁴ Art. 21(1) TD.

⁸⁵ See in more detail § 22 para. 4–7.

⁸⁶ The TD does not contain a general clause, comparable to the US-American Rule 13d-3(b) SEA on “the determination of beneficial ownership”, preventing forms of circumvention of the provisions. Yet as the directive only aims to achieve minimum harmonisation, the Member States are free to develop their own general clauses preventing circumvention. Should the amendments to the TD, however, be enacted (see para. 14) this would no longer remain possible.

⁸⁷ This was laid down more explicitly in the former TD of 1988 in Art. 7, which declared that “the following voting rights shall be regarded as voting rights held by that person or entity”. Cf. N. Elster, *Europäisches Kapitalmarktrecht*, p. 26–27.

to the shareholder.⁸⁸ Therefore a person can also be required to notify the issuer if he holds nothing but voting rights attributed to him through third-party shares.

37 According to the concept of the TD the attribution of voting rights leads to a multiple notification and disclosure of voting rights. The third party remains obligated to notify the issuer on the voting rights of his shares. There is no provision according to which voting rights attributed to someone else do not have to be taken into account for the shareholder himself.⁸⁹ The capital markets are not likely to be misled, as in the case of an attribution of voting rights in a corporate group the notification must contain the chain of controlled companies.⁹⁰

(b) *Cases of an Attribution of Voting Rights*

38 The TD lists eight cases in which notification requirements regarding the attribution of voting rights attached to third-party shares exist. The European Commission adopted most of these from the first TD in 1988 and the Directive 2001/34/EC,⁹¹ taking only a few of the consultations regarding the reform into account.⁹² This already indicates that it is probably now necessary to revise some of the provisions.

39 In the following the various cases of an attribution of voting rights will be examined in terms of the legal practice in the different Member States, who may extend the provision and provide further cases of an attribution of voting rights.⁹³ Some Member States have made extensive use of these regulatory powers.

(aa) “Acting in Concert“

40 Notification is required for voting rights held by a third party with whom a person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of their voting rights, a lasting common policy towards the management of the issuer in question.⁹⁴

41 The Commission’s original proposal for a new TD from 2003 still required the parties to conclude an *effective* agreement, obliging them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question.⁹⁵ However, the case of “acting in concert” was nevertheless adopted as in the former TD and Directive 2001/34/EC. An effective agreement is therefore not explicitly required.

42 It needs first to be clarified which types of agreements fulfil the definition of acting in concert. The starting point for this is the wording of the provisions according to which the concerted exercise of the voting rights has to have the aim of ensuring

⁸⁸ The attribution of voting rights in Germany takes place on the legal basis of § 22 WpHG.

⁸⁹ Cf. N. Elster, *Europäisches Kapitalmarktrecht* p. 27 on TD I.

⁹⁰ See above para. 30.

⁹¹ On this directive see § 1 para. 19.

⁹² Cf. Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 25.

⁹³ On the minimum harmonisation provided for by the Transparency Directive see above para. 5.

⁹⁴ Art. 10(a) TD.

⁹⁵ Cf. Commission, Proposal for a Directive of the European Parliament and of the Council of 26 March 2003 on the harmonisation of transparency requirements with regard to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, COM(2003) 138 final, p. 25.

a lasting common policy regarding the management of the issuer. Shareholders of stock companies incorporated in the Member States usually have no power to issue instructions addressed to the directors. However, acting in concert in the sense of the TD does not presuppose such means of influence.⁹⁶ The definition reaches further, encompassing all questions on which the shareholder has influence—albeit indirectly—e.g. the election of the supervisory board.⁹⁷ The requirement of a “lasting” common policy expresses that an ad hoc coalition does not suffice.⁹⁸

43 Furthermore, acting in concert with respect to the TD can only be assumed if the respective parties reach a contractual agreement. For this a minimum of two persons is required, i.e. an attribution of voting rights can also take place regarding an agreement between more than two people. The agreement has to refer to the concerted exercise of the voting rights. Whilst the TD does not explicitly require the agreement to be legally effective, it is to be assumed that only legally binding agreements can be intended.

44 An attribution of voting rights due to acting in concert results in a reciprocal attribution of voting rights. If, for example, A (5% of the shares) and B (10% of the shares) act in concert, A is attributed the voting rights attached to B's shares in accordance with Article 10(a) TD. At the same time, however, B is also subject to Article 10(a) TD and is attributed the voting rights attached to A's shares, thus obliging both A and B to notify the issuer that they hold voting rights of 15%.

45 The legal ground for this attribution is the influence the contracting party has over the pooled voting rights. Whilst neither of the two contracting parties will be able to prevail over the other, both have the legally ensured possibility to influence the other party's voting. This community of interest justifies the attribution of voting rights to the respective other party.⁹⁹

(1) Legal Practice in France

46 In French law acting in concert is defined as any agreement (*accord*) on the acquisition, transfer or exercise of voting rights with the aim of a common policy regarding the management of the issuer.¹⁰⁰ Acting in concert has gained great attention in France on account of a few spectacular cases, the most famous being *Sacyr/Eiffage* and *Gecina*. These contain questions of takeover law and will therefore be examined in the section on disclosure when acquiring corporate control.¹⁰¹ It is especially noteworthy that even a person who holds no shares himself must fulfil the disclosure requirements for voting rights attributed to him, as it can potentially influence the exercising of these voting rights.¹⁰²

47 This leads to two aspects of the French rules which will be examined in more detail. The discussion centres on the question whether an agreement necessarily has to

⁹⁶ Cf. U. Burgard, BB (1995), p. 2069, 2075; N. Elster, *Europäisches Kapitalmarktrecht*, p. 33.

⁹⁷ Cf. N. Elster, *Europäisches Kapitalmarktrecht*, p. 33.

⁹⁸ Cf. U. Burgard, BB (1995), p. 2069, 2075; N. Elster, *Europäisches Kapitalmarktrecht*, p. 33.

⁹⁹ Cf. N. Elster, *Europäisches Kapitalmarktrecht*, p. 32; R. Veil, in: *Festschrift für Karsten Schmidt*, p. 1645, 1648 ff.

¹⁰⁰ Cf. Art. L. 233-10 C. com. and Art. L. 233-9.1.3 C. com. The provisions were most recently amended in October 2010.

¹⁰¹ See § 24 para. 47.

¹⁰² Cf. F. Grillier and H. Segain, RTDF (2007), p. 20, 29.

have the nature of a contract under civil law or whether other types of agreements are also sufficient for assuming acting in concert.¹⁰³ In *Eiffage*¹⁰⁴ the court appears to adopt a wide understanding of the term “agreement” (cf. “*les dispositions de l’article L. 233–10 du code de commerce n’exigent pas que l’accord résulte d’un écrit, ni qu’il revête un caractère contraignant*”). The French legal literature on this question, however, states that this statement cannot be regarded as a renunciation of the requirement of a contract.¹⁰⁵

- 48 A further characteristic of French law is the wide understanding of a common company policy, including not only the company policy which the shareholders aim at influencing by making use of their voting rights in the shareholders meeting and which is defined in the TD, but also the strategy which the shareholders acting in concert pursue with the acquisition and exercise of their voting rights. The French understanding is thus that the concepts of a “common policy” and “control” merge.¹⁰⁶ Therefore, it comes as no surprise that the term “acting in concert” is described in French as *flou*, i.e. vague.¹⁰⁷ Thus, it can only be welcomed that French law clearly defines a few cases in which an *accord* is statutorily presumed.¹⁰⁸

(2) Legal Practice in Germany

- 49 The concept of acting in concert has attracted a lot of attention in Germany due to the fact that shareholder agreements are widespread and Germany has exceeded the European legislature’s provisions, introducing much stricter rules regarding the notification requirements for acting in concert.
- 50 One of the main issues with respect to acting in concert is the attribution of voting rights in cases of pooling agreements in which certain parties of the agreement prevail over others. This can occur if the parties of the pooling agreement adopt resolutions concerning the exercise of the pooled voting rights in the issuer’s general meeting by majority vote. This form of agreement raises the question whether voting rights may have to be attributed reciprocally.
- 51 *Facts:*¹⁰⁹ A, B, C and D conclude a pooling agreement. A holds 9.0% and B 4.0% of the voting rights, C is attributed 0.5% of the voting rights attached to shares held by a subsidiary company and D has no voting rights. The BaFin is of the opinion that the voting rights must be attributed reciprocally in this case, i.e. all four persons must notify the company that they hold 13.5% of the voting rights, A being attributed 4.5%, B 9.5%, C 13.0% and D 13.5% of the voting rights. This understanding is unconvincing.¹¹⁰ The spirit and purpose of the provisions on the transparency of major holdings require an attribution of voting rights if the

¹⁰³ Cf. E. Zabala, Bull. Joly Bourse (2008), p. 389, 395; C. Baj, RDBF (2008), p. 57, 59.

¹⁰⁴ CA Paris, 1re ch., sect. H, 18 décembre 2008, no. 2008/07645, *Adam c/ société Sacyr Vallehermoso SA*, Bull. Joly Bourse (2009), p. 185 ff.

¹⁰⁵ Cf. p. Le Cannu, Rev. soc. (2008), p. 394, 403–404.

¹⁰⁶ Cf. D. Schmidt, RDBF (2008), p. 56.

¹⁰⁷ Cf. C. Goyet, *Action de concert*, p. 9.

¹⁰⁸ Cf. Art. L233-10 C. com. The text of the provision can be found in R. Veil and P. Koch, *Französisches Kapitalmarktrecht*, p. 154. The CA Paris ch. 5–7, 15 septembre 2011, no. 2011/00690, *Adam et al. c/ SARL Émile Hermès et al.*, concluded from the behaviour of family members that they acted in concert (“family concerted action”).

¹⁰⁹ Cf. BaFin, *Emittentenleitfaden 2009* (issuer guideline), p. 144–145.

¹¹⁰ In more detail R. Veil, in: *Festschrift für Karsten Schmidt*, p. 1645 ff.

person may influence the voting rights attached to the shares. This is generally the case if all of the shareholders involved in the pooling agreement have the same legal possibility to influence the voting rights of the other participating shareholders. However, if one or more of the shareholders of the pooling agreement can prevail over the others, the latter need not be attributed its voting rights as they do not have the legal possibility of influencing the exercise of the voting rights.

- 52 The provision regarding the attribution of voting rights in cases of acting in concert reaches even farther in Germany: voting rights of a third party are not only attributed to a person or legal entity with a notification obligation on the grounds of a binding voting or pooling agreement but also if the parties coordinate their behaviour with regard to the issuer, based on an agreement or in another manner, with the exception of an agreements in individual cases.¹¹¹ A person or a legal entity is also attributed the voting rights of a third party if the parties coordinate their behaviour with regard to the issuer “*in another manner*”.
- 53 By extending the provision to “*coordinations in another manner*” the German legislature aimed to achieve transparency regarding the influence of financial investors on issuers. Supervisory practice has shown that it is not always easy to prove that financial investors have coordinated their behaviour. The term “*coordination in another manner*”, however, leads to difficulties, especially regarding the question as to how much contact between the shareholders is necessary in order to be able to assume such coordination. Legal practice generally requires a wilful cooperation with the aim of continually exercising and coordinating the rights attached to the shares. Simply following parallel business strategies, such as the restructuring of the company through a certain concept, does not suffice.¹¹²
- 54 The person with the notification obligation must coordinate his behaviour with that of the third party. This is defined in § 22(2) WpHG: coordinated conduct requires that the notifying party or its subsidiary and the third party reach a consensus on the exercise of voting rights or collaborate in another manner with the aim of bringing about a permanent and material change in the issuer’s business strategy.¹¹³
- 55 The reform of the provision in 2008 has caused many discussions.¹¹⁴ Even non-binding agreements *outside* the *general shareholder meeting* can be classed as acting in concert under the new rule. However, the agreement must have the aim of bringing about a permanent and material change in the issuer’s business strategy and the shareholders must follow a joint strategy such as is the case in one-on-one consultations.¹¹⁵ These describe constellations in which the shareholders collaborate with the aim of exerting pressure on the management of the company to change the company’s strategy.¹¹⁶

¹¹¹ Cf. § 22(2) WpHG.

¹¹² OLG Frankfurt/Main ZIP (2004), p. 1309.

¹¹³ Cf. § 22(2) WpHG.

¹¹⁴ Cf. H. Fleischer ZGR (2008), p. 185, 196; König, BB (2008), p. 1910; T.M.J. Möllers and F. Holzner, NZG (2008), p. 166; M. Schockenhoff and E. Wagner, NZG (2008), p. 361.

¹¹⁵ Bericht Finanzausschuss Risikobegrenzungsgesetz, BT-Drucks. 16/9821, p. 16.

¹¹⁶ Cf. C. von Bülow, in: R. Veil (ed.), *Übernahmerecht in Praxis und Wissenschaft*, p. 141, 164.

56 Other forms of collaboration outside the general meeting do not lead to an attribution of voting rights in Germany. A collaborative acquisition of shares does not suffice.¹¹⁷

(3) Legal Practice in Italy

57 The Italian provisions on acting in concert differ greatly from those in the TD. Shareholder agreements are defined as agreements whose object is the exercise of voting rights in a company with listed shares or in a company that controls it.¹¹⁸ Italian law provides that any person with a shareholding of less than 2% partaking in a shareholder agreement is attributed the voting rights of the other parties to the agreement at thresholds of 5, 10, 15, 20, 25, 30, 50 and 70%.¹¹⁹ The notification must contain information on the total amount of shares to which the agreement refers and also on the shares held by that person but not included in the shareholder agreement.

58 In practice, shareholder agreements are of great importance in Italy due to the fact that most listed companies are companies with a long tradition and still family owned, the most famous example being Fiat. For the families a shareholder agreement can be a means of ensuring their influence on the company and will thus mostly deal with questions of company policy and pre-emption rights for shares.¹²⁰

59 The decisive element of the provisions on notification and publication is the concept of the shareholder agreement, which under Italian law is understood in a wide sense. Article 120 RE (Regulation for Issuers) on the attribution of voting rights refers to Article 122 I, V(a) and (d) TUF with regard to the meaning of a shareholder agreement. It must therefore be an agreement whose object is the exercise of voting rights.¹²¹ Additionally, Article 122 TUF also applies to an agreement that creates obligations of consultation prior to the exercise of voting rights¹²² or that has as its object or effect the exercise, jointly or otherwise, of a dominant influence on the company.¹²³

60 Consob must be notified of any agreement regarding the exercise of voting rights within five days of its conclusion. In addition the agreement must be published in abridged form in the daily press within ten days of the date of its conclusion and entered in the Company Register where the company has its registered office within fifteen days from the date of their conclusion.¹²⁴ These measures are intended to improve the transparency of the markets.¹²⁵

61 Italy's sanctions in the case of non-compliance with these provisions are harsh. If the shareholder agreement is not made public it is null and void. Breaches of disclosure

¹¹⁷ Cf. E. Schockenhoff and A. Schumann, ZGR (2005), p. 568, 582; R. Veil, in: K. Schmidt and M. Lutter (eds.), *Kommentar zum AktG*, § 22 WpHG para. 41. Dissenting opinion: A. Engert, JZ (2007), p. 314.

¹¹⁸ Art. 122 TUF.

¹¹⁹ Art. 120 RE.

¹²⁰ Cf. G. Meo, in: M. Bessone (ed.), *Trattato di diritto privato*, p. 81 ff.; A. Fusi, 6 *Le Società* (2007), p. 689.

¹²¹ Cf. Art. 122 I TUF.

¹²² Cf. Art. 122 V(a) TUF.

¹²³ Cf. Art. 122 V(d) TUF.

¹²⁴ Cf. Art. 122 I TUF.

¹²⁵ Cf. F. Carbonetti, Riv. soc. (1998), p. 909, 911; D. Piselli, 2 *Le Società* (2009), p. 199, 200.

erne Verständnis von Compliance im Finanzmarktrecht, NZG (2005), p. 104–108; Lösler, Thomas, *Spannungen zwischen der Effizienz der internen Compliance und möglichen Reporting-Pflichten des Compliance Officers*, WM (2007), p. 676–683; Lösler, Thomas, *Zur Rolle und Stellung des Compliance-Beauftragten*, WM (2008), p. 1098–1104; Lösler, Thomas, *Die Mindestanforderungen an Compliance und die weiteren Verhaltens-, Organisations- und Transparenzpflichten nach §§ 31 et seq. WpHG (MaComp)*, WM (2010), p. 1917–1923; McVea, Harry, *Financial Conglomerates and the Chinese Wall* (1993); Moloney, Niamh, *Financial Services and Markets*, in: Baldwin, Robert et al. (eds.), *The Oxford Handbook of Regulation* (2010), p. 437–461; Mwenda, Kenneth K., *Banking Supervision and Systemic Bank Restructuring* (2000); Nelson, Paul, *Capital markets law and compliance* (2008); Newton, Andrew, *The Handbook of Compliance* (1998); Niermann, Stephan, *Die Compliance-Organisation im Zeitalter der MaComp*, ZBB (2010), p. 400–427; Oelkers, Janine, *Compliance in Banken*, in: Lucius, Otto et al. (eds.), *Compliance im Finanzdienstleistungsbereich*, p. 36–66; Poser, Norman, *Chinese Wall or Emperor's New Clothes? Regulating Conflicts of Interest of Securities Firms in the US and the UK*, 9 Mich. YBI Legal Stud. (1988), p. 91–103; Renz, Hartmut and Stahlke, Karsten, *Wird die Watch-List bei Kreditinstituten durch das Insiderverzeichnis abgelöst?*, ZfgK (2006), p. 353–355; Rodewald, Jörg and Unger, Ulrike, *Kommunikation und Krisenmanagement im Gefüge der Corporate Compliance-Organisation*, BB (2007), p. 1629–1635; Röh, Lars, *Compliance nach der MiFID—zwischen höherer Effizienz und mehr Bürokratie*, BB (2008), p. 398–410; Rönnau, Thomas and Schneider, Frédéric, *Der Compliance-Beauftragte als strafrechtlicher Garant*, ZIP (2010), p. 53–61; Sandmann, Daniel, *Der Compliance-Bericht im Wertpapierdienstleistungsunternehmen*, CCZ (2008), p. 104–107; Scharpf, Marcus A., *Corporate Governance Compliance und Chinese Walls* (2000); Schlicht, Manuela, *Compliance nach Umsetzung der MiFID-Richtlinie*, BKR (2006), p. 469–475; SDA Bocconi, *The Evolution of Compliance Function and Compliance Risk in Investment Services* (June 2009), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1446759; Skinner, Chris, *The Future of Investing* (2007); Spindler, Gerald, *Compliance in der multinationalen Bankengruppe*, WM (2008), p. 905–918; Taylor, Chris, *The Evolution of Compliance*, 6 J. Invest. Comp. (2005), p. 54–58; Veil, Rüdiger, *Compliance-Organisation in Wertpapierdienstleistungsunternehmen im Zeitalter der MiFID*, WM (2008), p. 1093–1098; Walsh, John H., *Right the First Time: Regulation, Quality, and Preventive Compliance in the Securities Industry*, Colum. Bus. L. Rev. (1997), p. 165–240; Wolf, Stefan, *Der Wandel der spanischen Finanzmärkte durch neue europarechtliche Entwicklungen* (2008); Wundenberg, Malte, *Compliance und die prinzipiengeleitete Aufsicht über Bankengruppen* (2012). Cf. further the bibliography in § 28.

I. Regulatory Concepts in European Law

1. Overview

- 1 The MiFID requires Member States to ensure that investment firms comply with the fundamental organisational requirements set out in Article 13¹ MiFID.² The European provisions are, however, drafted in a rather abstract fashion: Article 13(2), for example, merely requires investment firms to “establish adequate policies

¹ Art. 13 corresponds with Art. 16 of the proposal for a Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council, COM(2011) 656 final (published 20 October 2011). The regulatory provisions concerning compliance have yet not been subject to (significant) reforms.

² The MiFID defines the term “investment firm” as any legal person—and under certain conditions undertakings which are not legal persons—whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis; cf. Art. 4(1) No. 1 MiFID.

and procedures sufficient to ensure compliance of the firm including its managers, employees and tied agents with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons”. Article 13(3) proves to be equally vague, demanding that investment firms maintain and operate effective organisational and administrative arrangements with a view to taking all reasonable steps designed to prevent conflicts of interest as defined in Article 18 from adversely affecting the interests of its clients.

- 2 The organisational requirements to be met by investment firms are more concretely defined in Articles 5 ff. of the Organisational Requirements Directive,³ which was enacted as an implementing directive to the MiFID. The implementing directive puts the general organisational principles of the MiFID into more concrete terms as follows: Article 5 defines the term “general organisational requirements”. Articles 6–8 set forth the requirements regarding internal control structures, Article 6 referring to compliance, Article 7 dealing with risk management and Article 8 pertaining to internal audit. All three of these organisational provisions must be seen in connection with the requirements regarding a conflict of interest management as laid down in Articles 21 ff. According to these provisions, Member States must, for example, ensure that the respective investment firms “establish, implement and maintain an effective conflicts of interest policy set out in writing and appropriate to the size and organisation of the firm and the nature, scale and complexity of its business”.⁴ This section will place particular emphasis on the examination of the organisational requirements for compliance in investment firms, as described in Article 13(2) MiFID in conjunction with Article 6 of the Organisational Requirements Directive.
- 3 The regulatory provisions regarding the compliance function have recently been more clearly defined in detailed guidelines published by the ESMA.⁵ The purpose of these guidelines (issued under Article 16 ESMA regulations) is to promote greater convergence in the interpretation of the European compliance requirements by both market participants and national supervisory authorities. Even though the guidelines published by the ESMA are technically not binding, it is likely that market participants and supervisory authorities will follow the Authority’s interpretation and the guidelines will therefore be of great importance for legal practice.⁶

2. Principles-based Approach to Regulation

- 4 The requirements contained in the MiFID and the Organisational Requirements Directive are based on very vague legal criteria, as is typical of an approach to regulation that is commonly described as *principles-based regulation* in Anglo-American

³ Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive, OJ L241, 2 September 2006, p. 26.

⁴ Art. 22(1) Organisational Requirements Directive.

⁵ ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012.

⁶ See for details § 11 para. 64–65.

law.⁷ While this concept has its origins in the United Kingdom's capital markets law,⁸ elements of principles-based regulation can also be found in EU law. According to the European Commission, the reliance on "clear principles" constitutes one of the main political considerations that guided the drafting of the Organisational Requirements Directive.⁹ This approach to regulation can be described as follows:

- 5 "The Level 1 Directive and its implementing directive introduce a modern and comprehensive regime governing organisational and operating requirements for investment firms. The implementing directive covers all facets of an investment firm's organisation and introduces a high level of investor protection in the areas concerned with the relationship between investment firms and their clients. It has relied mainly on a *principles-based approach establishing clear standards and objectives that investment firms need to attain rather than prescribing specific and detailed rules*. The advantage of this approach is that it provides the flexibility needed when regulating a diverse universe of entities and activities while also imposing a significant degree of responsibility on all the actors concerned."¹⁰
- 6 The principles-based approach to regulation taken by the European Commission has two main characteristics. Firstly, the regulation is primarily based on high-level regulatory *objectives*¹¹ that are formulated in a very general way, and do not provide any detailed and prescriptive rules. The second characteristic is visible in the flexibility inherent in the regulation such that the regulatory objectives can be achieved by investment firms through the means they consider most appropriate regarding the size and the nature of their business, provided a sufficient level of investor protection is achieved.¹²
- 7 The Commission's regulatory approach has two aims. The regulatory regime is supposed to be flexible enough to take into account the wide variety of investment firms with regard to their size, structure and the nature of their business.¹³ Regulatory solutions following a "one-size-fits-all" approach are deemed inadequate for catering to different needs resulting from a heterogeneous corporate landscape. The Organisational Requirements Directive has therefore incorporated the principle of proportionality in a number of clauses in order to allow an adaptation of the organisational requirements to the nature of the individual company.¹⁴ Furthermore, the focus on the regulatory outcomes is to ensure a high level of investor protection.

⁷ See on this in the context of the MiFID C. Skinner, *The Future of Investing*, p. 85; N. Moloney, *EC Securities Regulation*, p. 372 ff., 470–471, 507–508 and passim; N. Moloney, in: R. Baldwin et al., *Oxford Handbook of Regulation*, p. 437, 447–449. In general on principles-based regulation see § 4 para. 51–61 and in detail M. Wundenberg, *Compliance und die prinzipiengeleitete Aufsicht über Bankengruppen*, p. 34–116 (examining the characteristics of principles-based regulation and the theoretical distinction between rules and principles in banking supervisory law).

⁸ See R. Veil and M. Wundenberg, *Englisches Kapitalmarktrecht*, p. 9–13.

⁹ Cf. Commission, *Working Document ESC/18/2005 (Explanatory Note)* (May 2005).

¹⁰ Commission, *Background Note Draft Commission Directive implementing Directive 2004/39/EC (Background Note)*, sec. 2.1. (emphasis added).

¹¹ Cf. *ibid.*; Commission, *Working document ESC/18/2005 (Explanatory Note)* (May 2005), No. 3.1 ("general compliance objectives", "regulatory objectives").

¹² Cf. Commission, *Working document ESC/18/2005 (Explanatory Note)* (May 2005), No. 3.1: "Our decision reflects our view that, where possible and where it does not compromise investor protection, regulation should be sufficiently flexible to allow the investment firms to achieve the regulatory objectives through the means they consider most appropriate to their size and structure and the nature of their business."

¹³ Recital 11 Organisational Requirements Directive. See also R. Veil, WM (2008), p. 1093, 1095.

¹⁴ Art. 6(1) subsec. 2 and (3) subsec. 2 (Compliance); Art. 7(2) (Risk management); Art. 8 (Internal audit)

- 8 The principles-based approach becomes visible both at the level of rule-making and the level of rule enforcement.¹⁵ On the level of *rule-making* the principles-based approach is characterised by a regulatory regime that relies mainly on outcome-based standards with a high level of generality. As opposed to detailed and prescriptive behavioural-based rules, principles generally focus on the regulatory aim and only vaguely outline the behavioural and organisational requirements necessary to achieve this aim. The provisions on compliance management of investment firms examined in this chapter can be seen as a typical example of principles-based rule-making, being drafted as qualitative regulatory objectives, complemented by a general organisational requirement: Article 13(2) MiFID, for example, requires that investment firms establish “adequate policies and procedures” (organisational requirement) sufficient to ensure compliance of the firm, including its managers, employees and tied agents, with its obligations under the provisions of this Directive as well as appropriate rules governing personal transactions by such persons (regulatory objective). The regulatory objectives are put in more concrete terms by the supervisory authorities in cooperation with market participants, enabling a continual adaptation of the organisational principles to the latest market developments. On the level of *rule enforcement* principles-based regulation can thus be seen as a regulatory regime in which the market rules are not unilaterally dictated by the legislator but are developed step-by-step in cooperation with supervisory authorities and market participants.¹⁶
- 9 According to the Commission, the principles-based approach to regulation has a considerable impact on the responsibilities of national supervisory authorities as well as investment firms: it imposes the responsibility on the investment firm and its senior management to monitor the firm’s own activities and to determine whether these comply with the principles set out in the MiFID and the implementing directive. The national supervisory authorities will need to acquire the operational expertise required in order to guide the industry and to enforce the new provisions effectively.¹⁷ The Commission therefore expects the national supervisory authorities to issue guidance pertaining to the applicability and interpretation of the general organisational requirements, thus mitigating any legal uncertainty associated with the principles-based approach.¹⁸
- 10 Most Member States have responded to the Commission’s request. In Germany the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin, German Federal Financial Supervisor) published a Circular on the “Minimum Requirements

Organisational Requirements Directive. The importance of the principle of proportionality has been stressed by ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, para. 12.

¹⁵ For more details on the characteristics of principles-based regulation and the theoretical distinction between rules and principles in banking supervisory law see M. Wundenberg, *Compliance und die prinzipiengeleitete Aufsicht über Bankengruppen*, p. 35–116.

¹⁶ Cf. J. Black, 3 CMLJ (2008), p. 425, 434 ff.; C.L. Ford, 45 Am. Bus. Law J. (2008), p. 1 ff. (principles-based regulation as a form of new governance); M. Wundenberg, *Compliance und die prinzipiengeleitete Aufsicht über Bankengruppen*, p. 34–72. See below para. 9–10 and 17.

¹⁷ Cf. Commission, *Background Note*, sec. 2.1.

¹⁸ Recital 12 Organisational Requirements Directive.

for the Compliance Function and Additional Requirements Governing Rules of Conduct, Organisation and Transparency pursuant to Section 31 et seq. of Securities Trading Act (WpHG) for Investment Services Enterprises (MaComp)” on 7 June 2010, after extensive consultations with representatives of investment practice. The MaComp puts the directive’s compliance requirements for investment firms into more concrete terms.¹⁹ The French supervisory authority (Autorité des Marchés Financiers (AMF)) has also published instructions (no. 2008–01 of 8 February 2008), rendering the compliance obligations more precise.²⁰ In Italy the Banca d’Italia has laid down its expectations towards the construction of a compliance organisation in a Disposizioni di Vigilanza (supervisory regulation).²¹ The Austrian approach to specifying the principles is especially noteworthy: the Standard Compliance Code published by the Austrian credit industry plays an important role and has even been described as a “dominant commercial practice” on the homepage of the Austrian supervisory authority (FMA). The guidelines are available on the FMA’s website and are also applied to the FMA’s “on-site inspection” audits.²² The FMA has further made public a circular on the organisational requirements of compliance, risk management and internal audit, which defines the provisions of the WAG 2007 (Austrian Securities Supervision Act) more concretely.²³ In the United Kingdom the Financial Services Authority (FSA) deliberately abstained from publishing comprehensive guidance on compliance requirements,²⁴ and only offers “good practices” on the management of compliance risks in large investment firms.²⁵ Interpretational guidelines have also been published by the supervisory authorities in Luxembourg,²⁶ Switzerland²⁷ and Spain.²⁸ As noted above, the ESMA has recently published “Guidelines on Certain Aspects of the MiFID Compliance Function Requirements”, which aim to clarify the application of the MiFID compliance requirements and to promote greater convergence in the interpretation of these rules.²⁹

- 11 In legal literature, the principles-based approach to regulation has proved controversial. A disadvantage of this approach is the fact that it leads to increased legal uncertainty and unpredictability for market participants. Principles-based regulation further places high demands on the competent national authorities which must supervise the investment firms and ensure abidance with the principles. The experience gained during the financial crisis has further raised doubts regarding the effectiveness of this regulatory approach.³⁰ The ensuing discussion on the merits

¹⁹ BaFin, *Rundschreiben* (circular) 4/2010 (WA), June 2011.

²⁰ Available at: www.amf-france.org/documents/general/8199_1.pdf.

²¹ Banca d’Italia, *The Compliance Function*, July 2007.

²² B. Bauer and K. Muther-Prader, *Gesetzliche und aufsichtsrechtliche Anforderungen an Compliance*, in: O. Lucius et al. (eds.), *Compliance im Finanzdienstleistungsbereich*, p. 38.

²³ FMA, *Rundschreiben* (circular) betreffend die organisatorischen Anforderungen des Wertpapieraufsichtsgesetzes 2007 im Hinblick auf Compliance, Risikomanagement und interne Revision.

²⁴ Cf. FSA, PS 06/13: *Organisational Systems and Controls*, November 2006, para. 1.9. and 1.10.

²⁵ FSA, *Managing Compliance Risk in Major Investment Banks—Good Practices*, July 2007.

²⁶ CSSF, *Circular 04/155, The Compliance Function*, September 2004.

²⁷ Eidg. Bankenkommission, *Rundschreiben* (circular) 06/6, *Überwachung und interne Kontrolle*, September 2007.

²⁸ CNMV, *Iniciativa contra abuso de mercado*, January 2007.

²⁹ ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, para. 12.

³⁰ Seen critically by J. Gray, 4 CMLJ (2009), p. 50 ff.; K. Alexander, 10 EBOR (2009), p. 163 ff. See also J. Black, *The Rise, Fall and Fate of Principles Based Regulation* (2010).

and the perils of principles-based regulation has shown that an effective enforcement of the principles can only be ensured if the principles are accompanied by adequate sanctioning powers for the supervisory authorities. Neither the MiFID nor its implementing directive, however, contains provisions in this regard. An effective supervision cannot therefore be guaranteed, especially in Member States with no experience with the principles-based approach to regulation.³¹ The Commission's request for national interpretational guidelines for the directives' general principles must also be seen critically, as it increases the risk of different national approaches to interpretation and legal fragmentation.³² Against this backdrop, the recent attempts made by the ESMA to promote greater convergence in the interpretation of the organisational principles laid down in the MiFID as well as the supervisions of these principles by the competent national authorities must be welcomed.³³

3. Regulatory Aim

- 12 The compliance obligations laid down in Article 13(2) MiFID in conjunction with Article 6 Organisational Requirements Directive have two regulatory aims. On the one hand they aim to protect investment firms from potential civil and administrative sanctions as well as reputational damages that result from a violation of MiFID rules. On the other hand the compliance obligations also aim to ensure investor protection and the efficient functioning of the capital markets:³⁴ the compliance requirements are supposed to ensure that the rules designed to protect investors are effectively applied and do not remain "law in the books".³⁵ By harmonising the behavioural and organisational requirements in the European Union, illegal practices are supposed to be prevented, thereby increasing investor confidence and market efficiency.³⁶ Both regulatory aims (protection of the investment firm and investor protection) must be kept in mind when interpreting the directives' provisions.³⁷
- 13 Regulating and supervising the internal organisation of investment firms is a typical characteristic of the regulatory concept described as "*management-based-regulation*" (sometimes also referred to as a form of "*meta-based regulation*") in Anglo-American law.³⁸ It typically combines internal control mechanisms with instruments of public supervision. The investment firms are required to organise

³¹ As pointed out by N. Moloney, *EC Securities Regulation*, p. 374.

³² Cf. N. Moloney, *EC Securities Regulation*, p. 374.

³³ ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012. See also ESMA, *Guidelines on Certain Aspects of the MiFID Suitability Requirements, final Report*, ESMA/2012/387, July 2012.

³⁴ Improving investor protection is one of the MiFID's key aims. See Recitals 2, 31, 44 and 71 Directive 2004/39/EC and Recital 5 Organisational Requirements Directive. Cf. Commission, *Working Document ESC/18/2005 (Explanatory Note)*, No. 3.

³⁵ Securities and Markets Stakeholder Group, *Advice on Guidelines on Certain Aspects of the MiFID Compliance Function Requirements*, February 2012, p. 1. See also FSA, *CP 06/9: Organisational Systems and Controls*, May 2006, para. 1.1: "Confidence in the ... financial markets depends on firms organising and controlling their affairs responsibly and effectively."

³⁶ Cf. A. Fuchs, in: A. Fuchs (ed.), *Kommentar zum WpHG*, § 33 para. 3.

³⁷ The dual regulatory objective of the compliance obligations can give rise to interpretational difficulties regarding the responsibilities of the compliance staff and senior management. See in the context of the legal status of the compliance officer below para. 49 ff.

³⁸ Cf. C. Coglianese and D. Lazer, 37 *Law & Soc'y Rev.* (2003), p. 691 ff. On meta-based regulation see C. Coglianese and E. Mendelson, in: R. Baldwin et. al (eds.), *Oxford Handbook of Regulation*, p. 146 ff.

to banking or financial service activities.⁸⁸ The Basel Committee's recommendations and supervisory standards also understand compliance as referring to all applicable laws and regulations.⁸⁹ The guidelines issued by the ESMA offer a potentially more narrow interpretation of the scope of compliance obligations, stating that the compliance risk assessment should take into account the applicable obligations "under MiFID and the national implementing regulation."⁹⁰

IV. Elements of a Compliance Organisation

29 Based on CESR recommendations⁹¹ the Organisational Requirements Directive distinguishes between "principles, measures and procedures" designed to detect and minimise compliance risk and the establishment of a permanent and effective "compliance function" by investment firms operating independently (see below 1). The Organisational Requirements Directive requires investment firms to appoint a compliance officer, who is responsible for the compliance function, and compliance reports (see below 2). Another essential element of any compliance organisation are "Chinese walls" that restrict the flow of information within the investment firm (see below 3).

1. Compliance Function

30 In conformity with the Basel Committee's recommendations,⁹² Article 6(2) Organisational Requirements Directive requires investment firms to establish and maintain a permanent and effective compliance function which operates independently. As to be expected from a principles-based approach to regulation, the term "compliance function" is not further defined in the directive.⁹³ European law thus does not prescribe a certain form of organisation; the Organisational Requirements Directive only formulates three abstract regulatory objectives of the compliance function (independence, effectiveness, permanence) and only gives rough outlines of its responsibilities.⁹⁴

⁸⁸ CSSF, *Circular 04/155, The Compliance Function*, September 2004, para. 12.

⁸⁹ Basel Committee on Banking Supervision, *Core Principles for Effective Banking Supervision*, October 2006, principle 17; Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, para. 3–5.

⁹⁰ ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 1, para. 16.

⁹¹ CESR, *Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments, 1st Set of Mandates*, CESR/05-024c, January 2005, p. 13 ff. (Box 2).

⁹² Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principles 5 ff.

⁹³ Commission, *Background Note*, Sec. 3.2. See also Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, para. 6; IOSCO, *Compliance Function at Market Intermediaries*, March 2006, p. 2. A more general definition can be found in recital 31 Solvency II Directive (2009/138/EC), which refers to the compliance function as the administrative capacity undertaking particular governance tasks.

⁹⁴ Cf. ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 8, para. 61. See also above para. 24–25.

(a) *Requirements*

(aa) Independence

31 In order to enable the compliance function to discharge its responsibilities effectively, it is a necessary prerequisite that the compliance staff is independent of the business units that it monitors.⁹⁵ This legal principle of independence involves a number of different aspects: as a general rule, persons involved in the compliance must perform their monitoring and advisory functions objectively and free from any conflicts of interest. The provisions of the Organisational Requirements Directive highlight two constellations in which the principle of independence assumes particular relevance. Firstly, the relevant persons in the compliance function are not permitted to be involved in the performance of the services or activities they monitor.⁹⁶ This rule refers to the general prohibition of self-monitoring under the concept of operational independence. Secondly, the Organisational Requirements Directive purports financial independence. The method of determining the remuneration of the relevant persons involved in the compliance function must therefore not compromise their objectivity and must not be likely to do so.⁹⁷

(1) **Operational and Financial Independence**

32 The prohibition of self-monitoring entails that the compliance function must be held separate from the operational business units in order to prevent influence from being exercised on the compliance staff.⁹⁸ This does not, however, mean that the compliance function cannot be involved in any of the business processes of the investment firm, as an effective management of legal risks requires active cooperation between the monitoring instances and the operative business units.⁹⁹ This becomes particularly clear with regard to the development of new financial products, for which it can be helpful, and often even advisable, to include compliance staff in the product approval process in order to identify legal risks at an early stage in the distribution process.¹⁰⁰

33 Financial independence restricts the possibilities of a performance-based remuneration for compliance staff. The remuneration structure must ensure that the compliance staff's salary does not depend on the results of the monitored business units, thereby prohibiting any remuneration concepts that provide financial incentives to cover up breaches of law in order to increase the operative profits

⁹⁵ Ibid., general guideline 7, para. 57–59. The importance of the principle of independence is emphasised in nearly all statements and has meanwhile been internationally recognised as an essential criterion of an effective compliance organisation. Cf. Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principle 5; IOSCO, *Compliance Function at Market Intermediaries*, March 2006, topic 3; Board of Governors of the Federal Reserve System, *Compliance Risk Management*, October 2008, sec. 2.

⁹⁶ Art. 6(3)(c) Organisational Requirements Directive.

⁹⁷ Art. 6(3)(d) Organisational Requirements Directive. On the compliance officer's independence from the management and in disciplinary questions see below para. 49–53.

⁹⁸ Cf. ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 7, para. 57–59.

⁹⁹ T. Lösler, NZG (2005), p. 104, 107–108.

¹⁰⁰ See ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 4, para. 41; Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principle 7, para. 37; BaFin, *Rundschreiben (circular) 4/2010 (MaComp)*, June 2011, BT 1.2. para. 3.

and thereby the compliance staff's own salary.¹⁰¹ Performance-based remuneration is therefore only permitted if it is constructed as a long-term incentive and focuses on the company's profits as a whole.¹⁰²

- 34 Both the CESR and national supervisory authorities address this problem regarding the remuneration of compliance staff. The CESR states that "the independence of compliance function personnel may be undermined if their remuneration is related to the financial performance of the business line for which they exercise compliance responsibilities. However, it should generally be acceptable to relate their remuneration to the financial performance of the investment firm as a whole."¹⁰³ The British FSA¹⁰⁴ and the German BaFin¹⁰⁵ come to the same conclusion. The Austrian FMA recommends a performance-orientated remuneration following qualitative and not quantitative criteria.¹⁰⁶
- 35 The principles of operational and financial independence cannot be applied without exception. According to the Organisational Requirements Directive investment firms are not obliged to comply with the obligations laid down in Article 6(3)(c) and (d) if they are able to demonstrate that, in view of the nature, scale and complexity of their business, and the nature and range of investment services and activities, the requirement under that point is not proportionate. This exemption is, however, only applicable if the senior management has been able to confirm that the company's compliance function continues to be effective.¹⁰⁷

(2) Organisational Independence

- 36 The principle of independence further entails that the compliance function's structural arrangements must be independent from the operative business units, constituting an independent part of the corporate structure. This follows from the principle of a separation of functions, inherent in the entire field of company supervision. Investment firms, however, have a large margin of appreciation with regard to the organisational approach they take in order to fulfil this requirement¹⁰⁸ and therefore do not necessarily need to introduce a separate compliance department.¹⁰⁹ The degree to which the compliance function must be organised independently depends on the nature, scale and complexity of the company's business. National supervisory practice generally regards an independent organisational unit as necessary provided the staff has regular access to inside and other confidential information.¹¹⁰

¹⁰¹ M. Casper, in: Bankrechtliche Vereinigung (ed.), *Bankrechtstag 2008*, p. 139, 149.

¹⁰² Cf. *ibid.* Similarly Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principle 5, para. 29 ("remuneration related to the financial performance of the bank as a whole should generally be acceptable"). In more detail G. Spindler, WM (2008), p. 905, 910.

¹⁰³ CESR, *Technical Advice on Possible Implementing Measures of the Directive 2004/39/EC on Markets in Financial Instruments*, 1st Set of Mandates, CESR/05-024c, January 2005, p. 12.

¹⁰⁴ FSA, *PS 06/13: Organisational Systems and Controls*, November 2006, para. 4.8.

¹⁰⁵ BaFin, *Rundschreiben* (circular) 4/2010 (*MaComp*), June 2011, BT 1.1.1 para. 8.

¹⁰⁶ FMA, *Rundschreiben* (circular) *betreffend die organisatorischen Anforderungen des Wertpapieraufsichtsgesetzes*, May 2007, p. 7.

¹⁰⁷ See above para. 23 ff.

¹⁰⁸ See above para. 4 ff.

¹⁰⁹ Commission, *Background Note*, Sec. 3.2: "[T]hese functions [Compliance, risk management and internal audit] may be embedded in the organisation of the firm in different ways. These differences reflect the nature of these functions as well as the need for proportionality."

¹¹⁰ BaFin, *Rundschreiben* (circular) 4/2010 (*MaComp*), June 2011, BT 1.1.1 para. 3.

- 37 In this context the question if (and under which circumstances) the compliance function can be combined with other internal control functions, such as risk management or internal audit, assumes particular importance.¹¹¹ The Organisational Requirements Directive only contains explicit rules on the relationship between the compliance function and the internal audit function. Pursuant to Article 8 investment firms must establish and maintain an internal audit function which is separate and independent from the other functions and activities of the investment firm and fulfils the responsibilities listed in Article 8(a)–(d). The internal audit must thus not only be independent from the other supervisory functions of the investment firms but must rather also be organised separately as an independent department. The reason for this is that the internal audit is charged with the oversight of the adequacy and effectiveness of the investment firm's compliance function.¹¹² This requires the internal audit to have a separate organisation from the other business units.¹¹³
- 38 Whether compliance and risk management also require strict organisational separation is under dispute.¹¹⁴ The legislative records indicate that European law takes a rather flexible and principles-based approach to this issue: while the principle of independence includes the general rule that the compliance function should generally not be an organisational component of risk management, this distinction is less clear with regard to the internal audit function. It is necessary to keep in mind that the responsibility of the compliance function also includes the task of monitoring compliance with the rules on risk management and that effective oversight always requires sufficient organisational independence of the controlling body from the controlled instances. At the same time, recital 15 of the Organisational Requirements Directive does not necessarily see the independent functioning of compliance as jeopardised if risk management and compliance functions are performed by the same person. Only for larger firms does the directive assume that a clear organisational distinction between both units is generally necessary. Organisational independence is thus subject to and restricted by the principle of proportionality.¹¹⁵ This interpretation is in line with the guidelines issued by the ESMA.¹¹⁶

¹¹¹ Cf. ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 9, para. 67–71. Business practice offers a number of possible structures. Cf. Gabbi et al., *Managing Compliance Risk after MiFiD*, p. 5–10; J. Oelkers, *Compliance in Banken*, in: O. Lucius et al. (eds.), *Compliance im Finanzdienstleistungsbereich*, p. 131, 152 ff. (Austria); M. Gallo, *Compliance Function*, p. 325 ff. (Italy); M.T. Biegelman, *Compliance Program*, p. 178 (USA).

¹¹² Art. 8(a) Organisational Requirements Directive. Cf. ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 9, para. 69.

¹¹³ According to the ESMA guidelines the separation of compliance and internal audit may, however, be disproportionate for very small investment firms.

¹¹⁴ The connection of the compliance function to the risk management function is particularly common in Anglo-American banks and investment firms. Cf. C. Taylor, 6 J. Invest. Comp. (2005), p. 54, 58. On the functional relationship between both functions see § 28 para. 2–3.

¹¹⁵ For more details see the Swedish report on implementation, *One Year with MiFiD*, April 2009, p. 8–9. On the relationship of the compliance function with the legal department see A. Früh, CCZ (2010), p. 121 ff.; T. Lösler, WM (2010), p. 1917, 1920; S. Niermann, ZBB (2010), p. 400, 422.

¹¹⁶ According to the ESMA the combination of the compliance function with other control functions (such as risk management) may be acceptable if this does not compromise the effectiveness and independence of the compliance function and if this is appropriately documented. See ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 9, para. 67.

39 The German BaFin decrees that the compliance function may be combined with other control units, such as departments responsible for money-laundering prevention or risk control, but that internal audit must remain separate at all times.¹¹⁷ In Italy the Banca d'Italia made the following statement: “[T]he compliance function’s activities may be performed by different organizational structures already established within the bank (for example, legal, organizational, operational risk management), provided that the risk management process and operations of the function are centralized through the appointment of a compliance officer.”¹¹⁸ The Austrian FMA underlines the fact that the compliance staff must be restricted to fulfilling compliance duties and should at no time be permitted to take over other duties or advise clients. The simultaneous assignment of an employee to the risk management function and the legal department is generally accepted.¹¹⁹

(bb) Permanence and Effectiveness

40 The compliance function must be established permanently and must be institutionalised in the company’s organisation by appropriate measures.¹²⁰ Although the wording of the directive does not explicitly require a written documentation of the status and authority of the compliance function, this requirement can be deduced from the requirement of permanence.¹²¹

41 Article 6(3)(a) of the Organisational Requirements Directive describes the elements of an effective compliance function: it must have the necessary authority, resources, expertise and access to all relevant information.¹²² National supervisory practice further demands that the compliance staff is to be supplied with all relevant information and documents, and has unrestricted access to the premises, records and data-processing systems as well as to any further information necessary for determining the relevant facts.¹²³ According to the Austrian Standard Compliance Code, withholding information constitutes a serious offence for company employees and calls for disciplinary action.¹²⁴

(b) Responsibilities

42 Legal literature traditionally distinguished between advisory and informational responsibilities of the compliance function and responsibilities regarding quality

¹¹⁷ BaFin, *Rundschreiben (circular) 4/2010 (MaComp)*, June 2011, BT 1.1.1 para. 4.

¹¹⁸ Banca d'Italia, *The Compliance Function*, July 2007, p. 3.

¹¹⁹ FMA, *Rundschreiben (circular) betreffend die organisatorischen Anforderungen des Wertpapieraufsichtsgesetzes*, May 2007, p. 8.

¹²⁰ Cf. ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 6, para. 53; L. Röh, BB (2008), p. 398, 403.

¹²¹ ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 6, para. 53; Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principle 5, para. 22 ff.; Banca d'Italia, *Compliance Function*, July 2007, p. 5 (“formalize the function’s status and authority”).

¹²² See for details ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012, general guideline 5, para. 43.

¹²³ BaFin, *Rundschreiben (circular) 4/2010 (MaComp)*, June 2011, BT 1.1.2 para. 1. See also Basel Committee on Banking Supervision, *Compliance and the Compliance Function in Banks*, April 2005, Principle 5, para. 30 ff. For details on the compliance officer’s informational rights and right to issue instructions see below para. 54–56.

¹²⁴ Standard Compliance Code, *Grundsätze ordnungsgemäßer Compliance*, No. 6.

control and marketing.¹²⁵ Since the enactment of the MiFID the responsibility towards investor protection must also be considered a priority.¹²⁶ The Organisational Requirements Directive places particular emphasis on two responsibilities of the compliance function: (i) the more repressive measures of monitoring and assessing the adequacy and effectiveness of the procedures designed to mitigate compliance risk;¹²⁷ and (ii) advisory and assisting responsibilities with more preventive effects.¹²⁸

(aa) Monitoring and Assessment

43 The compliance function monitors and assesses the principles and procedures developed by the investment firm in order to minimise legal risks.¹²⁹ These monitoring and assessment responsibilities are to ensure that, with the help of senior management, all relevant legal risks can be identified and any shortcomings of the compliance function can be determined. According to the implementing directive, the monitoring responsibility is comprehensive: it applies both to the organisational measures and procedures taken by senior management in order to prevent legal risks, as well as to the day-to-day business carried out by the operative staff, although the latter cannot be deduced from the provision's wording.¹³⁰ However, this does not prevent the compliance function (following a risk-based approach) from establishing priorities determined by the compliance risk assessment ensuring that compliance risks are adequately monitored. The aim of compliance monitoring is to ensure that company employees abide by the internal organisational principles and internal rules. If the compliance function identifies weaknesses in the principles and procedures developed by the investment firm, it must make suggestions on how to improve the compliance organisation and submit a report to the senior management thereon.¹³¹ The compliance function must further determine and manage conflicts of interest and monitor the flow of inside information.¹³²

(bb) Advice and Assistance

44 Article 6(2)(b) of the implementing directive defines a further responsibility of the compliance function: it must "advise and assist the relevant persons responsible for carrying out investment services and activities to comply with the firm's obligations under Directive 2004/39/EC". The advice and assistance given by the compliance function is becoming increasingly important in legal practice and should prevent offences and conflicts of interest from occurring.¹³³ It reflects the MiFID's understanding of the compliance function as an essential element of the investment firm's

¹²⁵ Cf. Standard Compliance Code, *Grundsätze ordnungsgemäßer Compliance*, No. 2. In detail T. Lösler, NZG (2005), p. 104 ff.

¹²⁶ See above para. 12.

¹²⁷ Art. 6(2)(a) Organisational Requirements Directive.

¹²⁸ Art. 6(2)(b) Organisational Requirements Directive.

¹²⁹ On the compliance function's responsibilities concerning monitoring and control see ESMA, *Guidelines on Certain Aspects of the MiFID Compliance Function Requirements, Final Report*, ESMA/2012/388, July 2012 general guideline 2, para. 18–26. A. Newton, *Compliance*, p. 143 ff.; S. Gebauer and S. Niermann, in: C.E. Hauschka (ed.), *Corporate Compliance*, § 36 para. 22 ff.

¹³⁰ J.A. Harm, *Compliance*, p. 44.

¹³¹ See below para. 60.

¹³² See below (in the context of the establishment of Chinese walls) para. 64–81.

¹³³ K. Rothenhöfer, in: S. Kümpel and A. Wittig (eds.), *Bank- und Kapitalmarktrecht*, para. 3.375. The compliance function's responsibility for the management of conflicts of interest does not result directly from Art. 6