UNIVERSITÄT
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EU CAPITAL MARKETS LAW

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Stephan Balthasar

OVERVIEW

1 INTRODUCTION

Course material. Statutes: *Kapitalmarktrecht*, Beck-Texte im dtv, 12th ed. 2025. English EU legislation is available for download on the e-Learning section for this course (https://elearning.uni-bayreuth.de/). For the examination, attention is drawn to the list of permitted material available online at https://www.jura.uni-bayreuth.de/pool/dokumente/Hilfsmittelbekanntmachungen/2025_NEU_HMB_SPB_062025-neu.pdf. **Textbooks:** Buck-Heeb, *Kapitalmarktrecht*, 13th ed. 2023; Langenbucher, *Aktien- und Kapitalmarktrecht*, 5th ed. 2022; Poelzig, *Kapitalmarktrecht*, 3rd ed. 2023; Veil, *Europäisches und Deutsches Kapitalmarktrecht*, 3rd ed. 2022; Veil, *European Capital Markets Law*, 3rd ed. 2022. **Preparatory material for examination (Schwerpunktbereich III – Unternehmen, Kapital und Strukturierung):** ***Practical cases***: Fleischer/Korch, *Fälle zum Kapitalmarktrecht*, 2021; Haertlein/Poelzig, *Fälle zum Bank- und Kapitalmarktrecht*, 2021; Leuschner/Sajnovits/Wilhelm, *Fälle zum Kapitalgesellschafts- und Kapitalmarktrecht*, 2nd ed. 2024. ***Recent developments***: Maume, "Die Entwicklung des Kapitalmarktechts 2024", (2025) NJW 940–946; Stüber, "Aktuelle Entwicklungen im Wertpapierhandelsrecht" (2025) *Der Konzern* 48–56; Stüber, "Neuerungen im Marktmissbrauchsrecht durch den EU Listing Act", (2025) *Wertpapiermitteilungen* 293–300; Weber, "Die Entwicklung des Kapitalmarktrechts 2023/24", (2024) *NJW* 939–945.

1.1 Course content and modules

1 This course covers the essential features of capital markets regulation in the European Union. The curriculum of this course includes:

- EU legislation in relation to capital markets, such as:
  - the Markets in Financial Instruments Directive II (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR),
  - the Prospectus Regulation (PR),
  - the Market Abuse Regulation (MAR),
  - the Transparency Directive (TD), and
  - the Takeover Bid Directive (TBD);
- Domestic legislation implementing and supplementing EU capital markets legislation, e.g.,
  - *Börsengesetz* (BörsG),
  - *Wertpapierhandelsgesetz* (WpHG),
  - *Wertpapierprospektgesetz* (WpPG), and
  - *Wertpapiererwerbs- und Übernahmegesetz* (WpÜG);
- Case law, both from the ECJ and domestic courts;
- The institutional framework, in particular, EU and domestic regulators (e.g., European Securities and Markets Authority, ESMA, and *Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin).

The course is open to any student interested in EU capital markets law. It is specifically designed for students enrolled in the *Schwerpunktbereich III – Unternehmen, Kapital und Strukturierung*, and will prepare them for the written examination. Work in class will include solving sample questions from previous examination papers.

2 The EU capital markets play a pivotal role in the European economy. They bring together supply and demand for mid- and long-term financing, i.e., investors on the one hand, and private enterprises and public authorities on the other. According to the ESMA report *EU Securities Markets* published in 2024, the total size of capital markets in the EU and the EEA combined amounted to 16.9 trillion euros (shares) and 22.7 trillion euros (bonds), or a total of 39.6 trillion euros, of which

11.5 trillion for sovereign issuers.[1] Due to the size and the economic importance of capital markets, policy-makers and market participants alike have a deep interest in the legal framework for these markets (see section 1.2 p. 4 below) and the way they are regulated (see section 1.3 p. 10 below).

Case Study 1. What is, in your view, the practical importance of English language and English legal terminology in the area of capital markets law? Consider the following:

1. The Market Abuse Regulation was published in the EU Official Journal in June 2014 in all official languages of the EU and applied as of 3 July 2016. Subsequently, the EU made 36 corrections to the German version of the regulation (OJ L 287 of 21 October 2016, OJ L 306 of 15 November 2016, OJ L 348 of 21 December 2016).
2. Where an issuer offers or lists securities in more than one EU Member State, article 27 Prospectus Regulation requires the securities prospectus to be published in languages accepted in the relevant Member States, or "in a language customary in the sphere of international finance".
3. ESMA maintains an "Interactive Single Rulebook", an online tool providing a comprehensive overview of EU legislation and implementing acts and measures (https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook).

Notes.

1.2 What are capital markets?

1.2.1 What is traded on capital markets?

1.2.1.1 Capital market instruments

3 The two types of mid- and long term financing instruments that are the cornerstone of capital markets are shares ("equity" instruments) and bonds, also referred to as "notes" ("debt" instruments). One of the central pieces of capital markets legislation at EU level, MiFID II, captures these instruments under the term "transferable securities", together with derivative securities (i.e., securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities or other indices or measures). The MiFID II definition of transferable securities refers to "classes of securities which are negotiable on the capital market",[2] which implies transferability, fungibility, and standardization of these instruments.

MiFID II Financial Instruments

- Transferable securities, i.e. those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:
  - (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
  - (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;
  - (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures;
- Money-market instruments;
- Units in collective investment undertakings;
- Derivative contracts;
- Derivative instruments for the transfer of credit risk;
- Financial contracts for differences;
- Emission allowances

4 There is a broader notion of "financial instruments" which goes beyond transferable securities: it includes, for example, units in UCITS funds (a specific type of investment funds), various types of

[1] ESMA, *EU Securities Markets 2023*, ESMA50-524821-3149, 2024, p. 5 (https://www.esma.europa.eu/sites/default/files/2024-05/ESMA50-524821-3149_EU_Securities_Markets_2023.pdf, accessed 11 Jun 2025).
[2] Article 4(1)(44) MiFID II, § 2(1) WpHG.

derivatives (options, futures, swaps, forwards) relating to a range of variables (e.g., securities, currencies, interest rates, commodities), and contracts for difference.[3] Financial instruments can be admitted to trading on a regulated market if they are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, freely negotiable.[4]

Case Study 2. Shares and bonds are the most prominent examples of transferable securities. They come, however, with very different legal and economic features. Complete the table below with explanations of the most essential features of standard shares and bonds!

Investors' view / Type of instrument	Legal texts determining investors' rights	Investors' economic motivation	Investors' exposure to losses	Investors' influence on issuer	Investors' position in issuer's insolvency	Investors' risk by comparison
Ordinary Shares (equity investment)						
Standard Bonds (debt investment)						

5 Traditionally, shares and bonds were issued in the form of individual paper certificates. Certificates of this type come with obvious disadvantages as regards additional costs for safe-keeping (e.g., through a bank), and for physically moving the certificate (e.g. in case of transfer of title). The predominant practice in use today is to issue "global certificates". Such global certificates are held in safe custody by central securities depositaries (CSDs), and settlement of transactions, including transfer of title, is arranged through the banks that participate in the clearing system without the need to move the global certificate.[5] More recently, legislative proposals include the option to replace paper certificates with digital securities or tokens, also referred to as "tokenized securities". For example, pursuant to § 1 eWpG, certain types of bonds and shares can be issued digitally. However, digitalized securities do not yet play a significant role in market practice. The MiFID II concept of financial instruments does not require certification in any specific form and thus also covers digitalized instruments.

1.2.1.2 Capital markets as part of financial markets

6 Capital markets are just one segment of the wider financial markets. Other financial markets that are commonly distinguished from capital markets include:

- markets in foreign currencies (FX markets),
- money markets for debt instruments with short-term maturities (typically, less than a year), and
- credit markets, e.g., credit facilities provided by banks, insurers, or investment funds.

[3] Annex I, Section C MiFID II.
[4] Article 51(1) MiFID II. Commission Delegated Regulation (EU) 2017/568 of 24 May 2016 defines requirements for fair, orderly and efficient trading, and free negotiability. For details on the admission process, see para. 11 below.
[5] EU law deals specifically with CSDs in the Central Securities Depositories Regulation (CSDR).

1.2.1.3 Related areas of law

7 Capital markets law is linked to many other areas of law. These include corporate law (regime applicable to shares), private law (regime applicable to bonds), banking law (role of investment firms), and insolvency law (determining the rights of investors in case of an issuer's bankruptcy). The interplay between capital market instruments and related areas of law is addressed more fully in chapter 2 p. 16ff. below.

1.2.2 What are capital market places, capital market transactions, and who are capital market participants?

1.2.2.1 Trading venues

8 As regards the trading of capital market instruments, EU capital market law provides for different types of trading facilities: "Multilateral systems" include "regulated markets", "multilateral trading facilities" (MTFs), and "organized trading facilities" (OTFs).[6] These multilateral systems are also referred to as "trading venues".[7] Trades in financial instruments can also occur outside such multilateral systems, for example, "over the counter" (OTC)[8] or through "systematic internalisers"[9]. The most prominent venues – regulated markets and MTFs – are described in more detail below.

1.2.2.1.1 Regulated Markets

9 MiFID II defines a "regulated market" as a multilateral system, which brings together multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary rules in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorized and functions regularly and in accordance with Title III of MiFID II.[10] The corresponding term under German law is that of an "*organisierter Markt*" within the meaning of § 2(11) WpHG. Pursuant to article 4(1)(21) MiFID II, a "regulated market" requires authorization and operation of the market in accordance with title III of MiFID II. A regulated market will only be authorized if both the market operator and the systems of the market comply with MiFID II requirements.[11] This includes, in particular, organizational safeguards as regards conflicts of interest, operational risks, fair and orderly trading, and the efficient and timely finalization of transactions,[12] and requirements as to system resilience, circuit breakers and electronic trading.[13] The operation of a regulated market is limited to market operators authorized under MiFID II, while MTFs and OTFs can also be operated by investment firms. In Germany, the operation of regulated markets is governed by the *Börsengesetz* (BörsG), which differentiates between the market operator and the market itself (§§ 2, 5 BörsG). The most prominent example of a regulated market in Germany is the *Frankfurter Wertpapierbörse* (FWB), which is operated by *Deutsche Börse AG*.

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[6] Article 4(1)(21), (22), (23) MiFID II.
[7] Article 4(1)(24) MiFID II.
[8] Recital (4) MiFID II.
[9] Article 4(1)(20) MiFID II.
[10] Article 4(1)(21) MiFID II. For a definition of what counts as a "system", as "buying and selling interest", and as "non-discretionary rules", see recital (6) of MiFID I.
[11] Article 44(1) MiFID II
[12] Article 47(1) MiFID II.
[13] Article 48 MiFID II.

10 Access of market participants to a regulated market is subject to a number of restrictions: A regulated market must establish transparent and non-discriminatory rules governing access to or membership of the regulated market.[14] In the case of FWB, these rules are contained in the stock exchange rules (*Börsenordnung*, BörsO) established pursuant to § 16 BörsG. A regulated market may admit as members or participants investment firms, credit institutions authorized under Directive 2013/36/EU and other persons who are of sufficient good repute, have a sufficient level of trading ability, competence and experience, have, where applicable, adequate organizational arrangements, and have sufficient resources.[15]

11 Regulated markets must have clear and transparent rules regarding the admission of financial instruments to trading,[16] e.g., in Germany, § 32 BörsG in conjunction with the admission rules under the *Börsenzulassungsverordnung* (BörsZulV). These rules must be designed to ensure that financial instruments admitted to trading on a regulated market are capable of being traded in a fair, orderly and efficient manner and, in the case of transferable securities, are freely negotiable.[17] A market operator may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such suspension or removal would be likely to cause significant damage to the investors' interests or the orderly functioning of the market.[18]

12 Admission of securities to a regulated market will come with additional requirements under the Prospectus Regulation, the Transparency Directive and the Takeover Bid Directive.[19] In addition, the Shareholder Rights Directive and the Accounting Directive attach corporate and accounting law consequences to the listing on a regulated market, e.g., the requirement to publish a remuneration report[20] and a corporate governance statement.[21] Similarly, at the level of German domestic law, a stock company that is "listed" within the meaning of § 3(2) AktG is subject to a specific legal regime,[22] and the concept of a "listed company" ("*börsennotierte Gesellschaft*") is limited to companies whose shares are admitted to trading on a regulated market, and accordingly does not extend to shares admitted on MTFs and other venues.[23] The entire system of legal rules applying to securities admitted to trading on regulated markets is designed to create a reliable framework for investors that is conducive to investor confidence and thus to the functioning of these markets.

1.2.2.1.2 Multilateral trading facilities

13 Multilateral trading facilities (MTFs) are an alternative trading venue to regulated markets. What MTFs have in common with regulated markets is the economic function to match supply of and demand for financial instruments. The legal framework follows certain principles applying to regulated markets: operation of MTFs is subject to an appropriate licence for the operator, and access

[14] Article 53(1) MiFID II.
[15] Article 53(3) MiFID II.
[16] Article 51(1)(1) MiFID II. Additional listing requirements exist under the Listing Directive which will be repealed and merged into MiFID II by the EU Listing Act (see para. 28 p. 14).
[17] Article 51(1)(2) MiFID II.
[18] Article 52(2) MiFID II.
[19] Cf. article 3(3) PR, article 1(1) TD, article 1(1), 2(1)(e) TBD.
[20] Article 9b SRD, implemented in German law in § 162 AktG.
[21] Article 20(1) Accounting Directive, implemented in German law in § 161 AktG as regards compliance with the *Deutscher Corporate Governance Kodex*.
[22] E.g., §§ 67a ff., 76, 87a, 91(3), 96(2), (3), 110ff. AktG.
[23] Heider, in: *Münchener Kommentar zum Aktiengesetz*, 6th ed. 2024, § 3 mn. 38 (note that it is not necessary that *all* shares issued are admitted to trading).

to trading is limited. A decisive difference is that MiFID II does not contain specific rules as to the admission of instruments to trading on an MTF. Accordingly, admission to trading is a matter for the trading rules established by the MTF operator under private law and does not necessarily depend on the issuer applying for admission to trading. The more liberal approach to admission is also reflected in the fact that certain capital market law requirements designed to protect investors only apply to securities listed on regulated markets and not to instruments solely traded on MTFs (see para. 12 above). A prominent example for an MTF is the "*Freiverkehr*" as defined in § 48 BörsG, e.g., the "Open Market" operated by Deutsche Börse AG.

> **Case Study 3.** You are legal counsel with a fund manager, and one of your portfolio managers bought Rocket Internet shares for a fund he manages. One day, he receives the following notice:
>
> "Disclosure of inside information pursuant to Regulation (EU) 596/2014 (Market Abuse Regulation)
>
> Ad hoc: Rocket Internet SE decides on launch of public delisting self-tender offer […]
>
> Today, the Management Board of Rocket Internet SE (the "Company") resolved, with approval of the Supervisory Board, to offer to the shareholders of the Company to purchase all no-par value bearer shares of the Company […] by way of a public delisting self-tender offer (the "Offer"). The Offer is designed to satisfy the criteria for a revocation of Rocket Internet Shares' admission to trading on the regulated market of the Frankfurt Stock Exchange pursuant to Section 39 […] of the German Stock Exchange Act."
>
> How do you believe delisting from the regulated market affected Rocket Internet shareholders? Why do you think the Market Abuse Regulation required publication of this notice?
>
> **Notes.**

1.2.3 What are the types of capital market transactions?

14 A distinction is often made between "primary" and "secondary" markets.

15 The "primary" market is the market for transactions between issuers and investors, i.e., for the issuance of securities by an issuer and the sale of such securities to investors ("placement"), often through a syndicate of banks. A prominent example for a primary market transaction is an "initial public offering" or "IPO" of an issuer, i.e., the first-time public placement with subsequent admission of shares of an issuer to a market. Another example – which is more frequent in practice – is the issuance of debt securities for (re-)financing purposes.

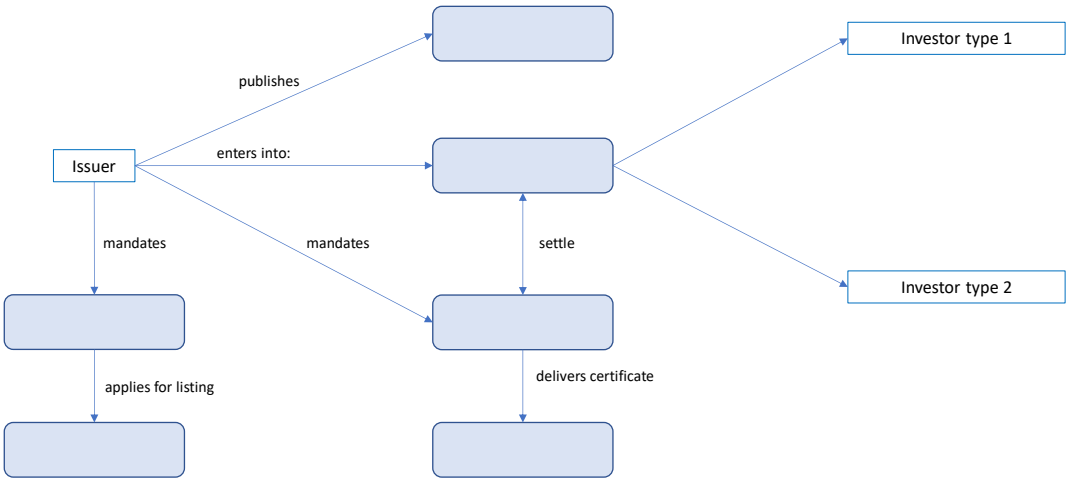
16 "Secondary" markets do not involve the issuer as a party: instead, they are markets for transactions between investors where one investor holding securities sells these securities to another investor. Secondary market transactions can also occur outside MiFID II market venues, e.g., through bilateral transactions traditionally referred to as "over the counter" or "OTC". Both primary and secondary market transactions involve financial intermediaries playing an important role, e.g., in giving investment advice to investors.

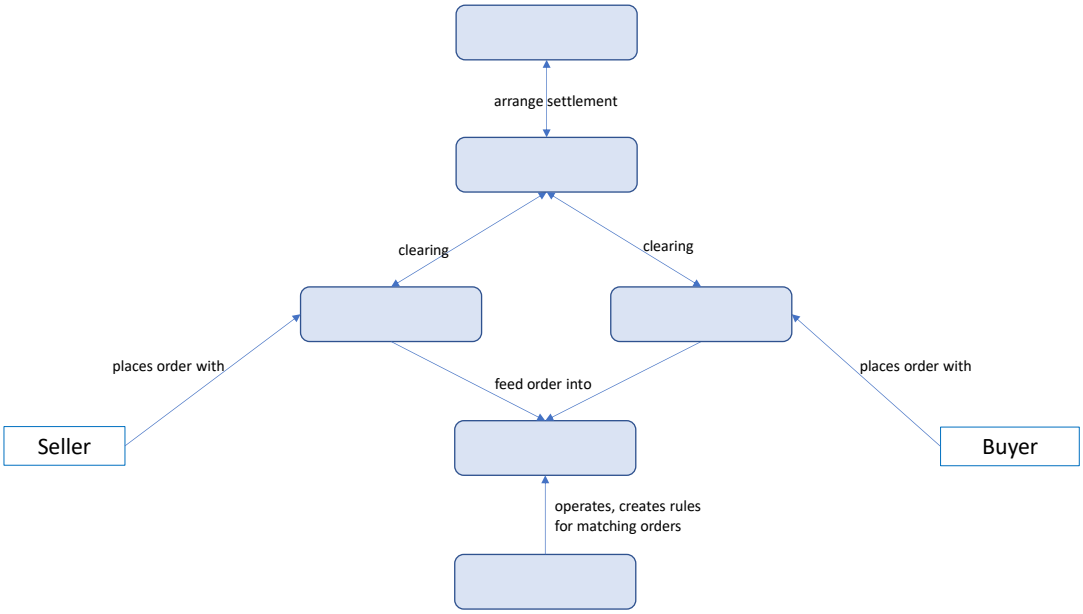
1.2.3.1 Capital market participants

17 What involves, at first sight, only investors and issuers, is, in reality, based on a complex market infrastructure: Markets need suitable marketplaces, i.e., "trading venues". These trading venues are

run by institutions referred to as “market operators”, and control access to trading activities on these markets. Trades arranged between market members are cleared through “central counterparties” which in turn arrange for settlement through central securities depositories which hold securities in custody (typically certificated through global certificates). Investment firms take the role of financial intermediaries, e.g., by giving investment advice to their clients, placing or underwriting financial instruments, or executing client orders. Credit rating agencies issue ratings as indicators of the creditworthiness or the financial stability of an issuer of securities. For a more detailed overview, see section 1.6 below.

Case Study 4. Complete the flow charts below for a primary and a secondary market transaction!





1.3 How are capital markets regulated?

1.3.1 What are the regulatory aims of capital markets law?

18 Capital markets law and regulation is essentially an exercise of balancing diverging interests and policies: one the one hand, it is generally accepted that capital markets serve an important economic function in providing financing to companies and public authorities. This perspective typically weighs in favour of reducing regulatory requirements in order to facilitate the use of capital markets as a source of funding, in particular, for smaller companies.[24] On the other hand, the functioning of the market depends on an appropriate level of investor protection and market integrity, without which investors will not be prepared to invest through capital market instruments. In this context, a sound level of investor protection is seen as an important tool to reinforce confidence in the markets, as is the existence of adequate powers for supervisors to fulfil their tasks.[25] Capital markets legislation therefore implies a continuous effort of arbitrating between the needs and expectations of market participants, and has proven to be an area of constant reform. On current legislative initiatives, see section 1.5 p. 14 below.

> **Case Study 5.** You are an intern with ESMA. You are asked to analyse a recent bond transaction containing the following terms and conditions:
>
> *§ 2 – Status*. The Notes constitute unsecured subordinated obligations of the Issuer. In the event of insolvency of the Issuer, obligations under the Notes shall be subordinated to senior obligations of the Issuer.
>
> *§ 3 – Interest*. Each Note shall bear interest of 3% per annum. The Issuer has the right to cancel any payment of interest on the Notes in its sole discretion.
>
> *§ 4 – Redemption*. The Notes have no scheduled maturity date. The Issuer may, in its sole discretion, call and redeem the Notes. The holders have no right to require the redemption of the Notes.
>
> How risky do you think the investment is? How do you think the EU could or should regulate (i) marketing and distribution of the Notes, (ii) admission of the Notes to trading on a trading venue, and (iii) trading of the Notes until their redemption?
>
> **Notes.**

1.3.2 What regulatory concepts and methods are applied?

19 Regulatory strategies and instruments used to achieve the objectives of capital market regulation focus on a number of topics: transparency and reporting requirements, regulation and prohibition of specific types of transactions, governance rules for market participants, regulatory supervision, and enforcement mechanisms. Transparency through disclosure of market-relevant information, e.g., periodic financial information such as annual reports, disclosure of inside information, creates a "level playing field" for investors.[26] Regulating and prohibiting certain transactions makes sure that the market venues create, and are perceived to create, fair conditions. Examples include the

[24] Recital (3) of Regulation 2024/2809.
[25] Recital (4) MiFID II.
[26] It is worth noting that adequate transparency on capital markets is an assumption relied on by courts when using stock exchange prices as a proxy to determine the fair value of securities or a participation, as for example in BGH, 31 January 2024 – II ZB 5/22, NZG 2024, 935 para. 27 – *Vodafone* in the context of fair compensation pursuant to § 305 AktG, and subsequently LG München I, 28 June 2024 – 5 HK O 15162/20 – *Audi*.

prohibition of insider dealing, market manipulation, and uncovered short sales. Governance requirements as to the organization and internal processes of capital market participants and rules on professional conduct – for example, professional duties with regard to conflicts of interest, investment advice, etc. – also help designing the market framework in such a way that regulatory objectives are achieved in terms of investor protection and reliability of transactions and their settlement. Prudential rules are designed to ensure the stability and resilience of capital market participants, e.g., through requirements as to capitalization and risk management. Licencing requirements make certain activities subject to prior regulatory authorization or approvals. Suitable enforcement mechanisms make sure that the substantial market rules are policed properly, including both public and private enforcement: Public enforcement involves financial sanctions such as fines and disgorgement of profits, non-financial sanctions such as "naming and shaming", intervention as regards financial instruments, governance of market participants or the revocation of licences. Private enforcement involves civil law remedies, in particular claims for damages for breach of capital market regulations as is the case for prospectus liability and liability for mis-selling.

Regulatory concepts & capital markets law

- transparency & reporting requirements
- regulation and prohibition of transactions
- governance rules
- prudential rules
- licencing and approval requirements
- prudential and conduct supervision
- public and private enforcement

1.4 What is the role of the EU for capital markets law?

1.4.1 EU capital markets legislation

20 The EU capital market is part of the internal market, and accordingly, the EU pursues the objective of market integration by providing for "the degree of harmonization needed to offer investors a high level of protection and to allow investment firms to provide services throughout the Union".[27] At EU level, capital market legislation has continuously expanded over the last decades. Initially, EU legislation was largely based on freedom of establishment under article 50(2)(g) TFEU and corresponding provisions in previous treaties. However, this provision only allows for the *coordination* of domestic legislation (as opposed to *harmonization*). More recently, the EU legislator has been relying primarily on the competence for establishing an internal market under article 114 TFEU to pass fully harmonized legislation. Today, there is virtually no area in capital markets law that is not to some extent dealt with by EU legislation.

21 EU legislative instruments include both regulations that are binding and directly applicable in all Member States[28] and directives that are binding on Member States which can choose the form and methods to implement the directive in the domestic legal system.[29] Recent years have shown a trend towards the use of regulations, reflecting the need to ensure that there are uniform rules, clarity of key concepts, and a single rule book. Recent examples of this trend are the Market Abuse Regulation and the Prospectus Regulation, which replaced previous EU directives.[30]

[27] Recital (3) MiFID II.
[28] Article 288(2) TFEU.
[29] Article 288(3) TFEU.
[30] Recital (3) MAR, following the conclusions of the report of 25 February 2009 by the High Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière (the 'de Larosière Group').

22 The rule-making process for capital market regulation in the EU is often referred to as the "Lamfalussy Process".[31] It is based on the 2001 Lamfalussy report[32] and involves four levels: Level 1 is the enactment of framework directives or regulations containing basic principles. Level 2 consists of delegated acts under article 290 TFEU and implementing acts under article 291 TFEU. These level 2 acts put level 1 texts into more concrete terms. Where the preparation of level 2 acts involves EU supervisory authorities, they are adopted as "regulatory" or "implementing" technical standards (e.g., under articles 10 and 15 ESMA Regulation). Level 3 is concerned with coherent application of EU law and covers "soft law instruments", e.g., guidelines and recommendations under article 16 ESMA Regulation, and "Q&A" documents prepared by ESMA under article 16b ESMA Regulation. At level 4, the report advocates a stronger role for the Commission in ensuring the correct enforcement of EU rules by national governments, to which one could add ESMA activities in that regard, e.g., "peer reviews" pursuant to article 30 ESMA Regulation, and the control of compliance of domestic regulators with Union law.[33] ESMA maintains an "Interactive Single Rulebook" (ISRB) which is an online tool providing a comprehensive overview of all level 2 and level 3 measures adopted in relation to a given level 1 text. The ISRB is available online at: https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook (accessed 11 Jun 2025).

23 By comparison to legislative activities and competences of the EU, the role of domestic legislation at Member State level is somewhat reduced. In many fields, domestic legislation has primarily the role of implementing policy decisions taken at EU level, in particular, through the legislative texts adopted at level 1 of the Lamfalussy process.

> **Case Study 6.** Consider how EU law specifies the requirements for the content of a securities prospectus under (i) articles 13 and 16 PR, (ii) the annexes to Commission Delegated Regulation (EU) 2019/980 of 14 March 2019, (iii) ESMA Guidelines on risk factors, (iv) ESMA Q&As on prospectuses, and (v) ESMA's peer review of the scrutiny and approval procedures of prospectuses by competent authorities. How do these instruments fit into the categories of the Lamfalussy process, and what is the role of domestic German law?

Lamfalussy process levels	Instrument
Level 1	
Level 2	
Level 3	
Level 4	
Role of German law	

1.4.2 EU institutions and supervisory bodies

24 EU legislation in the area of capital market law is complemented by a complex administrative framework, in particular, the European System of Financial Supervision (ESFS). The ESFS is a network consisting of the three European Supervisory Authorities (ESAs), the European Systemic

[31] Cf. https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en, accessed 11 Jun 2025

[32] Available at https://www.esma.europa.eu/sites/default/files/library/2015/11/lamfalussy_report.pdf, accessed 11 Jun 2025.

[33] Article 17 ESMA Regulation.

Risk Board (ESRB) and national competent authorities (NCAs). Its main task is to ensure consistent and appropriate financial supervision throughout the EU. The ESFS covers both macro-prudential and micro-prudential supervision. Macroprudential supervision is aimed at the functioning of financial and capital markets at large and is in the hands of the European Systemic Risk Board (ESRB). At micro-prudential level, the supervisory regime makes certain activities such as the provision of investment services, credit rating, fund management, and the publication of securities prospectuses subject to prior licencing, authorization or approval by supervisory authorities, including prudential supervision as regards the governance, the risk management, and capital requirements for market participants. Microprudential and conduct supervision is exercised at EU level by the ESAs and NCAs. In the area of capital markets law, the relevant authorities are the European Securities and Markets Authority (ESMA) and, in Germany, BaFin.

25 While capital markets legislation is dominated by EU legislative acts (see para. 23 above), regulatory supervision is almost completely the domain of NCAs. NCA competence includes, in particular, the authorization of investment firms and regulated markets, the approval of securities prospectuses, and the supervision of market transactions, disclosure obligations, and public enforcement through financial sanctions etc. Domestic regulatory practice therefore continues to play an important role. For example, guidelines issued by BaFin – most prominently, the "*Emittentenleitfaden*" – are an essential tool for market participants and their advisors.[34]

1.4.3 ECJ Case Law

26 The importance of EU legislation in the area of capital market law comes with a crucial role for the European Court of Justice, in particular, under articles 263, 267 TFEU. According to article 263(1) TFEU, the ECJ reviews the legality of legislative acts as well as of certain types of acts of EU bodies (in particular, the Council, the Commission, and the European Parliament). Review under article 263 is subject to a time limit, but even outside the time limit, individual parties can plead the grounds under article 263(2) TFEU (lack of competence, infringement of essential procedural requirements, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers) in order to invoke the inapplicability of the act in question.[35] In addition, pursuant to article 267(1) TFEU, the ECJ has jurisdiction to give preliminary rulings concerning the interpretation of the treaties and on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Under that provision, domestic courts routinely refer questions of EU law to the ECJ.

> **Case Study 7.** Based on article 16 ESMA Regulation, the European Securities and Markets Authority issues a set of "Guidelines" on how issuers should disclose and treat "Alternative Performance Measures". BaFin declared it intends to comply with these guidelines. You are in-house counsel with a company listed in Germany and are asked to advise on whether you could challenge the guidelines before the ECJ. (Case C-911/19, *Fédération Bancaire Française v. Autorité de contrôle prudentiel et de résolution*)
>
> **Notes.**

[34] Available online at https://www.bafin.de/DE/Aufsicht/BoersenMaerkte/Emittentenleitfaden/emittentenleitfaden_node.html, accessed 11 Jun 2025.
[35] Article 277 TFEU.

1.5 Recent developments

27 Capital market law is an area which is almost constantly subject to legislative review and reform. In recent times, capital markets regulation has been affected by policy concerns of sustainability, in particular following the Paris Climate Change Agreement 2015 and the UN 2030 Agenda for Sustainable Development. This resulted in specific legislation in the area of sustainable finance, e.g., sustainability-related disclosure requirements for financial markets participants under the Sustainable Finance Disclosure Regulation (SFDR), the Taxonomy Regulation defining what counts as sustainable activities, the requirement for companies to disclose information on sustainability aspects of their business activities under the Non-Financial Reporting Directive (NFRD) as modified by the Corporate Sustainability Reporting Directive (CSRD), and the European Green Bonds Standard Regulation introducing requirements for bonds labelled as "green". At the domestic level in Germany, the "*Zukunftsfinanzierungsgesetz*" modified the corporate law regime which now allows for subscription rights to be excluded for capital increases of up to 20%, shares with multiple vote, use of German stock companies as SPAC vehicles, and digital shares.[36] The subsequent "*Zukunftsfinanzierungsgesetz II*" was not passed by the 2021-2025 Bundestag, and it remains to be seen whether some of the reform proposals will be picked up by the new government.

28 Current reform initiatives at EU level pursue the Commission's overarching objective of a "Capital Markets Union".[37] The "EU Listing Act" aims at contributing to that project. It is a package of measures meant to review the Prospectus Regulation, Market Abuse Regulation, Markets in Financial Instruments Regulation and Directive (MiFIR/MiFID II), and to introduce a new Directive on multiple-vote share structures. The relevant regulations and directives were published in the Official Journal on 14 November 2024 (Regulation (EU) 2024/2809, Directive (EU) 2024/2810, and Directive (EU) 2024/2811). It is important to note that some of the provisions of the EU Listing Act will take effect only after 2025 and are not yet reflected in the consolidated versions available on the EU legislative portal (https://eur-lex.europa.eu/advanced-search-form.html).

29 Other examples of legislative reform include Regulation (EU) 2024/3005 governing ESG Rating Activities and making them subject to supervision by ESMA, and Regulation (EU) 2023/2859 establishing a European single access point ("ESAP"). The ESAP will be implemented from 2026 on and make available all information made public by regulated entities (listed companies, institutional investors, asset managers, market operators, proxy advisors, etc.), providing centralised access to publicly available information of relevance to financial services, capital markets and sustainability.

30 Cases with capital market relevance currently pending before the ECJ include: C-229/24 (hearing scheduled for 3 April 2025), C-363/24, and C-376/24 (hearing scheduled for 3 April 2025).

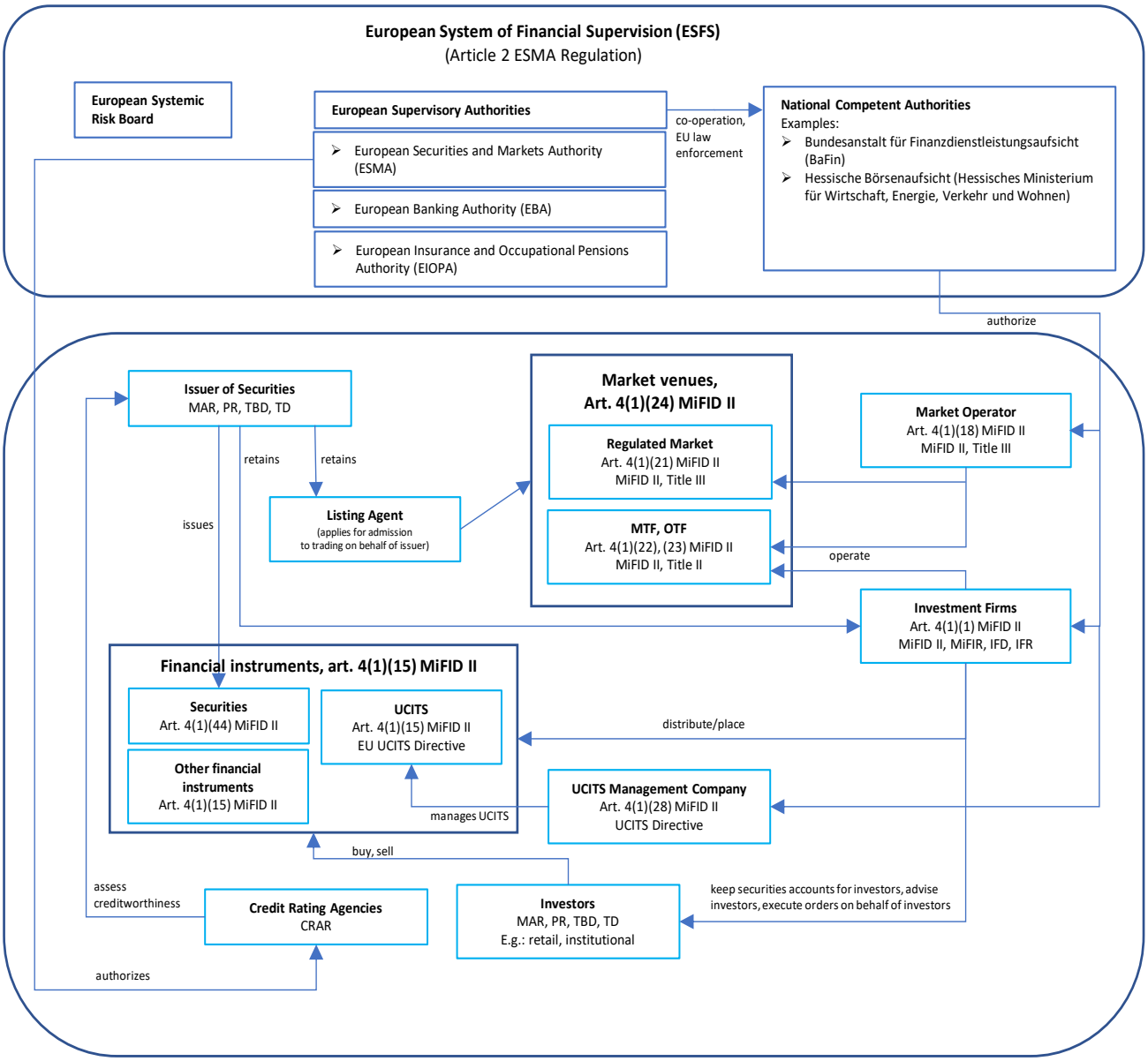
1.6 Reading assignment: Capital Market Law at a Glance

An example of a recent capital market transaction is the issuance of a subordinated bond by Allianz in 2022 (ISIN: DE000A30VJZ6). Have a look at the "cover page" of the prospectus for this

[36] §§ 186(3), 135a AktG n.F., §§ 44ff. BörsG n.F., § 1 eWpG n.F. For details, see Florstedt, "Das Zukunftsfinanzierungsgesetz – Erleichterte Eigenkapitalaufnahme, elektronische Aktie, und weitere Reformthemen" (2024) *NZG* 179–184.

[37] See https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union_en, accessed 11 Jun 2025.

transaction, i.e., pages 1–2 of the prospectus available online: https://www.luxse.com/pdf-viewer/102975801. Which of the categories of capital market participants appearing in the chart below were involved in the transaction, and who are they?



Abbreviations: CRAR = Credit Agency Regulation EBA = European Banking Authority EIOPA = European Insurance and Occupational Pensions Authority ESFS = European System of Financial Supervision ESMA = European Securities and Markets Authority IFD = Investment Firm Directive IFR = Investment Firm Regulation MAR = Market Abuse Regulation MiFID II = Markets in Financial Instruments Directive II MIiFIR = Markets in Finacial Instruments Regulation TBD = Takeover Bid Directive TD = Transparency Directive UCITS = Undertakings for Collective Investments in Transferable Securities

Note: This is a simplified overview on key elements covered in this course manual. Major players not reflected in this chart include: financial analysts, ESG rating agencies, central counterparties, and central securities depositories.

2 CAPITAL MARKET INSTRUMENTS AND CAPITAL MARKET PARTICIPANTS

2.1 Capital Markets Instruments

2.1.1 Overview

31 Financial instruments traded on capital markets cover a range of different categories. As we have seen in chapter 1 (paras 3f.), the most important instruments are:

- shares,
- bonds,
- units in UCITS and other investment funds, and
- derivative instruments referenced to other instruments (e.g., shares) or some other external factor such as an index or an exchange rate.

The MiFID II financial instruments can exist outside capital markets, following the general rules applying to stock companies, debt instruments, and contractual arrangements: as an example, think of an investor holding unlisted shares or unlisted bonds. Whenever these instruments are traded on capital markets, specific rules apply. This chapter illustrates the interplay between the different areas of law in the context of capital market transactions, in particular, as regards shares and bonds (sections 2.1.2 and 2.1.3 below), and basic features of other instruments.

32 It is important to bear in mind that only some financial instruments qualify as "transferable securities" within the meaning of article 4(1)(44) MiFID II. The MiFID II definition of transferable securities refers to "classes of securities which are negotiable on the capital market",[38] which implies transferability, fungibility, and standardization of these instruments. Some EU instruments on capital market law cover financial instruments at large (e.g., the MAR), while others only attach to transferable securities (e.g., the PR). It is worth noting in this context that the traditional concept of "*Wertpapiere*" under German domestic law (*Inhaber-, Order-, Namenspapiere*) is different from the EU law concept of "transferable securities" under article 4(1)(44) MiFID II and the corresponding implementing provision in § 2(1) WpHG.[39]

> **Case Study 8.** Holding Communal is a Belgian company established in 1860 for the financing of local authority investments in Belgium. Pursuant to Belgian law, only Belgian municipalities and provinces can be shareholders of Holding Communal, and transfer of shares is subject to approval of the board of Holding Communal. In the context of the 2008 financial crisis, Holding Communal proposed to shareholders to subscribe to a capital increase by contributions in cash. Does this require the publication of a securities prospectus? (Case C-627/23, *Commune de Schaerbeek and Commune de Linkebeek v. Holding Communal SA*)
>
> **Notes.**

[38] Article 4(1)(44) MiFID II, § 2(1) WpHG.

[39] The domestic concept is broader in that it covers instruments regardless of whether they can be traded on capital markets (for example, it includes "*Namenspapiere*"). It is narrower in that it used to require paper certification (§ 793 BGB), which is not required from an EU law perspective (see Case Case Study 10 p. 19 below).

2.1.2 Shares

33 "Shares" are the title of membership that limited liability companies issue to their members, i.e., their shareholders. They can be issued in different types: one common distinction is that of "par" shares (shares indicating a nominal value of the share capital subscribed) and "non-par" shares (with equal participation in the share capital of the company). Another distinction relates to voting rights attached to "ordinary shares", while "preference shares" (or "preferred stock") normally do not carry shareholder voting rights by default. A distinction is also made between "bearer shares" for which there is a presumption that the person in possession of the share certificate is its legal owner, and "registered shares" for which legal ownership is a matter of an entry in the register relating to a particular company.

34 To a large extent, the legal framework for shares derives from domestic company law for public limited companies, e.g., in Germany, primarily from the *Aktiengesetz* (AktG). However, EU legislation harmonizes certain aspects of domestic corporate law. Some instruments at EU level apply to corporate law irrespective of a listing of shares, as is the case for the Company Law Directive (CLD) or the SE Directive. Others apply only to listed companies, for example, the Shareholder Rights Directive (SRD).

2.1.2.1 EU Company Law Directive

35 Following public consultations in 2011 and 2012, the EU Commission developed an Action Plan for European corporate law and corporate governance which lead, in 2017, to the adoption of the EU Company Law Directive. The CLD codifies six previous pieces of legislation on various aspects of corporate law (including mergers and capital maintenance), consolidating these in one single directive. The Directive is divided into two main titles: The first one refers to the general provisions and establishment and functioning of limited liability companies. The second one refers to mergers and divisions of limited liability companies. Public limited liability companies to which this legislation applies are listed in Annex I of the Company Law Directive, which includes, in German law, the *Aktiengesellschaft* governed by the German Act on Stock Companies (*Aktiengesetz*).

36 The typical characteristics of the participation of a shareholder in a stock company is a contribution by the shareholder in cash or in kind which constitutes the capital of the company in return for participation in the profits of the company, together with rights relating to the administration of the company: e.g., voting rights at the general assembly of the company, information rights. One of the key concepts of the CLD in this context is the "principle of maintenance of the capital of the company": the capital of the company constitutes the creditors' security, and therefore it must remain available to satisfy creditors' claims. As a consequence, the CLD prohibits any reduction of the capital by distributions to shareholders with only limited exceptions: Under article 56(1) CLD, the principle is that no distribution to shareholders may be made as long as the net assets (equity) in the company's annual accounts are lower than the amount of subscribed capital[40] or where the distribution would have the effect to reduce net assets below that threshold. This restriction applies, in particular, to the payment of dividends.[41] Any distribution made in breach of capital maintenance

[40] Plus those reserves which may not be distributed under the law or the statutes of the company.
[41] Article 56(4) CLD.

principles shall be returned by shareholders who have received it.[42] The CLD also contains a principle of equal treatment of all shareholders who are in the same position,[43] and makes the acquisition of own shares by the company subject to a number of conditions.[44]

> **Case Study 9.** Defendant D is a German stock company and issues shares on the basis of a listing prospectus stating that the investment is "safe and risk-free" while in reality, D's business involves high-risk operations. H buys shares on the basis of that prospectus and later raises prospectus liability claims on the basis that risk disclosure in the prospectus was incorrect, incomplete, and misleading. Can D defend the claim on the basis that EU company law limits the distribution of funds to shareholders and that H should only be allowed to recover damages from defendants other than the company itself? (Case C-174/12, *Hirmann v. Immofinanz AG*. – Note: The Capital Directive referred to in the decision was repealed by the CLD – the CLD correlation table will point to the relevant provisions currently in force. Also see Case C-410/20, *Banco Santander SA v. J.A.C.*; BGH, 31 May 2011, II ZR 141/90, BGHZ 190, 7 and, in the context of insolvency proceedings, OLG München, 17 September 2024, 5 U 7318/22 e, *Wirecard*)
>
> **Notes.**

2.1.2.2 EU Shareholder Rights Directive

37 The EU Shareholder Rights Directive establishes rules promoting the exercise of shareholder rights at general meetings of companies with registered offices in the EU. Its scope of application is more restricted than that of the CLD in that the SRD only applies to companies the shares of which are admitted to trading on a regulated market in the EU.[45] As revised in 2017, the SRD aims to encourage long-term shareholder engagement to ensure that decisions are made for the long-term stability of a company and take into account environmental and social issues. Key points include:

- information a company must give shareholders on general meetings, including total number of shares and voting rights, documents to be submitted, a draft resolution for each agenda item of the meeting, and forms to be used to vote by proxy (article 5 SRD);
- shareholders' rights to
    - put items on the agenda of general meetings and to propose resolutions if they have a 5% holding in the company's capital;
    - ask questions related to items on the agenda that the company is obliged to answer; and
    - participate and vote without limitations other than the qualifying date set by a company for owning shares (articles 6 and 9 SRD);
- abolishment of restrictions on shareholders participating at meetings through electronic means (article 8 SRD);

[42] Article 57 CLD.
[43] Article 85 CLD.
[44] Article 60 CLD.
[45] Article 1(1) SRD.

- a say on pay of directors and a right for shareholders to vote on director remuneration policy at least every 4 years (article 9a SRD) together with public disclosure of the remuneration policy and related reports (article 9b SRD);
- the right for companies to identify their shareholders and obtain information on shareholder identity from any intermediary who holds that information (article 3a SRD);
- facilitation of shareholder rights, e.g., rules that make it easier for shareholders resident in one EU country to participate and vote in general meetings in another EU country (article 3c SRD);
- related party transactions: any material transaction between a listed company and a related party must be publicly announced, subject of a fairness assessment, and approved by shareholders or the board (article 9c SRD);
- transparency as regards policies adopted by institutional investors, asset managers and proxy advisers vis-à-vis companies covered by the directive (articles 3g ff. SRD).

2.1.3 Bonds

38 "Bonds" – also referred to as "notes" – are the unilateral promise of the issuer to the bondholder to make a certain performance, typically, repayment of the principal and payment of interest. In economic terms, a bond corresponds to a loan agreement, but unlike a loan agreement, a bond will not create obligations for the bondholder/creditor. While the EU legislator deals extensively with shareholder rights, as seen above, substantive rights of bondholders are not subject to a comparable legal regime at EU level which leaves regulation largely to domestic legislators. In German law, the traditional rules for bonds ("*Schuldverschreibungen*") are contained in §§ 793–808 BGB, with legislative reform introducing modern concepts such as digital securities.[46]

> **Case Study 10.** C, a German stock company, proposes an investment in "tokens". These tokens are described as instruments "using blockchain technology" and "representing a security with features of a structured bond with a maturity date in 2043". The purpose of this Security Token Offering is to raise funds from the public, which will essentially serve as funding the acquisition of a portfolio of commercial and residential real estate objects in European countries. Do the "tokens" qualify as "securities" under article 4(1)(44) MiFID II?
>
> **Notes.**

39 German law makes a distinction made between bearer notes (*Schuldverschreibung auf den Inhaber*, § 793 BGB), and registered notes (*Namensschuldverschreibung*, § 806 BGB). In the case of bearer notes, possession of the certificate is sufficient to claim payment, and payment to the person in possession will liberate the issuer from its obligations.[47] By contrast, registered notes require payment to the person in whose name the notes are registered or whose name is indicated in the note. Obligations under a bond depend on the terms and conditions used by the issuer, and accordingly, can vary from the typical obligations for an issuer to repay principal at maturity and interest. For

[46] *Gesetz zur Einführung von elektronischen Wertpapieren*, eWpG.
[47] § 793(1) BGB.

example, a convertible bond (*Wandelanleihe*, *Wandelschuldverschreibung*) entitles the bondholder to convert the bond into equity of the issuer. Where the exchange right is for equity of another company than that of the issuer, such bonds are referred to as "exchangeable bonds" (*Umtauschanleihen*). A zero bond (*Nullkuponanleihe*) is a bond where the terms and conditions do not provide for interest to be paid.[48] The rights of the bondholders are determined by the terms and conditions under which the bond is issued.

> **Case Study 11.** In 1997, Argentina issued 8% notes due in 2009 with a total principal amount of DEM 1bn. The notes were governed by German law. In 2002, Argentina declared a national emergency due to a general economic crisis in the country and suspended all payments. It later offered bondholders a restructuring arrangement, involving significant "hair-cuts" for the bondholders in return for a lift of the moratorium on payments. 92% of the bondholders accepted the offer. B is a bondholder who turned down the restructuring offer. Can he claim redemption of the bond at maturity at par? (BVerfG, 3 July 2019 – 2 BvR 824/15, ZIP 2019, 1472 and BGH, 24 February 2015 – XI ZR 193/14, ZIP 2015, 769)
>
> **Notes.**

40 Under certain conditions, a specific German statute (*Schuldverschreibungsgesetz*, SchVG) allows for terms and conditions of a bond to be modified by majority resolution. The law applies to any series of fungible notes issued under German law.[49] The terms and conditions of such notes can provide for an option to modify any of the terms and conditions by majority resolution.[50] Where the resolution aims at a modification of the terms and conditions that is *material*, it has to be passed by a majority of 75% of the votes.[51] A majority resolution will be binding on all noteholders, including those who did not agree to the resolution.[52]

> **Case Study 12.** Issuer I issued "registered notes" without certification through physical notes and without registration under eWpG. The terms and conditions allow noteholders to modify all terms and conditions of the notes through a resolution by majority. A noteholder meeting passes a resolution granting I the right to convert the notes into equity instead of redemption at par. Noteholder N wants to claim payment. (BGH, 16 January 2020 – IX ZR 351/18, NJW 2020, 986 – *Deutsche Oel & Gas*; BGH, 18 January 2024 – III ZR 245/22, NZG 2024, 349 – *US Öl & Gas*)
>
> **Notes.**

41 Reflecting the general requirement of equal treatment under § 4 SchVG, any resolution that does not provide for equal conditions for all creditors is invalid.[53] Details of the process for passing

[48] Typically, a zero bond will be issued at a price "below par" and be repaid "at par" at maturity. The difference between issue price and redemption price will correspond economically to the hypothetical interest rate for a comparable transaction.
[49] § 1(1) SchVG. An important exception relates to notes issued by German public bodies, § 1(2) SchVG.
[50] § 5(1) SchVG.
[51] § 5(4)(2) SchVG.
[52] § 5(2)(1) SchVG.
[53] § 5(2)(2) SchVG.

resolutions are contained in §§ 6–22 SchVG which follow, by and large, the rules for arranging and conducting shareholder meetings under German stock company law.

> **Case Study 13.** Issuer I issued notes due in 2011, granting investors the option to convert their notes into equity during the two months preceding the redemption date in 2011. In 2011, a noteholder meeting passes the following resolution: "(i) The maturity and redemption date is moved to 31 August 2015, and the conversion option is extended until that date. (ii) Noteholders who voted in favour of this resolution are entitled to claim redemption prior to 31 August 2015 if they waive their conversion right." Noteholder N voted against the resolution. Can he claim redemption of the notes at par in 2011? (BGH, 1 July 2014 – II ZR 381/13, BGHZ 202, 7 = NZG 2014, 1102)
>
> **Notes.**

2.1.4 Investment funds

42 Investment funds are vehicles that pool funds originating from a number of investors which are then invested collectively for the account of the fund investors under a common investment policy. The fund investors receive "fund units" in return for their cash contribution, and the fund management ("asset manager") will in turn invest the cash received on behalf of the fund – for example, in shares and/or bonds. The value of the fund units, and pay-outs to the holders of the fund units, will reflect the performance of the investments of the fund.

43 A specific type of investment fund is a "UCITS" fund (UCITS stands for "undertaking for the collective investment in transferable securities"). UCITS funds pool investments in "transferable securities" within the meaning of article 4(1)(44) MiFID II. The units of a UCITS fund qualify in turn as financial instruments within the meaning of article 4(1)(15) MiFID II. Also see section 2.2.4, p. 28 below.

2.1.5 Derivatives

44 Derivatives are arrangements that provide for performance at fixed terms at a future date (as opposed to spot transactions performed immediately). Examples include:

- futures and forwards, i.e. an irrevocable sale of a security (a share or a bond) at a determined price to be settled at a specific date in the future.
- options, i.e., a unilateral right to purchase or sell the underlying security (typically, a share) at a specific price at a certain point of time or during a certain period, and
- swaps.

Derivatives are referred to as "physically settled" where there is effective a delivery of the underlying security, and as "cash-settled", where the transaction is settled by cash payment.

45 Like securities, derivatives can be traded on a regulated market (a "futures market" such as Eurex in Germany) or off-market, i.e., "OTC". Trading on a regulated market depends on admission of the relevant instrument[54] which follows the rules of the relevant exchange (such as the *Eurex Börsenordnung*). OTC derivatives are routinely contracted under "master agreements". Master

[54] E.g., in Germany, pursuant to § 23 BörsG.

agreements of particular importance are the "ISDA Master Agreement", which is provided by the International Securities and Derivatives Association, and the "*Deutscher Rahmenvertrag*". The specific risks associated with derivative contracts are regulated at EU level through the European Market Infrastructure Regulation (EMIR).

46 There is some overlap between the concept of "derivatives" and "transferable securities": In fact, some derivatives can be arranged in such a way that they qualify as "securities" within the meaning of article 4(1)(44) MiFID II, e.g., where these derivatives take the form of a bond. Where derivatives qualify as securities, they are subject to the same rules as other transferable securities (e.g., as regards prospectus requirements and admission to trading).

2.2 Capital Market Participants

2.2.1 Overview

47 This chapter gives an overview on capital market participants and how EU capital market law regulates their activities. Capital market participants are the market players engaging in primary and secondary market transactions: Primary market transactions typically involve issuers of securities as sellers, and investors as buyers of securities. By contrast, secondary transactions are transactions among investors, and such transactions typically take place on MiFID II trading venues (see section 1.2.2.1 p. 6 ff. above). Secondary market transactions can also occur outside such venues, e.g., through bilateral transactions traditionally referred to as "over the counter" or "OTC".

48 In practice, both primary and secondary market transactions involve not only issuers and investors, but routinely rely on various types of financial services offered by institutions that help matching supply of and demand for capital. The category of providers of financial services includes:

- Service providers operating under MiFID II, i.e.
    - MiFID II investment firms; and
    - operators of MiFID II regulated markets;
- investment funds and investment fund managers;
- credit rating agencies;
- central counterparties;
- central securities depositories; and
- ESG rating agencies.

This chapter will give an overview on the legal framework applying to issuers, investors, and other prominent players on capital market such as investment firms, investment funds and their managers, and credit rating agencies. For regulated markets, see section 1.2.2.1.1, p. 6 above.

2.2.2 Issuers and investors

49 "Issuers" of securities are (re-)financing their activities through the issuance process. No particular qualification is necessary for an entity to issue securities, and issuers include both private and public institutions, e.g., private companies, public companies, states and local governments, international institutions such as the European Investment Bank. However, the process of issuing securities can

come with a number of capital market requirements for issuers involved. The most important ones are the following:

- securities prospectuses for an offer to the public and for admissions to trading on regulated markets (chapter 3);
- disclosure of inside information (chapter 4);
- disclosure of periodic information, e.g., annual reports, and ongoing information, e.g., information relating to major shareholders (chapter 5); and
- duties in the context of takeover bids and delisting (chapter 6).

50 "Investors" are the persons providing financing to issuers by buying their securities, or providing liquidity to other investors by buying the securities in which they are invested. Aspects of capital market regulation relevant for investors include the following:

- restrictions or prohibitions of certain types of transactions, e.g., the prohibition of insider dealing (chapter 4);
- notification of major holdings (chapter 5); and
- rights in the context of takeover bids (chapter 6).

51 Capital market law often differentiates between different categories of investors, depending on their experience. For example, under the Prospectus Regulation, there are exemptions from prospectus requirements for offering securities to "qualified investors". Under MiFID II, requirements in the context of investment services are reduced where these are provided to "professional clients".[55]

2.2.3 Financial service providers under MiFID II

52 MiFID II provides the framework for two major types of financial service providers: investment firms (title II) as well as regulated markets and their operators (title III). See section 1.2.2.1.1 p. 6 above.

2.2.3.1 Investment firms and investment services

2.2.3.1.1 Definition of investment firm and investment services

53 Article 4(1)(1) MiFID II defines investment firms as "any legal person 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." These investment services and activities are listed in Annex I Section A of MiFID II and are linked to virtually any imaginable type of capital market transactions (see box on the right). Section B of Annex I defines the scope of "ancillary services".

MiFID II Investment Services

(1) Reception and transmission of orders in relation to one or more financial instruments;
(2) Execution of orders on behalf of clients;
(3) Dealing on own account;
(4) Portfolio management;
(5) Investment advice;
(6) Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis;
(7) Placing of financial instruments without a firm commitment basis;
(8) Operation of an MTF;
(9) Operation of an OTF.

[55] Article 2(e)(i) PR, article 4(1)(11) in conjunction with articles 24(3), (4), 25(2), (3) MiFID II.

2.2.3.1.2 Prudential framework for investment firms

54 Due to the importance of investment firms for the functioning of the capital markets, particular attention is paid by EU regulators to the framework for financial safety and stability of institutions and the broader financial system, also referred to as the "prudential framework". The prudential framework for investment firms depends on their categorization: large investment firms (class 1 firms) are treated as credit institutions and are subject to the prudential requirements of the banking sector under the CRD IV and CRR. Other investment firms (class 2 and class 3 firms) fall under the prudential regime of the Investment Firms Regulation (IFR) and the Investment Firms Directive (IFD). These requirements are implemented in Germany through the *Kreditwesengesetz* (KWG) and the *Wertpapierinstitutsgesetz* (WpIG).

2.2.3.1.3 Operating conditions for investment firms under MiFID II

55 The provision of investment services is regulated at EU level through the level 1 texts MiFID II and MiFIR and the level 2 technical standards. The core framework is title II of MiFID II, dealing with the authorization and the operating conditions for investment firms (articles 5 – 43 MiFID II). This framework is implemented in Germany by the *Wertpapierhandelsgesetz* (WpHG), the *Wertpapierdienstleistungs-Verhaltens- und -Organisationsverordnung* (WpDVerOV), and BaFin's "*Rundschreiben zu den Mindestanforderungen an die Compliance-Funktion und die weiteren Verhaltens-, Organisations- und Transparenzpflichten für Wertpapierdienstleistungsunternehmen*" (MaComp).

2.2.3.1.3.1 Conditions and procedures for authorization (title II, chapter I MiFID II)

56 The conditions and procedures for the authorization of investment firms are dealt with by chapter I of title II MiFID II (articles 5 – 20 MiFID II). The provision of investment services and the performance of investment activities as a regular occupation or business on a professional basis is subject to prior authorization by the competent authority of the home member State.[56] Subject to the requirements of articles 34ff. MiFID II, investment firms and credit institutions authorized in an EU Member State may provide investment services and/or perform investment activities as well as ancillary services throughout the EU, provided that such services and activities are covered by their authorization.[57] The cross-border effect of authorizations or approvals of NCAs across the EU is often referred to as "passporting".

57 Home Member States shall require that investment firms comply with the organizational requirements laid down in articles 16 and 17 MiFID II (article 16(1) MiFID II). These requirements include a system of adequate policies and procedures to ensure that an investment firm's managers, employees and tied agents comply with MiFID II requirements.[58] In particular, a firm has to maintain and operate organizational and administrative arrangements that prevent conflicts of interests

[56] Article 5(1) MiFID II. It should be noted that credit institutions authorized under Directive 2013/36/EU do not need another authorization under MiFID II in order to provide investment services or perform investment activities (recital (38) MiFID II), and the authorization of a market operator under MiFID II implies authorization of the investment services as MTF and OTF operator (article 5(2) MiFID II).
[57] Article 34(1) MiFID II.
[58] Article 16(2) MiFID II, articles 21, 22, 25, 26 – 32 Delegated Regulation 2017/565. For implementation in German law, see § 80(1) No. 1 WpHG.

from affecting the interests of the firm's clients.[59] It has to take reasonable steps to ensure business continuity and regularity,[60] avoid undue operational risks when outsourcing critical operational functions to third parties, and keep records of all services, activities and transactions undertaken by it in a way sufficient to ascertain compliance with obligations with respect to potential and existing clients and the integrity of the market.[61]

58 Specific requirements apply to investment firms that "manufacture financial instruments for sale to clients". Manufacturers have to maintain, operate and review a "process for the approval" of financial instruments,[62] a requirement often referred to as "product governance". For the purpose of product governance, manufacturers include "investment firms that create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments".[63] In their product approval process, manufacturers shall specify an "identified target market of end clients" for each financial instrument, identify relevant risks for the target market, and make sure the distribution strategy is consistent with the identified target market.[64] Manufacturers must make available information on the product approval process to distributors, and distributors must make sure they obtain product approval process information.[65]

2.2.3.1.3.2 Operating conditions (title II, chapter II MiFID II)

59 The operating conditions for the provision of investment services are dealt with by title II, chapter II of MiFID II (articles 21–33 MiFID II). The general provisions of this chapter require that an investment firm complies at all times with the conditions for initial authorization as described in paras 56 ff. above.[66] Compliance with these conditions and the operating conditions under MiFID II is monitored by the national competent authorities.[67]

60 The operating conditions deal extensively with conflicts of interests and other issues of investor protection: Article 23(1) MiFID II requires firms to take all appropriate steps to identify, and prevent or manage conflicts of interests between themselves and their staff or associated persons on the one hand and their clients on the other, or between clients. Where risks of damage to client interests cannot be prevented with reasonable confidence, this has to be clearly disclosed to clients (general nature of conflicts of interest, mitigation steps taken), article 23(2) MiFID II.

61 General principles of investor protection are contained in article 24 MiFID II (implemented in German law in § 63 WpHG). As a general rule, an investment firm must act honestly, fairly and professionally in accordance with the best interests of its clients.[68] An investment firm shall assess the compatibility of the financial instruments with the needs of its clients, taking account of the target market identified in the product approval process (see para. 58 above), and ensure that financial instruments are offered or recommended only when this is in the interest of the client.[69] All

[59] Article 16(3)(1) MiFID II, articles 33 ff. Delegated Regulation 2017/565. For implementation in German law, see § 80(1) No. 2 WpHG.
[60] Article 16(4) MiFID II.
[61] Article 16(6) MiFID II.
[62] Article 16(3)(2) MiFID II.
[63] Recital (15) of Commission Delegated Directive (EU) 2017/593 of 7 April 2016.
[64] Article 16(3)(3) MiFID II.
[65] Article 16(3)(5), (6) MiFID II.
[66] Article 21(1) MiFID II.
[67] Article 21(2), 22(1) MiFID II.
[68] Article 24(1) MiFID II.
[69] Article 24(2) MiFID II.

information that an investment firm addresses to clients or potential clients shall be fair, clear and not misleading.[70] It must include specific details relating to investment advice provided, financial instruments and proposed investment strategies, as well as costs and associated charges.[71] Such information must be comprehensible so that recipients are reasonably able to understand the nature and risks of the investment service and the specific type of financial instrument offered.[72]

62 Under MiFID II, investment firms must assess the suitability of products and appropriateness of services (article 25 MiFID II, § 64 WpHG). To that end, firms must make sure that natural persons involved have the necessary knowledge and competence.[73] When providing investment advice or portfolio management, a firm must obtain information on the client's knowledge and experience that enables it to recommend services and instruments "suitable" to the particular client (in particular, as regards risk tolerance and loss bearing ability).[74] In the context of services other than advice and portfolio management, firms must obtain information enabling it to assess whether the service is "appropriate" for the client.[75]

63 The operating conditions are somewhat attenuated where an investment firm provides services to professional clients as defined in Annex II MiFID II. Most importantly, the suitability assessment required under article 25(2) MiFID II does not apply to services provided to professional clients, unless they inform the investment firm that they wish to benefit from the rights provided for in those provisions.[76] Even less stringent conditions apply to eligible counterparties, in particular investment firms, credit institutions, insurance companies as well as UCITS and their management companies.[77] Investment firms authorized to execute client orders, to deal on own account, and/or to receive and transmit orders may enter into transactions with eligible counterparties without being obliged to comply with most of the operating conditions under articles 24 and 25 MiFID II.[78]

2.2.3.2 Enforcement regime

64 Public enforcement of MiFID II requirements takes place primarily through NCAs monitoring investment firms' compliance with conditions for initial authorization and with operating conditions (see paras 56ff. and 59ff. above). As regards supervisory powers, article 69(2) MiFID II requires domestic legislation to confer a vast array of powers to NCAs, including access to documents and data, on-site inspections or investigations, auditor or expert investigations, orders for the temporary or permanent cessation of practice or conduct in breach of MiFIR or legislation implementing MiFID II, measures to ensure compliance with legal requirements, suspend trading in a financial instrument. Similar provisions exist under other major EU legislative acts in the area of capital markets law.[79]

[70] Article 24(3) MiFID II, article 44 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.
[71] Article 24(4) MiFID II, articles 45–51 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.
[72] Article 24(5) MiFID II.
[73] Article 25(1) MiFID II.
[74] Article 25(2) MiFID II, articles 54, 55 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.
[75] Article 25(3) MiFID II, articles 55, 56 Commission Delegated Regulation (EU) 2017/565 of 25 April 2016.
[76] Article 29a(2) MiFID II.
[77] Article 30(2) MiFID II.
[78] Article 30(1) MiFID II.
[79] E.g., article 32 PR, article 23 MAR.

65 Sanctions for infringements are dealt with by article 70 MiFID II. Typical sanctions include public statements as regards infringements, cease and desist orders as well as administrative fines.[80] In case of legal persons, the maximum amount of fines is turn-over related.[81] Just like for supervisory powers, the MiFID II sanction regime corresponds to those available under similar capital markets law instruments.[82]

66 In addition, MiFIR provides a basis for product intervention in favour of NCAs and ESMA. Under article 40(1), 42(1) MiFIR, NCAs and ESMA may temporarily prohibit or restrict the distribution of certain financial instruments or certain categories of financial instruments, or a specific type of financial activities or practices. This power exists where the proposed intervention addresses a significant investor protection concern or a threat to financial markets or to the stability of the EU financial system, provided that applicable regulatory requirements under EU do not address such threat.[83] ESMA may make use of product intervention powers only where NCAs failed to take action adequately addressing the threat.[84]

67 Civil enforcement as regards damage claims against investment firms breaching investor protection requirements, e.g., under articles 24 and 25 MiFID II, is not addressed by MiFID II. Accordingly, civil enforcement depends on the application of domestic rules.

Note: In an international context, a conflict of law analysis is necessary to determine the applicable substantive law under the Rome I and Rome II Regulations, and jurisdiction under the Brussels Ia Regulation. On these issues, see Case C-304/17, *Löber*, and Case C-375/13, *Kolassa*.

A. Contractual liability for mis-selling/investment services

- I. Contract for investment services (e.g., investment advice, or provision of information on financial instruments)
- II. Breach of contractual duties
  - 1. MiFID requirements (e.g., articles 16, 23–25 MiFID II, §§ 63ff. WpHG)
    - a) Breach of MiFID II requirements
    - b) Is a breach of MiFID II a breach of contract? Implications of EU law principles of equivalence and effectiveness (cf. *Genil 48* and BGH, BKR 2014, 32)
  - 2. Breach of implied duties
- III. Negligence
- IV. Causal link and burden of proof
- V. Damages, §§ 249ff. BGB

B. Tort claims (e.g., § 823(2), § 826 BGB)

Case Study 14. On recommendation from its bank B, Genil 48, a Spanish company, enters into an interest swap agreement to protect itself against variations in interest rates affecting other financial products subscribed by Genil 48 with B. Prior to the transaction, B does not carry out the assessment under article 25(2) and (3) MiFID II. Does EU law determine contractual consequences in case an investment firm does not comply with MiFID II requirements? (Case C-604/11, *Genil 48 SL v. Bankinter SA* – Note: the ECJ decision refers to MiFID I; correlation table: Annex IV MiFID II)

Notes.

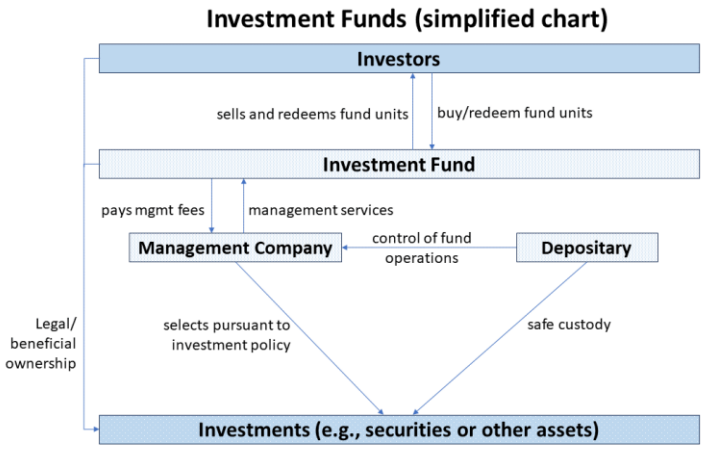
[80] Article 70(6)(a), (b), (f) MiFID II.
[81] Article 70(6)(f) MiFID II.
[82] E.g., article 38 PR, article 30 MAR.
[83] Articles 40(2)(a), (b), 42(2)(a), (b) MiFIR. For an example, see the BaFin order of 30 September 2022, WA 35-Wp 5427/00001#00273).
[84] Article 40(2)(c) MiFIR.

Under German domestic law, civil enforcement claims can be framed as a breach of express or implied contractual duties to provide advice or information under a service contract, and as tort claims (see the box above). While courts have been restrictive in treating MiFID requirements as protective norms for the purpose of § 823(2) BGB, some legal writers argue in favour of extending the scope of tort liability on the basis that public enforcement risks being insufficient to protect investors.[85]

68 There is some debate to which extent investors seeking to enforce damage claims should be able to rely on documents in the possession of regulators and supervisory bodies. As a general rule, article 76(1) MiFID II prescribes a principle of secrecy.[86] It allows for disclosure only under the limited exceptions expressed in that provision.[87] Disclosure under article 76(2) for the purpose of civil or commercial proceedings requires precise and consistent evidence that the information is relevant for the litigation in question.[88]

2.2.4 Investment funds and management companies

69 Investment funds play an important role in matching supply and demand of capital: they pool capital from a number of investors which is then used to invest under a collective investment strategy. EU law deals with investment funds primarily on the basis of two instruments, namely, the UCITS Directive and the AIFM Directive. The former deals with "Undertakings for the Collective Investment in Transferable Securities" (UCITS) which are defined in article 1(2) of the UCITS Directive as undertakings with the sole object of collective investment in transferable securities or other liquid financial assets of capital raised from the public, which operate on the principle of risk-spreading and with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Any investment fund that does not qualify as a UCITS, is an "Alternative Investment Fund" (AIF).[89] EU law relating to investment funds is implemented in Germany in the *Kapitalanlagegesetzbuch* (KAGB).



70 UCITS may be structured in accordance with contract law (as common funds managed by management companies), trust law (as unit trusts), or statute (as investment companies).[90] Collective investment undertakings of the closed-ended type and collective investment undertakings raising

[85] Wagner, in: *Münchener Kommentar zum BGB*, 9th ed. 2024, § 823 para. 675ff.
[86] Case C-140/13, *Altmann*, para. 33.
[87] Case C-140/13, *Altmann*, para. 35.
[88] Case C-594/16, *Buccioni*, paras 38, 40.
[89] Article 4(1)(a) AIFMD.
[90] Article 1(3) UCITS Directive.

capital without promoting the sale of their units to the public are excluded from the scope of the UCITS Directive.[91]

71 A UCITS must be authorized to pursue its activities.[92] Such authorization of the UCITS requires that the fund complies with the preconditions laid down in Chapter V of the UCITS Directive, and that the management company is authorized for the management of UCITS in its home Member State. For a UCITS management company to obtain authorization, it must comply, inter alia, with the general operating conditions under article 12 UCITS Directive. These require in particular that a management company has "sound administrative and accounting procedures, control and safeguard arrangements for electronic data processing and adequate internal control mechanisms", and "is structured and organized in such a way as to minimize the risk of UCITS' or clients' interests being prejudiced by conflicts of interest".[93] As an example, article 14b(1)(n), (o) UCITS Directive requires variable remuneration of fund management company employees to be deferred in order to deter them from taking excessive risks on behalf of the fund.

> **Case Study 15.** HOLD is a company the regular business of which is the management of UCITS and AIFs. It has a remuneration policy that applies to individuals holding the office of, respectively, managing director, investment manager and portfolio manager. These individuals also hold shares in HOLD and receive dividends. Do these dividends circumvent the UCITS Directive rules on deferred payment of performance-based remuneration? (Case C-352/20, *HOLD Alapkezelő Befektetési Alapkezelő Zrt. v. Magyar Nemzeti Bank*)
>
> **Notes.**

72 The UCITS Directive includes provisions on the depositary, i.e., the institution trusted with the safe-keeping of the securities (chapter IV), funds structured as investment companies (chapter V), merger of UCITS (chapter VI), the investment policies of UCITS (chapter VII), master-feeder structures (chapter VIII), information for investors, in particular, prospectuses and periodical reports (chapter IX) together with general obligations of UCITS (chapter X). The AIFM Directive contains rules for the authorization, operation, and transparency of the managers of alternative investment funds (AIFMs),[94] much like the UCITS Directive does for UCITS management companies. However, the AIFM Directive does not establish rules applicable to AIFs and their organization which remains the remit of domestic legislators.

2.2.5 Credit rating agencies

73 Credit rating agencies provide an important service to market participants in assessing the financial robustness and creditworthiness of issuers and the credit risks associated with financial instruments. In the EU, these activities are regulated under the Credit Rating Agencies Regulation (CRA Regulation). The CRA Regulation introduces a common regulatory approach in order to enhance the integrity, transparency, responsibility, good governance and independence of credit rating activities, contributing to the quality of credit ratings issued in the Union and to the smooth functioning

[91] Article 3 UCITS Directive.
[92] Article 5(1) UCITS Directive.
[93] Article 12(2) UCITS Directive.
[94] Article 1(1) AIFMD

of the internal market.[95] It applies to credit ratings issued by credit rating agencies registered in the EU and which are disclosed publicly or distributed by subscription.[96] "Credit rating" means an opinion regarding the creditworthiness of an entity, a debt or financial obligation, debt security, preferred share or other financial instrument, or of an issuer of such a debt or financial obligation, debt security, preferred share or other financial instrument, issued using an established and defined ranking system of rating categories.[97]

74 Title II of the CRA Regulation deals with the issuance of credit ratings and contains operational requirements in relation to this activity. A credit rating agency shall take all necessary steps to ensure that the issuing of a credit rating or a rating outlook is not affected by any existing or potential conflicts of interest or business relationship involving the credit rating agency issuing the credit rating or the rating outlook, its shareholders, managers, rating analysts, employees or any other natural person whose services are placed at the disposal or under the control of the credit rating agency, or any person directly or indirectly linked to it by control.[98] A credit rating agency shall disclose any credit rating or rating outlook, as well as any decision to discontinue a credit rating, on a non-selective basis and in a timely manner.[99] Until disclosure to the public of credit ratings, rating outlooks and information relating thereto, they shall be deemed to be inside information as defined in the Market Abuse Regulation.[100]

75 Title III of the CRA Regulation deals with the surveillance of credit rating activities. A credit rating agency must register with ESMA under articles 14, 15 CRA Regulation, and its activities are then supervised by ESMA under articles 21ff. CRA Regulation. Enforcement measures include penalties and fines under articles 36, 36a CRA Regulation. The regulation makes provision for civil liability: an investor or issuer may claim damages where a credit rating agency commits, intentionally or with gross negligence, any of the infringements listed in Annex III of the CRA Regulation and where this has an impact on a credit rating.[101]

2.3 Reading assignment

Buck-Heeb, *Kapitalmarktrecht*, §§ 1–3, 11–13, 17; Veil, *European Capital Markets Law*, §§ 1–12, 26–34.

[95] Article 1(1) CRA Regulation.
[96] Article 2(1) CRA Regulation.
[97] Article 3(1)(a) CRA Regulation.
[98] Article 6(1) CRA Regulation.
[99] Article 10(1) CRA Regulation.
[100] Article 10(2a) CRA Regulation. The reference in article 10(2a) to Directive 2003/6/EC is to be read as a reference to the MAR (article 37 MAR).
[101] Article 35a(1) CRA Regulation.

3 SECURITIES PROSPECTUSES

3.1 Overview

PR level 2 and 3 texts

The most important level 2 and 3 texts relating to the PR are:

- Commission Delegated Regulation (EU) 2019/980 as regards the format, content, scrutiny and approval of the prospectus
- ESMA Guidelines on Risk Factors (https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf)
- ESMA Q&A PR (https://www.esma.europa.eu/sites/default/files/library/esma31-62-1258_prospectus_regulation_qas.pdf)

For more level 2 and level 3 texts relating to the PR, see: https://www.luxse.com/regulation/prospectus-regime.

All links accessed 11 Jun 2025

76 The placement of securities requires particular arrangements to protect investors: a key instrument for this purpose is adequate disclosure. Such disclosure removes asymmetries of information between investors and issuers and allows investors to make an informed decision prior to investing. Certain offers and admissions to trading are therefore subject to a specific disclosure regime under EU law which requires the publication of a securities prospectus prior to a public offering or an admission of securities to a regulated market. At EU level, a prospectus regime was first introduced in the 1980s through directives.[102] This regime was replaced, in 2017, by the Prospectus Regulation (PR). At level 2, the PR is supplemented, *inter alia*, by Commission Delegated Regulation (EU) 2019/980 as regards the format, content, scrutiny and approval of securities prospectuses.[103] There is also a number of level 3 texts such as *ESMA Guidelines on risk factors under the Prospectus Regulation* and *ESMA Questions and Answers on the Prospectus Regulation*.[104] Implementing legislation in Germany is the *Wertpapierprospektgesetz* (WpPG).

3.2 EU Prospectus Regulation

3.2.1 Prospectus requirements (principles, exceptions; chapter I PR)

3.2.1.1 Securities

77 The scope of the PR is limited to offerings and admissions of "securities" to trading.[105] Pursuant to article 2(a) PR, "securities" within this meaning are transferable securities as defined in article 4(1)(44) MiFID II.[106] Certain types of securities are excluded from the scope of the regulation under article 1(2) PR: An example of practical importance is article 1(2)(b) PR which exempts non-equity securities issued by Member States or a Member State's regional or local authorities and certain international institutions from the regulation. Another example relates to units in UCITS funds and other open-ended funds.[107] Disclosure in the context of distribution of fund units is therefore subject to specific legislation, namely articles 68ff. UCITS Directive and article 23 AIFMD

[102] Council Directive 80/390/EEC of 17 March 1980 (listing particulars for the admission of securities to official stock exchange listing) and Council Directive 89/298/EEC of 17 April 1989 (prospectuses for public offerings). These directives were consolidated by Directive 2003/71/EC 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading.
[103] For other level 2 measures, see: https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook/prospectus-regulation (accessed 11 Jun 2025).
[104] See https://www.esma.europa.eu/regulation/corporate-disclosure/prospectus (accessed 11 Jun 2025).
[105] Articles 1(1), 2(a) PR.
[106] See para. 3 above.
[107] Article 1(2)(a) PR.

(implemented in Germany in the KAGB). For investments that fall outside the scope of EU disclosure requirements, domestic legislators can create dedicated disclosure regimes as is the case in Germany for the *Vermögensanlagengesetz* (VermAnlG) which applies to certain types of instruments not covered by the PR and the UCITS Directive, such as profit participation instruments, subordinated loans, and registered bonds.

3.2.1.2 Public offerings and admissions to trading

78 The Prospectus Regulation covers two scenarios in which prospectuses have to be published: this is the case where securities are offered to the public, and where they are admitted to trading on a regulated market.[108]

79 Article 3(1) PR deals with the publication of a prospectus where securities are offered to the public. An "offer to the public" means a communication presenting sufficient information so as to enable an investor to decide to purchase those securities, including placement of securities through financial intermediaries.[109] Article 1(4) PR exempts certain types of offers from this requirement, *inter alia*, offers addressed solely to "qualified investors",[110] offers addressed to fewer than 150 natural or legal persons,[111] and offers of securities with a denomination per unit of at least EUR 100 000 (sometimes referred to as "wholesale" transactions).[112] The Listing Act added two exemptions for the issuance of fungible securities, allowing for an unlimited offer of fungible securities that have been listed for at least 18 months on a regulated market or an SME growth market, and for a 30%-in-a-year increase in all other cases.[113] In addition to article 1(4) PR, there is a *de minimis* rule that allows Member States to exempt offers with a small volume from prospectus requirements.[114]

> **Case Study 16.** ADCADA is a company governed by Liechtenstein law and has its registered office in Liechtenstein. It is the issuer of the "adcada.money" bonds. On its website https://adcada.money it releases the following information: "100% top-tier business investment – 4.25 to 5.50% annual fixed interest rate – minimum term from 12 months – quarterly interest payments – investment possible from EUR 10 000 – no premium – no agency fees". The webpage includes the following disclaimer: "GET FURTHER INFORMATION HERE". Does this require a prospectus under the PR? Which regulator would approve a prospectus? How do you expect the Liechtenstein regulator to react if no prospectus is approved? (Case E-10/20, *ADCADA Immobilien AG PCC v. FMA*)
>
> **Notes.**

80 Article 3(3) PR requires publication of a prospectus prior to the admission of securities to trading on a regulated market within the Union.[115] Article 1(5) PR exempts certain types of securities admitted to trading. The amendments of the EU Listing Act as regards listing prospectuses (para. 79 above) also apply to offering prospectuses (article 3(5)(a), (ba) PR).

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[108] Article 1(1) PR.
[109] Article 2(d) PR.
[110] Articles 1(4), 2(e) PR.
[111] Article 1(4)(b) PR.
[112] Article 1(4)(c) PR.
[113] Article 1(4)(db) and (da) PR. The offering exceptions are mirrored for admission to trading in article 1(5)(a), (ba).
[114] Article 3(2) PR.
[115] On the admission process, see para. 11 p. 6 above.

81 Whenever a type of security, a type of offering or a type of admission is exempted from the scope of the regulation, issuers can still draw up a prospectus voluntarily (article 4 PR).

Prospectus requirements under article 3 PR	
Offering Prospectus (article 3(1) PR)	Admission Prospectus (article 3(3) PR)
Applies to "public offerings" within the meaning of article 2(d) PR Exceptions: article 1(4), article 3(2) PR	Applies to admissions to trading to a regulated market within the meaning of article 2(j) PR Exceptions: article 1(5) PR

3.2.2 Drawing up and content of prospectuses (chapters II, III PR)

82 Chapter II of the PR deals with drawing up of securities prospectuses. Article 6(1) PR contains the core requirement for their content: a prospectus shall contain "the necessary information which is material to an investor for making an informed assessment" of the securities in question. It is universally accepted that this requires the prospectus to be complete, accurate, up-to-date, and clear. Information to be provided under article 6 PR includes the financial strength of the issuer (assets, liabilities, results of operations, prospects), the rights attaching to the securities, and the reasons for the issuance.[116] The information that is captured under this blanket provision depends on the nature of the issuer and the securities as well as the circumstances (article 6(1)(1) PR). Whether a prospectus is correct and complete will not be assessed on the basis of isolated parts of the prospectus, but rather on the "overall picture" that the prospectus gives the investor, taking into account the careful and thorough reading that is required of the investor.[117] Information is deemed "material" if an investor would "rather than not" use it for his investment decision.[118] The test is the knowledge and experience of an average investor.[119]

> **Case Study 17.** An investor subscribes to shares offered to the general public on the basis of a prospectus that contains language indicating that the issuer forecasts an average return of 7%. Do investors have a case that the prospectus is incorrect if the investment return is loss-making? (BGH, 23 April 2012 – II ZR 75/10, WM 2012, 1293 – *Bavaria Ertragsfonds 1*, also see BGH, 26 March 2024 – XI ZB 25/22, BKR 2024, 577 – *MS Barbados* and BGH, 12 March 2024 – XI ZB 2/22)
>
> **Notes.**

> **Case Study 18.** T held a participation in S Corp. valued at €2bn, which it transferred to its subsidiary N as a "capital contribution in kind" valued at €10bn. Subsequently, T publishes a prospectus for shares in T, stating that T had entered into a "sale" of its subsidiary S Corp. generating a "profit of €8bn on a non-consolidated basis". After the offering, T writes down the participation in N from €10bn to €4bn. Does the prospectus meet disclosure requirements under the Prospectus Regulation? (BGH, 21 October 2014 – XI ZB 12/12, BGHZ 203, 1 – *Dt. Telekom I*; 15 December 2020 – XI ZB 24/16, NZG 2021, 457 – *Dt. Telekom II*)

[116] Article 6(1)(1)(a), (b), (c) PR.
[117] BGH, 13 June 2023 – XI ZB 11/22, WM 2023, 1418, para. 53.
[118] BGH, 14 November 2023 – XI ZB 2/21, WM 2024, 393, para. 66.
[119] BGH, 13 June 2023 – XI ZB 11/22, WM 2023, 1418, para. 38, 14 November 2023 – XI ZB 2/21, WM 2024, 393, para. 66.

Notes.

83 The essential structure of a prospectus is described in article 6(3) PR: A prospectus consists of

- A registration document containing information on the issuer (i.e., issuer description and risk factors relating to the issuer),
- A securities note containing information on the securities (i.e., terms and conditions, note-specific risk factors), and
- A summary (cf. article 7(1) PR).

A prospectus can be drawn up as a single document, or as a combination of three separate documents split up into the three parts described above which can be approved separately.[120] Once a prospectus is approved, it remains valid for offers or admissions to trading for a period of 12 months after approval.[121]

84 Chapter III PR (articles 13–19) deals with the content and the format of prospectuses. Article 13(1) PR provides for delegated acts at level 2 to establish details as to format and information to be included (see the box on page 31 above).

> **Case Study 19.** Issuer I runs an online retail business through its subsidiary S GmbH. It issues bearer notes to investors on the basis of a securities prospectus through a public offering. Can investors raise liability claims on the basis that (i) the prospectus did not include a balance sheet for S GmbH and that (ii) the prospectus did not indicate the equity ratio (*Eigenkapitalquote*), i.e., equity divided by total assets? (OLG Brandenburg, 1 July 2020 – 7 U 33/19, BeckRS 2020, 17763 – *getgoods.de*; also see BGH 14 June 2022 – XI ZB 33/19, WM 2022, 1633 and § 9(2) no. 9 VermVerkProspV)
>
> **Notes.**

85 Article 16 PR requires a prospectus to indicate risk factors. These risk factors must be specific to the issuer or the securities, and material for taking an informed investment decision.[122] They must be adequately described, including an assessment of the materiality, and must be presented in a limited number of categories, with the most material risk factor mentioned first in each category.[123] ESMA issued guidelines under article 16(4) PR to assist NCAs in the review of specificity and materiality of risk factors and their presentation across categories.[124]

> **Case Study 20.** Issuer I is a German stock company and issues debt securities under an offering prospectus. M is major shareholder of I and holds 74 % of the shares in I. In addition, M and I had entered into a "Control and Profit and Loss Transfer Agreement" (*Beherrschungs- und Gewinnab-*

[120] Article 10(1) PR.
[121] Article 12(1) PR.
[122] Article 16(1) PR.The new article 16(1)(2) PR expressly ecludes "generic" risk factors.
[123] Article 16(1)(4), (5) PR.
[124] See https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf (accessed 11 Jun 2025).

führungsvertrag) which entitles M to give instructions to I's management even if such instructions are only in the interest of M and not in the interest of I.

a) Does the securities prospectus have to mention anything in the context of the control and profit transfer agreement?

b) I files for insolvency. Can investors in the debt securities raise prospectus claims against M on the basis that the prospectus does not explain M's right to give instructions to I?

(BGH, 18 September 2012 – XI ZR 344/11, BGHZ 195, 1 – *Wohnungsbau Leipzig West*)

Notes.

86 The PR provides for a number of particular types of prospectuses: For non-equity securities, there is an option for issuers to use a "base prospectus" under article 8(1) PR. A base prospectus creates a framework with options for certain types of securities to be offered or admitted to trading. The options left open in the base prospectus (e.g., volume, currency, interest rate, maturity of a bond) are later completed with securities-specific information entered in the "form of final terms".[125] A simplified prospectus regime applies in certain cases, e.g., secondary issuances, and the EU Growth prospectus,[126] and the EU Listing Act intends to create an even more efficient "EU Follow-on prospectus" for secondary issuances.[127]

3.2.3 Prospectus approval, advertisements, supplements (chapter IV PR)

87 Chapter IV PR establishes the rules governing approval and publication of prospectuses. Prior to publication, a prospectus must be approved by the relevant NCA.[128] Article 20(8) PR implies that the NCA competent for prospectus approval is the authority for the issuer's home Member State within the meaning of article 2(m) PR. Where an NCA finds that the draft prospectus does not meet the requirements for approval under the regulation, it will inform the issuer and specify what changes or supplementary information are needed.[129] Once approved, the prospectus must be made available to the public reasonably in advance, and at any rate, at the latest at the beginning of the offering or the admission to trading.[130]

88 If significant new factors, material mistakes or material inaccuracies emerge between approval and closing of the offer period or admission to trading, they must be the subject of a supplement to the prospectus which is approved in the same way as a prospectus.[131] The publication of the supplement triggers a right for investors to withdraw an acceptance declared prior to the publication of the supplement.[132]

[125] Article 8(2) PR.
[126] Articles 14, 15 PR. The specific EU Recovery Prospectus regime under article 14a PR ended on 31 December 2022, article 47a PR.
[127] Note that the provisions on the "Follow-on Prospectus" will come in effect only in 2026 and are not yet reflected in the EU consolidated legislation database.
[128] Article 20(1) PR. In Germany: BaFin, § 17 WpPG.
[129] Article 20(4) PR.
[130] Article 21(1) PR.
[131] Article 23(1) PR.
[132] Article 23(2) PR.

89 Advertisements relating to offerings or admissions to trading must comply with the requirements under article 22 PR: in particular, they must indicate that a prospectus has been or will be published, and where investors can obtain a copy,[133] and they must not be inaccurate or misleading and shall be consistent with the information contained in the prospectus.[134]

3.2.4 Cross-border issues (chapters V and VI PR)

90 A prospectus approved under chapter VI can be used for offerings and admissions in any number of EU Member States,[135] provided that the home Member State NCA notifies the NCAs of the host Member States, confirming approval of the prospectus and providing a copy.[136] The language of the prospectus is the language accepted by the NCA of the home Member State for offerings or admissions to trading in the home Member State.[137] For offerings or admissions outside the home Member State, the issuer, the offeror or the person seeking admission to trading have the choice between a language accepted in the host Member State and "a language customary in the sphere of international finance",[138] i.e., English (with the exception of summaries: article 27(2)(2) PR).

3.2.5 Enforcement (chapters VII and VIII)

3.2.5.1 Public enforcement

91 As regards public enforcement, Member States will designate a single competent administrative authority under article 31(1) PR. In Germany, this is BaFin, § 17 WpPG. Enforcement of PR requirements happens essentially through the review and approval process which is designed to ensure that prospectuses comply with content and form requirements under the PR framework. In addition, under article 32(1), NCAs have a range of powers, including the power to prohibit offers and admissions to trading if there is a breach of the PR,[139] and to make public any failure to comply with the PR.[140] Administrative sanctions include public statements indicating infringements, disgorgement of profits, and pecuniary sanctions.[141] For legal persons, the pecuniary sanction can reach the higher of €5m and 3% of the annual turnover of the entity in question.[142] Any decision on administrative sanctions or measures will be published in accordance with article 42(1) PR (so-called "naming and shaming"). NCAs are required to co-operate with each other and ESMA in line with articles 33, 34 PR. → see Case Study 16, p. 32 above.

3.2.5.2 Private enforcement

92 While the Prospectus Regulation makes detailed provision for public enforcement, it leaves legislation on civil liability largely to Member States: article 11(1) PR requires Member States to ensure that responsibility for information given in a prospectus and supplements attaches to "at least the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading or the guarantor, as the case may be", and such persons must be clearly

[133] Article 22(2) PR.
[134] Article 22(3) PR.
[135] Article 24(1) PR.
[136] Article 25(1) PR.
[137] Article 27(1) PR.
[138] Article 27(1) PR.
[139] Article 32(1)(f) PR.
[140] Article 32(1)(i) PR.
[141] Article 38(2)(a), (c), (d) and (e) PR.
[142] Article 38(2)(d) PR.

identified in the prospectus. Member States must make sure that their laws on civil liability apply to the persons responsible for the prospectus.[143] Implementation in the Member States is subject to the principles of equivalence and effectiveness (→ see Case Study 14 on p. 27 above).

93 Implementing legislation in Germany is contained essentially in §§ 8ff. WpPG. Liability attaches where material information in a prospectus is incorrect or incomplete (§§ 9, 10 WpPG), or when a prospectus is missing altogether (§ 14 WpPG). As a rule, investors can claim reimbursement of investment plus customary costs, in return for restitution of the securities that they have acquired.[144] A time limit applies in that liability only attaches to transactions within six months of admission to trading[145] or six months from beginning of the offering.[146] The claim lies against the person responsible for the prospectus within the meaning of § 8 WpPG, and, in addition, against persons from whom the preparation of the prospectus originates.[147] (→ see Case Study 20, p. 34 above).

94 As regards the correctness and completeness of the prospectus, case law applies the test whether the prospectus informed investors accurately, comprehensibly and completely about all circumstances that are or may be of material importance for their investment decision, in particular about the disadvantages and risks associated with the investment offered.[148] This includes information about circumstances that could frustrate the purpose of the transaction and about circumstances that, although not yet certain, make it likely that they will jeopardise the purpose pursued by the investor. For the presentation of a risk, it is necessary for the prospectus to explain which event may lead to the realisation of a certain risk.[149] The assessment of whether a prospectus is incorrect or incomplete must be based on the overall picture it conveys to the reasonable investor, taking into account the careful and thorough reading required of him.[150] In this respect, the relevant time of assessment is generally the time at which the prospectus was prepared. [151]

95 § 12 WpPG lists defences against a claim for prospectus liability. Under § 12(1) WpPG, the defendant can avoid liability if he proves that he was not aware of the incorrectness or incompleteness of the information, and that this was not due to gross negligence. In addition, pursuant to § 12(2) WpPG, no claim exists:

- if the acquisition of the securities was not based on the prospectus,
- if facts on which information in the prospectus was incorrect or incomplete did not contribute to a reduction of the market price of the securities,
- if the investor was aware, at the moment of the investment, of the incorrectness or incompleteness of the prospectus,
- if the incorrectness or incompleteness was amended through certain types of communications from the issuer (e.g., annual report, disclosure of inside information), and

[143] Article 11(2) PR.
[144] §§ 9, 10 WpPG.
[145] § 9(1) WpPG.
[146] § 10(1) WpPG.
[147] § 9(1)(1), (2) WpPG.
[148] BGH, 20 February 2024 – XI ZB 33/21, BKR 2024, 536, para. 38 – *Lignum Fonds*.
[149] BGH, 20 February 2024 – XI ZB 33/21, BKR 2024, 536, para. 38 – *Lignum Fonds*.
[150] BGH, 20 February 2024 – XI ZB 33/21, BKR 2024, 536, para. 38 – *Lignum Fonds*.
[151] BGH, 20 February 2024 – XI ZB 33/21, BKR 2024, 536, para. 38 – *Lignum Fonds*.

– if liability is based solely on the summary unless the summary is misleading or incomplete when read together with the rest of the prospectus (see article 11(2)(2) PR).

Case Study 21. T, an issuer of listed shares, faces damage claims from investors on the bases that an IPO prospectus was incorrect. Can T defend prospectus liability claims on the basis that (i) the prospectus did not create a positive market sentiment in favour of the offering, (ii) information not included in the prospectus was in the public domain and therefore adequately reflected in the issue price of the shares, and (iii) the discovery of the alleged inaccuracies of the prospectus did not have a negative impact on the share price? (BGH, 21 October 2014 – XI ZB 12/12, BGHZ 203, 1 – *Dt. Telekom I*; 15 December 2020 – XI ZB 24/16, NZG 2021, 457 – *Dt. Telekom II*)

Notes.

Case Study 22. B issued an offer of shares to the public, divided in two tranches, one for retail, and one for qualified investors. I is an insurance company and purchased shares for €600k. Following a revision of B's financial statements, the shares lost almost all their value. Can B defend prospectus liability claims raised by I on the basis that, under the Prospectus Regulation, (i) in case of an offer to both retail and qualified investors, only retail investors can rely on prospectus liability, and (ii) account must be taken of the fact that the investor was, or ought to have been aware of the economic situation of the issuer. (Case C-910/19*, Bankia SA v. Unión Mutua Asistencial de Seguros*)

Notes.

96 In addition to §§ 9, 10 WpPG, civil liability can also be based on other grounds (cf. the box at the end of this chapter on p. 42): First, specific liability attaches to prospectus-type disclosure not covered by the PR, e.g., information provided for securities falling under the exemption under article 3(2) PR (§§ 11, 15 WpPG), or prospectuses for investments that do not qualify as securities under article 1(1), (2) PR, e.g., liability relating to prospectuses for investment fund units (§ 306 KAGB) and for other types of investments (§§ 20ff. VermAnlG). Second, leaving aside prospectus-specific rules, liability can also exist under general tort law principles. Bases for liability under tort include § 823(2) BGB, e.g., in conjunction with § 400 AktG, § 332 HGB, §§ 263, 264a StGB, and § 826 BGB.

97 It is worth noting that prior to specific legislation on prospectus liability, German domestic law had developed a case-law based principle of civil liability attaching to "prospectuses" for investment opportunities, based on a concept of pre-contractual liability under § 311 BGB. It attached to initiators and sponsors of prospectuses ("*Prospekthaftung im engeren Sinne*"), and to individuals in a position of particular trust vis-à-vis investors, who are liable for prospectuses used during negotiations ("*Prospekthaftung im weiteren Sinne*"). However, it is now recognised that these general civil law principles do not apply where special legislation exists as is the case for §§ 9ff. WpPG.[152] For example, where a relevant transaction occurs outside the 6 months window under §§ 9, 10 WpPG,

[152] See, most recently, BGH, 11 July 2023 – XI ZB 20/21, WM 2023, 1692 as regards the law currently in force (paras 45ff). This applies not only to §§ 9ff. WpPG, but also to other instances of prospectus liability legislation such as §§ 20, 21 VermAnlG, § 127 InvG. On the basis of the 11 July 2023 decision, the obiter dictum of BGH, 25 October 2022, II ZR 22/22, NJW-RR 2023, 109 does not apply to the law currently in force.

prospectus liability cannot be based on general civil law principles.[153] As a result, such (pre-)contractual civil law liability is at best of limited of practical importance in the context of prospectuses.[154] It can only attach to statements that go beyond the prospectus, e.g., incorrect oral advice or assurance,[155] or where an individual is involved in or responsible for the distribution of the securities in question to investors.[156] Liability in such cases follows the general principles of contractual liability for mis-selling (→ Case Study 14, p. 27 above).

98 For an overview on prospectus-related liability, see the box after para. 99 below.

> **Case Study 23.** Issuer I issues notes on the basis of an offering prospectus. None of I's securities is listed on a regulated market. The prospectus contains audited annual reports together with the auditor's report confirming that the issuer's annual report is free from material misstatements and that the management report accurately reflects the issuer's situation and the risks associated with its activities. Can investors claim damages from the auditor on the basis that the auditor's statement is incorrect and that the auditor failed to conduct the most basic inquiries into the issuer's activities? (BGH, 12 March 2020 – VII ZR 236/19, NZG 2020, 1030 – *Infinus*)
>
> **Notes.**

3.2.6 Prospectus requirements outside the Prospectus Regulation

99 Specific prospectus requirements also exist for certain transactions or instruments that are not covered by the Prospectus Regulation. This is the case, under EU law, for disclosure relating to the sale of fund units of UCITS funds: article 68(1)(a) UCITS Directive requires the publication of a prospectus that must be kept up to date pursuant to article 72 UCITS Directive. Under domestic German law, a prospectus is needed for investment instruments ("*Vermögensanlagen*") within the meaning of § 2 VermAnlG. In both cases, civil liability claims attach to incorrect or incomplete disclosure in these prospectuses (§ 306 KAGB, §§ 20ff. VermAnlG).

> **Case Study 24.** IFM is a licensed UCITS management company. On 28 August 2019, two new members are appointed to IFM's supervisory board. Does this change require an update of the fund prospectuses for the funds managed by IFM? (Case C-473/20, *Invest Fund Management AD v. Komisia za finansov nadzor*)
>
> **Notes.**

[153] BGH, 13 December 2022, XI ZB 10/21, WM 2023, 245; BGH, 14 November 2023, XI ZB 2/21, WM 2024, 393 para. 61.
[154] Assmann/Kumpan, in: Assmann/Schütze/Buck-Heeb, *Hdb des Kapitalanlagerechts*, 6th ed. 2024, § 5 paras 24, 30.
[155] BGH, 11 July 2023 – XI ZB 20/21, WM 2023, 1692. Liability only exists where these statements go beyond the content of the prospectus: BGH, 26 September 2023, XI ZR 311/22, BKR 2023, 838.
[156] BGH, 11 June 2024 – XI ZR 491/21, BKR 2024, 812; BGH, 5 November 2024 – XI ZR 251/22, BKR 2025, 87.

Case Study 25. A real estate fund prospectus contains the following language: "The offering targets all investors, even those who are unfamiliar with investments in immovable property and who want to use the investment as a convenient savings product." The prospectus also describes the process for redemption of fund units, including the power for the fund management to suspend redemption when there is insufficient liquidity. Certain investors suffer significant losses when the fund suspends redemption of fund units because of liquidity constraints. Can investors raise liability claims on the basis that the prospectus is misleading as regards risks? (BGH, 23 October 2018 – XI ZB 3/16, BGHZ 220, 100 = NJW-RR 2019, 301 – *Morgan Stanley P2 Value*)

Notes.

3.3 Reading assignment

Buck-Heeb, *Kapitalmarktrecht*, §§ 4–5, 11–13; Veil, *European Capital Markets Law*, §§ 17, 29–34. Further material: Fischer-Appelt, "Reforming EU securities laws: the new EU Prospectus Regulation" (2017) 18(4) *J. Inv. Compl*. 53–58.

Prospectus Liability

Note: In an international context, a conflict of law analysis is necessary to determine the applicable law under the Rome I and Rome II Regulations, and jurisdiction under the Brussels Ia Regulation. On these issues, see Case C-304/17, *Löber*, and Case C-375/13, *Kolassa*.

A. (Pre-)contractual liability under §§ 280, 311 BGB

Note: Where special legislation exists as regards prospectus liability, this is regarded precluding (pre-)contractual liability for statements in prospectuses. Accordingly, (pre-)contractual liability can only attach to statements made outside the prospectus, e.g., oral statements in the distribution process (beyond the prospectus content) that are incorrect or misleading (para. 97 above).

B. Liability under §§ 9, 10 WpPG (these provisions apply mutatis mutandis to
(i) cases where a prospectus is missing altogether (§ 14 WpPG), and
(ii) incorrect, incomplete, or missing securities information leaflets (§§ 11, 15 WpPG)

I. Scope of transactions covered

1. Securities covered: § 2 Nr. 1 WpPG, Art. 2 lit. a PR
2. Relevant transactions
   a) Admission to regulated market (§ 2 Nr. 8 WpPG, Art. 2 lit. j PR), or
   b) Public offering (§ 2 Nr. 2 WpPG, Art. 2 lit. d PR)
3. Acquisition 6 mths after admission (§ 9(1) WpPG) or start of offering (§ 10 WpPG)

II. Prospectus is incorrect or incomplete in material aspects, § 9 I 1 WpPG

1. Relevant documents
2. Incorrect or incomplete in material aspects, e.g.
   a) Art. 6(1), (2) PR: "necessary information material to investor for making informed assessment", "easily analysable, concise and comprehensible"
   b) Art. 13 PR, delegated regulation 980/2019: minimum requirements
   c) Art. 16 PR, risk factors
3. Failure to publish appropriate supplement, art. 23 PR

III. Persons liable for damages

1. Persons responsible for the prospectus, § 9(1)(1), § 8 WpPG, art. 11(1) PR
2. Persons sponsoring/initiating the prospectus, § 9(1)(2) WpPG

IV. No exclusion of liability

1. Lack of gross negligence/intentional conduct, § 12(1) WpPG
2. Liability excluded under § 12(2) WpPG, - most relevant examples:
   a) Securities not acquired on the basis of the prospectus, § 12(2)(1) WpPG
   b) Facts did not contribute to reduction of price, § 12(2)(2) WpPG

V. Damages

1. Acquisition price (max. placement price) + usual costs, § 9(1) WpPG, vs. transfer of securities
2. Difference between acquisition price (max. placement price) and proceeds from sale, usual costs, § 9(2) WpPG

C. Other bases for liability attaching to prospectuses, e.g., §§ 20ff. VermAnlG, § 306 KAGB

D. Liability under general tort law principles

I. § 823(2) BGB, e.g., in conjunction with § 400 AktG, § 332 HGB, §§ 263, 264a StGB

II. § 826 BGB

4 MARKET ABUSE

4.1 Overview

100 It is universally accepted that an integrated, efficient and transparent financial market requires market integrity and public confidence in the integrity of financial markets.[157] Therefore, EU capital market legislation in the EU deals specifically with market abuse that may harm market integrity and public confidence. The term "market abuse" encompasses insider dealing, the unlawful disclosure of inside information, and market manipulation.[158] Previous EU legislation on market abuse was based on a directive that had to be implemented by the Member States,[159] but with a view "to establish a more uniform and stronger framework in order to preserve market integrity, to avoid potential regulatory arbitrage, to ensure accountability in the event of attempted manipulation, and to provide more legal certainty and less regulatory complexity for market participants",[160] EU legislation is now dealing with market abuse essentially on the basis of a regulation that is of direct application, namely, Regulation (EU) No 596/2014 on market abuse, commonly referred to as "Market Abuse Regulation" ("MAR"). The MAR aims at removing divergences between national laws, establishing a more uniform interpretation of the EU's market abuse framework, reducing regulatory complexity and firms' compliance costs, and eliminating distortions of competition.[161]

MAR level 2 and 3 texts

The most essential texts at level 2, 3 and 4 are:

- Commission Implementing Regulation (EU) 2016/1055 of 29 June 2016 for appropriate public disclosure of inside information
- ESMA Guideline on delay of disclosure (https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf)
- ESMA Q&A (https://www.esma.europa.eu/sites/default/files/library/esma70-145-111_qa_on_mar.pdf)

For additional level 2 texts relating to MAR see: https://finance.ec.europa.eu/system/files/2022-10/mar-level-2-measures-full_en.pdf.

(links accessed 11 Jun 2025)

101 The MAR is divided into seven chapters. Chapter 1 deals with general provisions, chapter 2 with inside information, insider dealing and market manipulation, and chapter 3 with disclosure requirements. Supervision and public enforcement are addressed in chapters 4 and 5, and delegated acts, implementing acts and final provisions in the last two chapters (chapters 6 and 7).

4.2 EU Market Abuse Regulation

4.2.1 Scope of application

102 The MAR covers trading activities in financial instruments on regulated markets, MTFs and OTFs.[162] It also covers financial instruments whose price or value depends on the price of financial instruments within the scope of the MiFID II trading venues.[163] For the purpose of defining relevant terms, article 3 MAR refers essentially to the list of definitions under MiFID II. The scope of the

[157] Recital (2) MAR.
[158] Article 1 MAR.
[159] Directive 2003/6/EC
[160] Recital (4) MAR.
[161] Recital (5) MAR.
[162] Article 2(1) MAR.
[163] Article 2(1)(d) MAR.

MAR goes beyond capital market law in that the regulation applies also to the trading of emission allowances.[164]

103 Market operators and investment firms have to notify NCAs of relevant trading activities.[165] In accordance with article 4 MAR and article 27 MiFIR, trading venues and systematic internalisers submit reference data for the relevant financial instruments to NCAs who will subsequently transmit it to ESMA for publication through the Financial Instruments Reference Data System ("FIRDS"), a database collecting and publishing information on financial instruments traded on MiFID II trading venues (accessible online at https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_firds).

4.2.2 Definition of inside information

104 The central concept of the regulation is that of "inside information" as defined in article 7 MAR. In fact, a number of legal consequences attach to situations where inside information exists: the regulation prohibits the use of inside information for insider dealing and its unlawful disclosure, and requires issuers to publish such information where it concerns them directly, and to maintain insider lists.[166] The essential cornerstones of the definition are contained in article 7(1)(a) MAR, which defines inside information on the basis of four elements: first, the information has to be "of a precise nature", second, it has to be information that has not been made public, third, the information must relate directly or indirectly to an issuer or a financial instrument, and fourth, it would be likely to have a significant effect on the prices of those financial instruments or of related derivatives if it were made public. Article 7(1)(b) and (c) MAR slightly modify this definition as regards commodity derivatives, emission allowances, and information relating to pending orders in financial instruments.

105 Information that can qualify as inside information can relate both to an issuer as such (e.g., its financial position) or to a particular financial instrument (e.g., a call notice for a specific bond). Information is "not public" within the meaning of article 7(1) MAR as long as it is not accessible for the market participants at large. For practical purposes, this is the case for information that is not "in the public domain" in such a way as it would be after publication under article 17(1)(2) MAR and corresponding level 2 texts (see para. 115 below).

106 Information is of a "precise nature" within the meaning of article 7(1) MAR not only in case of past events and existing circumstances: It also includes future events and circumstances that may "reasonably be expected" to occur,[167] which is usually read to imply a likelihood of 50%+x. According to the ECJ, the required probability of occurrence of a future event does not vary depending on the magnitude of their effect on the prices of the financial instruments (no "probability-magnitude test").[168] For information to be of a precise nature, it must be "specific enough" to enable a conclusion to be drawn as to the possible effect on the prices of the financial instruments or related derivatives.[169]

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[164] Article 2(1) MAR.
[165] Article 4(1) MAR.
[166] Articles 14, 17, 18 MAR.
[167] Article 7(2) MAR.
[168] Case C-19/11, *Geltl v. Daimler AG*, para. 50.
[169] Article 7(2) MAR.

Case Study 26. In June 2007, Wendel, a listed company, decided to acquire a substantial stake in its competitor Saint-Gobain and bought derivatives with shares in Saint-Gobain as underlying. On 3 September, Wendel decided to convert the derivatives into Saint-Gobain shares and acquired, until 27 November, 18% of the shares of Saint-Gobain. AMF, the French regulator, took the view that the operation qualified as "inside information" relating to Wendel at the latest by 21 June 2007, when Wendel had concluded all derivative contracts. Wendel argued that no inside information existed as it was not possible to determine whether the operation would have a positive or a negative effect on Wendel shares. (Case C-628/13, *Lafonta v. AMF*)

Notes.

107 Specific provision is made for "protracted processes", i.e., processes over a certain period of time intended to bring about, or to result in, particular circumstances or a particular event. In these cases, both the intermediate steps that have already occurred, and the potential future outcome of the process, may be deemed to be precise information.[170] An intermediate step qualifies as inside information if it satisfies the criteria of article 7 MAR.[171]

Case Study 27. Viktor is chairman of the management board of Quitonda-AG (QAG), a listed company. In spring 2022, V is considering resigning early from his office which would normally run until 2024. On 17 May, V discusses his plans with Karl, the chairman of the supervisory board of QAG. On 13 June, V and K agree to propose the early retirement of V and the nomination of Nina as his successor at the meeting of the supervisory board on 28 July. On 28 July at 9:50, the QAG supervisory board passes a resolution that V is to retire at the end of 2022 and he will be replaced by N. At 10:02, QAG notifies the stock exchanges and BaFin, and releases an ad hoc announcement at 10:32. The stock price of QAG increased significantly after the announcement.

a) Was the ad hoc announcement made in time?

b) Assuming the announcement was late, can BaFin impose a fine, and if so, for what amount?

c) Are there other sanctions which BaFin may or must impose?

d) Can a shareholder claim damages resulting from a sale of shares prior to the announcement?

(Papers 2022_2 #14; 2018_2 #II.2; Case C-19/11, *Geltl v. Daimler AG*; BGH, 23 April 2013, II ZB 7/09, NZG 2013, 708)

Notes.

108 Information is likely to have a "significant effect on prices" of financial instruments if it is information that a reasonable investor would be likely to use as part of the basis of his or her investment decisions.[172] Accordingly, there are no specific quantitative "thresholds" for a price effect to qualify as "significant". Rather, the question is whether there is an "incentive to trade", i.e., whether a market participant in possession of the information could derive a profit from a trade in relevant instruments. The test is an objective one (based on the perspective of a "reasonable investor"), and some writers suggest, that in the context of future events, a probability-magnitude test is

[170] Article 7(2) MAR.
[171] Article 7(3) MAR.
[172] Article 7(4) MAR.

permissible to conclude that even a relatively unlikely event can create an incentive to trade where the magnitude of the price effect is sufficiently high.[173]

4.2.3 Prohibited transactions (chapter 2 MAR)

4.2.3.1 Prohibition of insider dealing

109 Article 14(a) MAR prohibits engaging in insider dealing, including the attempt. The constitutive elements of insider dealing are described in article 8 MAR: Insider dealing occurs where a person is in possession of inside information and uses such information for transactions in financial instruments to which the information relates.[174] The definition under article 8(1) MAR covers both transactions for one's own account and for the account of third parties, and it also covers the cancellation or amendment of an order concerning financial instruments. A person possesses inside information where it obtains inside information as the member of a corporate body of the issuer, as a shareholder of the issuer, through the exercise of an employment or profession, or through criminal activities.[175] Beyond these scenarios, the provision also captures any other person possessing inside information, provided, however, that the person in question knows or ought to know that it is inside information.[176]

110 Article 14(b) MAR prohibits recommending insider dealing, or inducing others to engage in insider dealing. Such recommendation or inducement is prohibited where it is made by a person in possession and "on the basis of that information", and is aimed at the acquisition or disposal of financial instruments, or the cancellation or amendment of an order.[177] Where the recipient acts on a prohibited recommendation or inducement, this amounts to insider dealing whenever that person knows or should have known that the recommendation or the inducement is based on inside information.[178]

111 Article 9 MAR goes on to define a number of scenarios of "legitimate behaviour" where the mere fact that a person possess inside information does not imply that such person "uses" inside information for the purposes of article 8. An example of practical importance is the case of legal persons that have created internal information barriers (often referred to as "Chinese walls") that ensure that the natural persons making decisions on transactions do not have access to inside information and are, in fact, not influenced by the legal person in any other way.[179] Legitimate behaviour also exists where a person possessing inside information conducts transactions in the discharge of an obligation that results from orders or agreements made before the person received inside information, or where a legal or regulatory obligation arose before that moment.[180] It also covers scenarios where a person receives inside information in the course of a public takeover or a merger, and uses inside information solely for the purpose of proceeding with the merger or takeover – provided, however, that at the moment where shareholders of the target company approve of the merger or accept the offer, any inside information has either been made public or otherwise ceased

[173] See Buck-Heeb, in: Assmann, *Handbuch Kapitalanlagerecht*, 6th ed. 2024, § 8 para. 125.
[174] Article 8(1) MAR.
[175] Article 8(4) MAR.
[176] Article 8(4) MAR *in fine*.
[177] Article 8(2) MAR.
[178] Article 8(3) MAR.
[179] Article 9(1) MAR.
[180] Article 9(3) MAR.

to constitute inside information.[181] Finally, pursuant to article 9(5) MAR, a person using its own knowledge that is has decided to trade in financial instruments for a transaction in these instruments is not by that mere fact deemed to use inside information.

112 There is an important reservation as regards "legitimate behaviour" described in article 9 MAR: in fact, the cases described as legitimate behaviour only imply that certain elements do not as such and by themselves justify the conclusion that a person has "used" inside information. However, the ultimate assessment depends on the specific facts of the case, and if illegitimate reasons are behind a specific activity or behaviour, the prohibition of insider dealing still applies.[182]

> **Case Study 28.** Spector is a listed Belgian company. It offers a stock option programme to its staff. In May 2003, Spector decided to buy own shares as part of its employee stock option programme. From 28 May to 30 August Spector purchased a total of 30,000 shares. On 11 and 13 August, a Spector employee placed two orders enabling Spector to acquire 20,000 shares at an average price of 10 €. Spector subsequently published information concerning its results and its commercial policy. Following the announcement, the company's share price increased to 12.50 €. (Case C-45/08, *Spector Photo Group NV v. Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)*)
>
> **Notes.**

113 In addition to article 9, certain types of transactions are exempted altogether from the prohibitions of insider dealing: the prohibition does not apply to share buy-back programmes and stabilization in accordance with article 5 MAR. The article 5 exemption applies not only to the prohibition of insider dealing, but all prohibitions under articles 14, 15 MAR, including the prohibitions of unlawful disclosure and market manipulation.

4.2.3.2 Prohibition of unlawful disclosure of inside information

114 In addition to insider dealing, the MAR also prohibits the unlawful disclosure of inside information.[183] Pursuant to article 10 MAR, unlawful disclosure occurs where a person in possession of inside information as described in article 8(4) MAR discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties.[184] Likewise, it is prohibited to pass on recommendations or inducements prohibited under article 8(2) MAR where the person disclosing the recommendation or inducement knows or ought to know that it was based on inside information.[185] The objective of the prohibition to disclose inside information is to prevent insider dealing by restricting access to inside information.

> **Case Study 29.** Mr Grøngaard was employee-elected member of the board of RealDanmark, a listed company. He was also appointed by Finansforbundet, a trade union, as member of the trade union's "Liaison Committee" with RealDanmark. In a RealDanmark board meeting, Mr Grøngaard learned about RealDanmark's plan to merge with Danske Bank, and disclosed this plan to Mr Bang, General Secretary of Finansforbundet, with the aim of helping the staff to deal with the consequences of the merger. They discussed, in particular, the timetable for the merger as well as the expected rise in the price of RealDanmark's shares, understood to be between 60% and 70%. A few

[181] Article 9(4) MAR.
[182] Article 9(6) MAR.
[183] Article 14(c) MAR.
[184] Article 10(1) MAR.
[185] Article 10(2) MAR.

months later, the merger was made public, and RealDanmark shares rose by 65%. Did Mr Grøngaard breach article 10 MAR? (Case C-384/02, *Grøngaard and Bang*)

Notes.

115 Where information or recommendations are disclosed or disseminated for the purpose of journalism or other form of expression in the media, the assessment of such disclosure or dissemination must take into account the rules governing the freedom of the press and freedom of expression.[186] This applies not only to the prohibition of unlawful disclosure of inside information, but also to the prohibition of market manipulation where this involves the dissemination of information,[187] and the dissemination of investment recommendations and statistics under article 20 MAR. The media privilege under article 21 MAR does not apply where the persons concerned or closely associated with them derive an advantage from the disclosure or dissemination in question or where disclose is made with the intention of misleading the market.[188]

Case Study 30. A prominent journalist intends to publish an article containing market rumours concerning certain issuers (Hermès and Maurel). He informs his habitual sources about the imminent publication of that article who in turn pass on this information and use it for trading in shares of the two issuers involved. Did the journalist breach the Market Abuse Regulation? (Case C-302/20 – *Hermès*, also see AMF Commission des sanctions, 24 October 2018)

Notes.

4.2.3.3 Market manipulation, article 12 MAR

116 Article 15 MAR prohibits engaging, and attempting to engage, in market manipulation. Market manipulation is in turn defined in article 12 MAR. Article 12(1) MAR gives an abstract definition of certain activities that constitute market manipulation, and article 12(2) MAR adds a list of specific behaviours that are "considered as market manipulation".

117 Article 12(1)(a), (b) MAR captures transactions and orders. These constitute market manipulation where they

- create or are likely to create false or misleading signals as to supply, demand, and prices of financial instruments[189], article 12(1)(a)(i) MAR,
- secure or are likely to secure prices of financial instruments at an artificial level, article 12(1)(a)(ii) MAR,
- affect the price of financial instruments by employment of fictitious devices or other form of deception or contrivance, article 12(1)(b) MAR.

[186] Article 21 MAR.
[187] Article 12(1)(c) MAR.
[188] Article 21(a), (b) MAR.
[189] The MAR also covers other instruments that are outside the scope of capital markets: e.g., article 12(1) MAR also applies to commodity contracts and emission allowance products.

The circumstances listed in Annex I to the regulation define "indicators" relating to fictitious devices, deception or contrivance, false or misleading signals and securing prices within the meaning of article 12(1).[190]

118 Article 12(1)(c), (d) MAR captures dissemination and transmission of information. These activities amount to market manipulation where the information

- gives false or misleading signals as to supply, demand, or prices relating to financial instruments, or secures abnormal or artificial price levels,
- is false or misleading in relation to a benchmark.

The prohibition applies where the person dissemination the information knows or ought to have known that the information is false or misleading.

119 Article 12(2) MAR describes specific behaviours constitutive of market manipulation. In relation to financial instruments, these behaviours are the following:

- conduct securing a dominant position in relation to financial instruments which is likely to have a price-fixing effect or to create unfair trading conditions (also referred to as "cornering"),
- buying or selling securities at the opening or closing of markets if this is likely to mislead investors acting on the basis of prices displayed (e.g., "marking the close"),
- placing, cancelling or modifying orders on a trading venue in a way that disrupts to functioning of the venue, makes it difficult for others to identify genuine orders or create or are likely to create false or misleading signals as to the supply, demand or price of financial instruments (e.g., "wash trades"), and
- voicing opinions through the media and profiting from the effect of such opinions on prices of financial instruments, where there is a conflict of interest in relation to an opinion voiced earlier and where the conflict of interest is not disclosed simultaneously and in a proper and effective way ("scalping").

4.2.4 Disclosure requirements (chapter 3 MAR)

4.2.4.1 Scope of application

120 Chapter 3 MAR includes a number of disclosure requirements that require a particular monitoring and compliance effort from issuers. The obligations for issuers include detailed requirements as to format and content of disclosures through level 2 texts. As a result, the legislator limited the scope of application of the essential provisions of chapter 2 to those issuers that have actively contributed to the listing of their instruments: Issuers in scope of the obligations of articles 17, 18 and 19 MAR are issuers that have requested or approved admission of their instruments to trading on a regulated market.[191] In case of instruments only traded on an MTF or OTF, issuers are in scope only where they have approved trading or, in the case of an MTF, have requested admission to trading.

[190] Article 12(3) MAR
[191] Articles 17(1)(2), 18(7), 19(4) MAR.

Case Study 31. The shares of Z AG are listed on the Open Market of the Frankfurt Stock Exchange. The admission was applied for by the board of management of Z AG. Is Z subject to ad hoc disclosure obligations under the MAR? (Paper 2019_2 #6)

Notes.

4.2.4.2 Disclosure of inside information and delay of disclosure

121 In order to create a level playing field for investors and to avoid insider dealing, the MAR imposes disclosure obligations on issuers of financial instruments: Pursuant to article 17(1)(1) MAR, an issuer shall inform the public as soon as possible of inside information where the information directly concerns that issuer.[192] The regulation does not specify the scenarios where information concerns an issuer *directly*, but there is level 3 guidance from CESR[193] that is still used by NCAs.[194] Examples of information that concerns an issuer only indirectly include data and statistics published by public institutions, coming publication of rating agencies' reports, coming publication of research, recommendations or suggestions concerning the value of listed financial instruments, central bank decisions concerning interest rates, and governmental decisions on taxation or industry regulation.[195] It is important to note that where events of this nature have an impact on the financial situation of a specific issuer (e.g., effects on the profitability or refinancing options), this may create information that directly concerns the issuer and triggers disclosure obligations under article 17(1) MAR. It is also important to bear in mind that inside information that does not concern an issuer directly does not require disclosure by the issuer under article 17(1), but still falls under the prohibitions of insider dealing and unlawful disclosure pursuant to articles 8, 10, 14 MAR.[196]

122 Article 17(1)(2) MAR contains requirements as regards content and form of the disclosure: inside information must be made public in a manner which enables fast access and complete, correct and timely assessment of the information by the public. These requirements are refined at level 2 by implementing technical standards as per Commission Implementing Regulation 2016/1055: disclosure must be made using technical means that ensure dissemination of the information to as wide a public as possible on a non-discriminatory basis, free of charge, and simultaneously throughout the Union,[197] and communication to the media which are reasonably relied upon by the public.[198] Communication to the media shall use electronic means that ensure that the completeness, integrity and confidentiality of the information is maintained during the transmission, and it shall clearly identify the fact that the information communicated is inside information, the identity of the issuer, the identity of the person making the notification, the subject matter of the inside information, and the date and time of the communication to the media.[199]

[192] A similar obligation exists under article 17(2) MAR for emission allowance market participants.
[193] See https://www.esma.europa.eu/sites/default/files/library/2015/11/06_562b.pdf (accessed 11 Jun 2025).
[194] E.g., BaFin, *Emittentenleitfaden Modul C*, 2020, p. 33 fn. 52.
[195] See fn. 193 above.
[196] Article 7 MAR includes in the definition of inside information cases that concern an issuer only "indirectly".
[197] Article 2(1)(a) Regulation 2016/1055.
[198] Article 2(1)(b) Regulation 2016/1055.
[199] Article 2(1)(b) Regulation 2016/1055.

123 Article 17(1)(2) MAR also requires an issuer to post on its website all inside information it is required to disclose publicly, and to maintain this information on the website for at least five years. The website must allow users to access the information in a non-discriminatory manner and free of charge, and to locate the inside information in an easily identifiable section of the website.[200] The disclosed inside information must indicate clearly date and time of disclosure, and be organized in a chronological manner.[201]

> **Case Study 32.** Give two examples of cases in which the management board of a listed stock company with its seat in Germany has to disclose an ad hoc release, and explain on the basis of applicable legislation. What is the purpose of such ad hoc disclosures? In your examples, what would have to be the essential content of the ad hoc disclosure? (Paper 2017_2 #2.1)
>
> **Notes.**

124 Given the broad scope of the disclosure obligation under article 17(1) MAR, situations may arise where *immediate* disclosure is inadequate. Article 17(4) MAR therefore allows issuers to delay disclosure in certain circumstances: This is the case where:

- immediate disclosure is likely to prejudice legitimate interests of the issuer,
- delay of disclosure is not likely to mislead the public, and
- the issuer is able to ensure the confidentiality of the inside information.

ESMA issued guidelines under article 17(11) MAR as to which circumstances create legitimate interests of issuers and potential for misleading the public.[202] Legitimate interests include, for example, scenarios where an issuer is conducting negotiations and their outcome could be jeopardized by premature disclosure, or where premature disclosure of innovation or inventions are likely to jeopardize intellectual property rights of the issuer. A case of legitimate interests can also be made out where decisions taken or contracts entered into by the management body of an issuer need, pursuant to national law or the issuer's bylaws, the approval of another body of the issuer (other than the shareholders' general assembly) in order to become effective, provided that immediate disclosure before a definitive decision would jeopardize the correct assessment of the information by the public, and the issuer arranges for a definite decision as soon as possible. Delay under article 17(4) MAR is also possible in case of protracted processes occurring in stages.[203]

125 Article 17(4)(1) MAR is understood to imply an active decision of the issuer on the delay. This reading is supported by the documentation requirement under article 4(1) Commission Implementing Regulation 2016/1055 which requires issuers to use technical means that ensure the accessibility, readability, and maintenance in a durable medium of information relating to a deal, including

[200] Article 3(a), (b) Regulation 2016/1055.
[201] Article 3(c) Regulation 2016/1055.
[202] ESMA, *MAR Guidelines*, 2016, available online at: https://www.esma.europa.eu/sites/default/files/library/2016-1478_mar_guidelines_-_legitimate_interests.pdf.
[203] Article 17(4)(2) MAR.

- dates and times when inside information first existed within the issuer, when the decision to delay the disclosure of inside information was made, and when the issuer is likely to disclose the inside information;
- identity of the persons within the issuer responsible for the decision to delay and its likely end, ensuring the ongoing monitoring of the conditions for the delay, the decision to publicly disclose the inside information, and providing the requested information about the delay and the written explanation to the competent authority;
- evidence of the initial fulfilment of the conditions referred to in article 17(4) MAR, including information barriers which have been put in place, and arrangements to disclose the relevant inside information as soon as possible where the confidentiality is no longer ensured.

Where an issuer has delayed disclosure under article 17(4) MAR, it shall inform the competent authority of that fact and how the conditions of delay were met immediately after the information is disclosed to the public.[204] The competent authority is determined under article 17(3) MAR in conjunction with article 6 Commission Delegated Regulation 2016/522; in most cases, this will be the authority of the Member State where the issuer is registered.[205]

126 Following legislative reform through the EU Listing Act (see para. 28 above), the regime for disclosure of inside information will be modified (taking effect on 5 June 2026): The disclosure requirement under article 17(1) MAR will no longer apply to intermediate steps connected to bringing about particular circumstances or an event; only the "final" event or circumstances have to be disclosed.[206] Delaying disclosure of "intermediate steps" under these principles will not be subject to requirements under article 17(4).[207] Where confidentiality is no longer ensured, the issuer has to make public the relevant inside information as soon as possible.[208] The Commission is empowered to adopt a non-exhaustive list of final events and when these are deemed to have occurred.[209]

127 In addition to delay of disclosure available to any issuer under article 17(4) MAR, article 17(5) allows credit institutions and financial institutions to delay disclosure where immediate disclosure entails a risk of undermining the financial stability of the issuer and the financial system at large, provided that there is a public interest in delaying disclosure, confidentiality can be ensured, and the competent authority has consented to the delay.

128 Where the issuer has delayed disclosure in accordance with article 17(4), (5) MAR, and confidentiality is no longer ensured, the issuer must make public the information as soon as possible, article 17(7)(1) MAR. This includes, in particular, situations where there are rumours in the market that explicitly relate to inside information for which disclosure was delayed, and where the rumour is sufficiently accurate to indicate that confidentiality is no longer ensured, article 17(7)(2) MAR.

[204] Article 17(4)(3) MAR (which allows Member States to provide that issuers have to give such information only on request).
[205] Article 6(1)(a) Commission Delegated Regulation 2016/522.
[206] Future version of article 17(1) MAR.
[207] Future version of article 17(4b) MAR.
[208] Future version of article 17(7) MAR.
[209] Future version of article 17(12) MAR.

4.2.4.3 Insider lists

129 The disclosure obligations incumbent on issuers under article 17 MAR are complemented by the requirement under article 18(1) MAR to draw up and maintain insider lists. This obligation exists for issuers and any person acting on their behalf or on their account (e.g., external advisors such as law firms, tax consultants, investment firms).[210] These lists shall include all persons who have access to inside information through a contract of employment or other performance of tasks. Details to be included are the identity of the person with access to the information, the reason for its inclusion, and the date and time when access to inside information was obtained.[211] Further details of the format are laid down in Commission Implementing Regulation (EU) 2016/523.

130 Insider lists have to be updated when the reason for including a person on the list changes, where a new person has access to the information and therefore needs to be added to the list, or where a person ceases to have access to inside information, and these updates shall specify date and time of the triggering event.[212] The person obliged to draw up an insider list must retain the list for at least five years after its creation or update.[213]

131 One purpose of the requirement to maintain insider lists is to make sure that persons with access to inside information are aware of the regulatory regime applicable to inside information: in fact, article 18(2) MAR requires persons obliged to maintain insider lists to take reasonable steps so that persons on the list acknowledge in writing the legal and regulatory duties attaching to inside information and are aware of the sanctions applicable to insider dealing and unlawful disclosure. In addition, article 18(1)(c) MAR requires persons maintaining insider lists to make those available to the competent authority on its request as soon as possible. For any person included on an insider list, this transparency vis-à-vis regulators will tend to ensure compliance with the prohibition under article 14 MAR.

4.2.4.4 Disclosure of managers' transactions, article 19 MAR

132 The regulatory objective to prevent insider dealing is also the basis for disclosure obligations under article 19 MAR: persons discharging managerial responsibilities – i.e., senior management as defined in article 3(1)(25) MAR – and persons closely associated with them must notify issuers and the competent authorities in respect of every transaction conducted on their own account relating to the share or instruments of the issuer or instruments linked thereto ("managers' transactions" under article 19(1)(a) MAR). The notification must be made promptly and no later than three business days after the transaction.[214] It applies as soon as the *de minimis* threshold of 20,000 euros under article 19(8) MAR is reached in a calendar year.[215] The issuer has to make public the information contained in a notification under article 19(1) MAR within two business days of receipt, article 19(3)(1) MAR.

133 The disclosure and publication mechanism under article 19(1) and (3) MAR create a degree of transparency that is perceived to be conducive to managers' compliance with the prohibition of

[210] Article 18(1) MAR.
[211] Article 18(3) MAR.
[212] Article 18(4) MAR.
[213] Article 18(5) MAR.
[214] Article 19(1)(2) MAR.
[215] The threshold can be lowered to 10,000 or increased to 50,000 euros by the competent authority.

insider dealing. In addition, the regulation seeks to avoid the mere appearance of prohibited transactions by imposing "closed periods": under article 19(11) MAR, a person discharging managerial responsibilities shall not conduct any transaction on its own account or for a third party relating to shares or debt instruments of the issuer or instruments linked thereto during a "closed period" of 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public either under the rules of the trading venue where the shares are admitted to trading, or national law.

> **Case Study 33.** V is a member of the management board of the N-AG, the shares of which are listed on the regulated market at the Frankfurt stock exchange. The publication of the annual accounts of the N-AG is scheduled for 15 March 2022. On 12 March 2022, V wants to sell 2,000 shares of the N-AG. Is he allowed to do this? (Papers 2022_2 #15; 2019_1 #6)
>
> **Notes.**

4.2.5 Public and private enforcement

134 Public enforcement measures are largely dealt with by chapter 5 MAR. It includes administrative sanctions, in particular, cease and desist orders,[216] disgorgement of profits,[217] withdrawal or suspension of authorization of an investment firm,[218] and pecuniary sanctions. Pecuniary sanctions can amount to the higher of

- absolute amounts (depending on the type of infringements, between 500,000 and 5,000,000 for natural persons, and 1,000,000 to 15,000,000 euros for legal persons) and
- in case of legal persons a percentage of annual turnover (depending on the type of infringement, between 2 and 15%).[219]

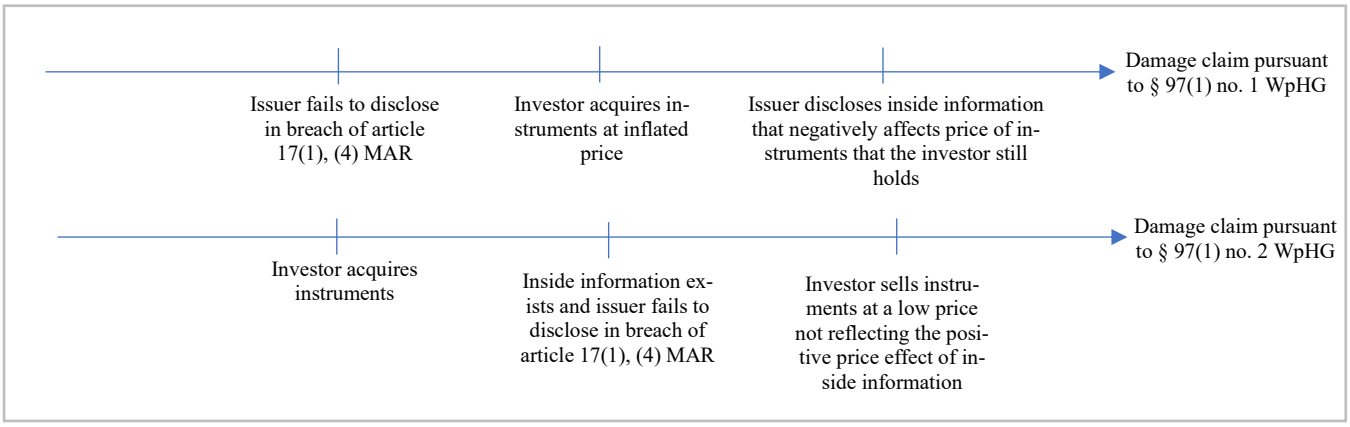
The administrative sanction regime is implemented in German law in the WpHG. Under § 120 WpHG, it is an administrative offence (*Ordnungswidrigkeit*) to engage in market manipulation,[220] as is a breach of obligations in relation to disclosure of inside information, insider lists, manager's transactions, and disclosure of conflicts of interest.[221] Any decision imposing an administrative sanction or other administrative measure in relation to infringements of the MAR must be published immediately by the competent authorities on their website after the person subject to the decision has been informed of the decision, article 34(1) MAR, § 125 WpHG.

135 The EU legislator lacks legislative competence for imposing criminal liability through regulations. These are therefore contained in a directive (MAD) which is implemented in domestic law in Germany in §119 WpHG. Insider dealing[222] and unlawful disclosure of inside information[223] are

[216] Article 30(2)(a) MAR.
[217] Article 30(2)(b) MAR.
[218] Article 30(2)(d) MAR.
[219] Article 30(2)(i), (j) MAR.
[220] § 120(15) no. 2 WpHG. § 25, § 120(2) no. 3 WpHG extends the scope of market manipulation to goods and foreign instruments for payment.
[221] § 120(15) nos 6–23.
[222] § 119(3) no. 1, 2 WpHG.
[223] § 119(3) no. 3 WpHG.

criminal offences, as is market manipulation that has an impact on the stock exchange or market price of a financial instrument or the fixing of a benchmark.[224]

136 The MAR is silent on private enforcement in case of infringements of the regulation which is therefore the remit of domestic legislation. In German law, §§ 97, 98 WpHG make specific provision for liability for late or incorrect disclosure of inside information: Under § 97(1) WpHG, a claim for damages lies for investors against an issuer failing to timely disclose inside information. The claim is for the benefit of investors buying instruments after the moment disclosure should have been made and who still hold these instruments where the information is made public,[225] and to investors who invested prior to the occurrence of inside information and sold the instruments after the publication.[226] The issuer can defend liability where it can be established that failure to disclose was not due to intentional conduct or gross negligence, § 97(2) WpHG, and where the investor was aware of the inside information.[227] Liability also exists (*mutatis mutandis*) where an issuer publishes inside information which is incorrect and where an investor relies on the correctness of that information.[228]



137 In addition to the MAR-specific liability regime, general tort law principles apply, e.g., §§ 823(2), 826 BGB. As regards the prohibitions of insider dealing and market manipulation, the traditional view under German law is that these protect only the public interest in the functioning of capital markets and therefore do not create liability under § 823(2) BGB,[229] but there is some debate whether this reasoning still applies under the new MAR regime.[230] Likewise, a breach of the prohibition of market manipulation was not in itself sufficient to be qualified as "against good morals" within the meaning of § 826 BGB,[231] but some writers adopt a more investor-friendly approach.[232]

> **Case Study 34.** IKB is a listed bank that invested, prior to the financial crisis 2007/08, in subprime mortgage products for a total of just under €7bn. In July 2007, several rating agencies downgraded the investments. Subsequently, there were rumours in the market relating as to how IKB was

[224] § 119(1) WpHG.
[225] § 97(1) no. 1 WpHG.
[226] § 97(1) no. 2 WpHG.
[227] § 97(3) WpHG.
[228] § 98(1) WpHG.
[229] BGH, NJW 2012, 1800, as regards market manipulation, Wagner, in: *Münchener Kommentar zum BGB*, 9th ed. 2024, § 823 paras 668ff, § 826 para. 148.
[230] See, e.g., Foerster, in: Habersack/Mülbert/Schlitt (eds), *Handbuch der Kapitalmarktinformation*, 3rd ed. 2020, § 31 paras 58 ff.
[231] BGH, NJW 2012, 1800, as regards § 15 WpHG as then in force.
[232] Cf. Wagner in: *Münchener Kommentar zum BGB*, 9th ed. 2024, § 826 paras. 150, 152.

affected by the crisis. On 20 July, the CEO IKB issued a press statement to the effect that it was not affected by the rating downgrade. The statement did not mention that IKB was exposed to losses of several hundred million euros and was, in fact, on the verge of financial collapse. On 26 July, an investor bought shares in IKB. Can the investor claim damages on the basis that (i) the press release of 20 July was misleading and (ii) that IKB should have disclosed its exposure to subprime before 26 July 2007? (BGH, 13 December 2011, XI ZR 51/10, BGHZ 192, 90 = NJW 2012, 1800 – *IKB*)

Notes.

Case Study 35. Hypo Real Estate Holding AG was the ultimate parent of a banking group invested in a certain type of debt instruments (so-called "Collateralized Debt Obligations" (CDOs)) with a nominal value of €1.5bn. On 10 July 2007, rating agencies announced they would look into some of these CDOs. On 11 July, HRE published inside information posting a profit of €183m in Q2 and raising its profit forecast for the year from €680m to €710m. On 3 August, HRE issued a press release confirming its profit forecast, adding that it did not expect negative effects from CDOs. On 7 November, HRE issued a press release stating that its position had improved notwithstanding the financial turmoil. Subsequently, HRE instructed auditors to reassess its CDOs. On 7 January 2008, HRE received the auditors' report which indicated a need too write-off several hundred millions euros. On the morning of 15 January, HRE announced a loss of €290m, causing the share to drop by 30%. Can investors raise damage claims on the basis that (i) the profit forecast of 11 July did not correspond to the actual profit; (ii) the press releases of August and November were incorrect or should have been corrected, and (iii) HRE should have made public the results of the auditors' report on 7 January? (BGH, 17 December 2020, II ZB 31/14, WM 2021, 285 – *Hypo Real Estate*)

Notes.

For an overview on civil liability claims in relation to late or incorrect disclosure of inside information, see the box on the next page.

4.3 Reading assignment

Buck-Heeb, *Kapitalmarktrecht*, §§ 6–7; Veil, *European Capital Markets Law*, §§ 13–15, 19.

Further material: Busch, "The private law effect of the EU market abuse regulation" (2019) 14 *Cap. Mark. Law J.* 296–319; Giltjes & Pijls, "The subtle relationship between paragraphs 1, 4, 7 and 8 of Article 17 of the Market Abuse Regulation", (2020) 15 *Cap. Mark. Law J.* 474–488.

LG Stuttgart, 24 October 2018 – 22 O 101/16, WM 2019, 463 – Porsche.
OLG Stuttgart, 29 March 2023 – 20 Kap 2/17 – Porsche.

Civil liability in relation to late or incorrect disclosure of inside information

A. §§ 97, 98 WpHG

I. Issuer of instruments within the meaning of § 97(1), § 98(1) WpHG

II. Breach of article 17 MAR

1. Inside information within article 7(1) MAR
2. Inside information directly concerns issuer, article 17(1)
3. Failure to disclose, § 97(1) WpHG
   a) Time limit (as soon as possible, article 17(1) MAR)
   b) Form and content of disclosure (article 2(1) Reg. 2016/1055, § 4 WpAV)
   c) Delay of disclosure, article 17(4) MAR
4. Alternatively: disclosure of incorrect information, § 98(1) WpHG

III. Relevant transaction, § 97(1), § 98(1) WpHG

IV. Exclusion of liability

1. No gross negligence or intentional misconduct, § 97(2), § 98(2) WpHG
2. Investor was aware of relevant information, § 97(3), § 98(2) WpHG

V. Scope of damages: §§ 249ff. BGB

1. Unwinding of the transaction
2. Payment of difference between original purchase price and hypothetical adequate purchase price
3. Causal link needed between failure to disclose and transaction?

B. § 823(2) BGB in conjunction with relevant laws

I. *Note*: German case law considers the prohibition of market manipulation and the requirement to disclose inside information to protect only the *public* interest in the functioning of the markt, but not the *private* interests of individual investors – and accordingly, would not hold issuers liable on the basis of § 823(2) BGB. Query whether that is still correct against the background of article 1 MAR.

II. § 400 I Nr. 1 AktG – recognized by case law as a "protective norm" ("*Schutznorm*") protecting individual investors, but limited scope of communications covered under that provision.

C. § 826 BGB

5 TRANSPARENCY REQUIREMENTS

5.1 Overview

138 Capital market legislation imposes a number of disclosure obligations on market participants. This reflects one of the overarching regulatory objectives of capital market law: namely, to create transparency which is needed for a level playing field for capital market investors (see para. 18 above). Examples that we have covered already include the requirement to publish securities prospectuses under article 3 PR, and to disclose inside information under article 17(1) MAR. Additional disclosure obligations can be found in other legislative acts such as the Short Selling Regulation[233] and the Shareholders' Rights Directive.[234] Another central piece of legislation in this context is the Transparency Directive which is dealt with in this chapter.

5.2 EU Transparency Directive

5.2.1 General provisions (chapter I TD)

139 In the view of the EU legislator, efficient, transparent and integrated securities markets contribute to a genuine single market in the EU. Disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence which in turn enhances market efficiency. To that end, the Transparency Directive compels security issuers to ensure appropriate transparency for investors through a regular flow of information, essentially through the publication of annual and half-yearly reports complied under applicable accounting rules. The TD also imposes on shareholders holding voting rights or related financial instruments to inform issuers of the acquisition of or other changes in major holdings in companies so that these issuers are in a position to keep the public informed.[235]

140 As a directive, the TD is not of immediate application, and requires Member States to transpose the directive into domestic laws. In that regard, the directive pursues a minimum harmonization approach in that it allows home Member States to impose more stringent requirements than those laid down in the directive.[236] However, imposing requirements that go beyond the directive are subject to specific conditions in some cases,[237] and in some cases expressly prohibited.[238]

141 One important restriction to bear in mind is that the TD only applies to issuers as defined in the directive, i.e., issuers whose securities are admitted to trading on a regulated market.[239] Accordingly, disclosure requirements for issuers outside regulated markets are not subject to the directive, and corresponding disclosure obligations depend on domestic law (e.g., in Germany, pursuant to

[233] The SSR creates a harmonized regulatory framework dealing with short selling issues. It deals essentially with two types of instruments: namely, short sales and similar short positions, and credit default swaps. Under chapter II SSR, certain net short positions and credit default swap positions must be notified to competent authorities (articles 5, 7, 8 SSR), and in case of shares, have to be disclosed to the public (article 6 SSR).
[234] Under article 9c(2) SRD, Member States shall ensure that companies publicly announce material transactions with related parties at the latest at the time of the conclusion of the transaction. Such announcement shall contain at least information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether or not the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders (cf. §§ 111a ff. AktG, also see article 9c(7) SRD as regards subsidiaries).
[235] Recital (2) TD.
[236] Article 3(1) TD.
[237] Article 3(1a) TD.
[238] Article 3(2) TD.
[239] Article 2(1)(d) TD.

§§ 20, 21 AktG). The Directive ceases to apply where admission to trading for shares is revoked (delisting or downlisting).[240]

5.2.2 Periodic information (chapter II TD)

142 Chapter II of the TD deals with periodic information, the most important examples being annual and half-yearly financial reports (articles 4 and 5 TD). The directive sets down timelines for the publication of these reports, which has to occur within four months after the end of the financial year for annual reports,[241] and three months after the end of the relevant period in case of half-yearly reports.[242] These reports must remain publicly available for at least 10 years.[243]

143 The directive also defines the format of these reports: An annual report shall comprise audited financial statements, the management report, and a "true and fair view" confirmation from the management of the issuer.[244] The financial statements include at least a balance sheet, a profit and loss account, and notes.[245] The management report includes a fair review of the development and performance of the issuer's business and of its position, together with a description of the principal risks and uncertainties that it faces.[246] The "true and fair view" confirmation is a statement of the persons responsible within the issuer to the effect that, to the best of their knowledge, the financial statements prepared in accordance with applicable accounting standards give a true and fair view of the situation of the issuer, and that the management report includes a fair review of the position of the issuer, together with a description of principal risks and uncertainties. Following recent legislative reform, this statement must also include a confirmation that the management report is, where appropriate, prepared in accordance with EU sustainability reporting standards.[247]

144 The drawing up of the annual report is largely a matter of EU legislation on accounting and consolidated accounts (cf. the references in article 4(3), (4), (5) TD). For the format of the half-yearly financial reports, see article 5(2) TD together with implementing domestic legislation.[248] To make sure reports are comparable, they have to be prepared in a single electronic reporting format, also referred to as the "European Single Electronic Format" (ESEF).[249]

145 The financial reporting requirements under articles 4 and 5 TD do not apply to States, certain public bodies, and issuers with only wholesale debt instruments (denomination of at least €100k) listed on a regulated market.[250] Issuers in the mining and forestry industry also have to disclose a report on payments to governments.[251] The periodic reporting requirements pursuant to the TD are implemented in domestic law in Germany in §§ 114ff. WpHG.

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[240] OLG München, 11 October 2023, 7 U 380/23, NZG 2024, 16.
[241] Article 4(1) TD.
[242] Article 5(1) TD.
[243] Article 4(1), 5(1) TD.
[244] Article 4(2) TD.
[245] Article 4(1) of the Accounting Directive.
[246] Article 1981) of the Accounting Directive.
[247] Article 4(1)(c) TD as amended by Directive (EU) 2022/2464 of 14 December 2022.
[248] In Germany, interim reporting follows DRS 16: Zimmermann, in: Fuchs/Zimmermann, *Wertpapierhandelsgesetz*, 3rd ed. 2024, § 115 para. 14.
[249] Article 4(7) TD.
[250] Article 8 TD, § 118 WpHG.
[251] Article 6 TD.

146 Pursuant to article 7 TD, Member States shall ensure that responsibility for the information to be drawn up in accordance with articles 4, 5, 6 and 16 TD lies at least with the issuer or its administrative, management or supervisory bodies. They must ensure that their laws on liability apply to these persons and bodies. Under German domestic law, liability is essentially a question of tort law, in particular liability under § 823(2) BGB where there is an infringement of § 400(1) no. 1 AktG or § 331(1) no. 1a HGB which make it a criminal offense to make incorrect or misleading statements in the context of financial reporting.

5.2.3 Ongoing information (chapter III TD)

147 Chapter III of the Transparency Directive deals with ongoing information. It covers both disclosure of important participation in listed issuers under articles 9ff. TD, and information that issuers have to disclose to their investors (i.e., shareholders and bondholders) pursuant to articles 17 and 18 TD.

5.2.3.1 Major holdings

148 Articles 9ff. TD create a disclosure regime for major holdings in shares that is designed to enable investors to form a view on the influence that major shareholders have, in particular as regards voting at general assemblies. The principle under article 9(1) TD is that a shareholder holding shares with voting rights is obliged to notify the issuer whenever as a result of the acquisition or the disposal of shares the proportion of voting rights held by the shareholder reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50%, and 75%. Such notification must also be filed with the competent authority of the issuer's home Member State.[252] A corresponding disclosure obligation exists where thresholds are crossed as a result of events changing the breakdown of voting rights (article 9(2) TD) which in turn have to be disclosed by the issuer under article 15 TD. Certain exemptions apply to market makers and trading book positions under article 9(5), (6) TD.

149 Major holding disclosure under the TD is implemented in Germany in §§ 33ff. WpHG. Due to the minimum harmonization approach of the directive, some provisions go beyond what is required as a matter of EU law (this excess in implementation is colloquially referred to as "gold-plating"). For example, the initial threshold for voting rights disclosure in Germany is at 3%[253] and therefore lower than would be required under article 9(1) TD.[254] In addition, German law also requires a shareholder reaching or crossing a threshold of 10% to make a "declaration of intent" and to disclose whether he pursues strategic aims or profits from trades, whether he intends to acquire additional voting rights in the course of the next 12 months, to influence the composition of corporate boards or a material change of the capital structure of the issuer.[255]

150 In an attempt to maximize transparency, and to avoid circumvention of disclosure obligations by financial engineering or artificial structures, the Directive extends the disclosure obligation to certain types of scenarios of indirect acquisition and disposal (article 10) and certain types of financial instruments (articles 13, 13a TD, → see Case Study 26, p. 44 above). Under article 10(e) TD[256],

[252] Article 19(3) TD.
[253] § 33(1) WpHG.
[254] Additional thresholds of this type are permitted under article 3(1a)(4)(i) TD.
[255] § 43(1) WpHG.
[256] Cf. § 34(1)(2) WpHG.

voting rights held by controlled entities as defined in article 2(1)(f) TD[257] are also captured by the obligation to notify under article 9(1) TD, and accordingly, a controlling entity has to aggregate its exposure across all affiliates when calculating the applicable thresholds. Aggregation requirements under article 10 TD are implemented in § 34 WpHG.

> **Case Study 36.** D is the sole shareholder of H GmbH. H acquires a 5% stake in T, a German company listed on a regulated market. While H makes appropriate disclosures, D does not disclose its indirect holdings. Subsequently, H sells 2.5% in T to a third party, and 1% to a subsidiary, S GmbH. Can H and S vote at a general meeting of T on the basis that (i) D and its subsidiaries no longer hold a disclosable position, and (ii) any restriction on the exercise of rights linked to the shares is lifted by the subsequent sale to S? (OLG Hamm, 4 March 2009 – 8 U 59/01, AG 2009, 876)
>
> **Notes.**

151 Likewise, article 10(a) TD[258] requires aggregation of voting rights with third parties where there is an agreement obliging the shareholder to adopt by concerted exercise of voting rights a lasting common policy towards the management of the issuer in question (commonly referred to as "acting in concert"). Note that § 34(2) WpHG is not a *verbatim* implementation of article 10(a) TD, and the question of whether German domestic law is compatible with article 10(a) is subject of a request for preliminary ruling.[259]

Acting in concert pursuant to § 34(2) WpHG	
Formal requirements	**Substantive requirements**
➢ Binding agreement ("*Vereinbarung*") OR ➢ Some other form of co-ordination, e.g., a non-binding gentlemen's agreement ("*in sonstiger Weise*") EXCEPT Agreements in individual cases („*Vereinbarungen in Einzelfällen*")	➢ aimed at exercise of voting rights OR ➢ aimed at a permanent and material change of the issuers business strategy („*Ziel einer dauerhaften und erheblichen Änderung der unternehmerischen Ausrichtung des Emittenten*")

Other examples of voting rights attribution include collateral holders, beneficial owners, and proxy-holders (article 10(c), (g) and (h) TD[260]).

> **Case Study 37.** S1, S2 and S3 are shareholders in company C which is listed on a regulated market, and each hold 2% in C. They are acting in concert as regards C, and each of them disclosed combined holdings of 6%. S1 then transfers his participation to T, a trustee, who holds the participation for the benefit and the account of S1. (BGH, 19 July 2011, II ZR 246/09, NZG 2011, 1147)
>
> **Notes.**

[257] Cf. § 35(2) WpHG.
[258] Cf. § 34(2) WpHG.
[259] BGH, 22 October 2024 – II ZR 193/22, WM 2025, 20.
[260] Cf. § 34(1) WpHG.

Case Study 38. S1 and S2 are shareholders in C, a listed company. S1 holds 20% of the shares in C. S2 holds 11% of the shares in C and has just been dismissed as CEO of C. S1 and S2 agree to align their votes at the next general meeting to pass resolutions revoking the appointment of the chairman of the supervisory board and appointing certain new members of the supervisory board. Their ultimate aim is to have S2 reappointed as CEO by the new supervisory board so that he can continue to implement C's business strategy. (BGH, 25 September 2018 – II ZR 190/17, NZG 2018, 1350)

Notes.

152 Article 13(1) TD[261] extends the notification requirement under article 9(1) TD to situations where a person holds, directly or indirectly, financial instruments that give the holder the unconditional right or discretion to acquire shares with voting rights and already issued, and financial instruments with a similar economic effect. A typical example would be the acquisition of a call option or a total return swap. In addition, article 13a(1) TD[262] requires monitoring relevant thresholds on an aggregate basis, aggregating shares and financial instruments.

153 Article 12 TD specifies details on the notification process. The notification must include the situation in terms of voting rights resulting from the transaction in question, the chain of controlled undertakings, the date on which the threshold was reached or crossed, and the identity of the shareholder.[263] It must be made promptly, and no later than four trading days after the date on which the shareholder learns of the acquisition or disposal, or is informed about a change in the breakdown of voting rights.[264] The issuer receiving a shareholder's notification under article 12(1) TD must make the notification public pursuant to article 12(6) TD (implemented in § 40(1) WpHG).

Case Study 39. Investor I buys an option to buy 4 % of the shares of the listed O-AG. Does he have to inform anyone of this? If so, who must be informed, in which manner and within which time limit? (Paper 2022_2 #16)

Notes.

154 A controlled undertaking is exempted from disclosure where its parent makes a notification (article 12(3) TD).[265]

Case Study 40. P owns 51% in Claimant C. Both companies have an agreement that prohibits P from exercising its voting rights at general meetings of C. When C acquires 8% in Defendant D, a company listed on a regulated market, P makes a notification under article 9 TD. Later, the annual general meeting of D passes resolutions that C contests through an action before the competent commercial court. D argues that C has failed to make appropriate disclosure under article 9 TD and that, as a result, has no standing to contest the validity of the resolutions of the shareholder meeting. (BGH, 22 September 2020 – II ZR 399/18, NZG 2020, 1349)

[261] § 38 WpHG.
[262] § 39 WpHG.
[263] Article 12(1) TD, § 15 WpAV.
[264] Article 12(2) TD, § 33(1) WpHG.
[265] § 37(1) WpHG.

Notes.

155 The TD is silent on private enforcement in case of infringements of the major holding regime. German law contains a specific provision in § 44 WpHG. Under § 44(1)(1), (2) WpHG, a shareholder cannot exercise rights attaching to shares – for practical purposes, voting rights and distribution rights (for practical purposes: dividend pay-outs) – for the period during which notification obligations under §§ 33, 38, 39 WpHG are not complied with (i.e., the provisions implementing articles 9, 13, 13a TD). Dividend and distribution rights are not affected where failure to notify was not intentional and has been remedied in the meantime, § 44(1)(2) WpHG. Where failure to notify relates to the proportion of voting rights and is due to gross negligence or intent, § 44(1)(3) extends the loss of rights to a period of six months following remediation, unless the deviation was minor (10% of the correct proportion) and did not affect thresholds, § 44(1)(4) WpHG.

Case Study 41. The share capital of G AG is €2m and divided into 2m shares with no par value. A holds 900,000 shares, B holds 400,000 shares, and C holds 190,000 shares. All other shares are in free float with minor shareholders. At the next shareholder meeting, A, B, and C want to pass a shareholder resolution modifying the statutes of G AG. The statutes do not contain any requirement as to the majority. A, B, and C agree during a dinner, in an informal way and on that single occasion, that they will vote with all their shares in favour of the modification of the statutes. In order to secure a majority even in presence of all other shareholders, C declares his intention to by another 11,000 shares prior to the shareholder meeting. He does so the next day, intentionally discloses this to BaFin only after two months, immediately prior to the shareholder meeting. A, B, and C want to know whether a shareholder voting against the resolution would have a case on the merits if he contested the validity of a resolution adopted with the votes of A, B, and C (Paper 2018_1 #2.2).

Notes.

5.2.3.2 Information for holders of securities

156 In addition to major holding disclosure, chapter II TD also deals with information for holders of shares (article 17 TD) and debt securities (article 18 TD). As a general rule, an issuer must ensure equal treatment of holders of these securities, i.e., equal treatment for all holders of shares who are in the same position and equal treatment for all holders of debt securities ranking *pari passu*, article 17(1), 18(1) TD. They must also ensure that facilities and information necessary to enable holders of shares to exercise their rights are available in the home Member State (articles 17(2), 18(2) TD), including information on place, time and agenda of meetings,[266] availability of proxy forms,[267] designation of a paying agent,[268] and information on allocation and payment of dividends.[269] These provisions are implemented in German law in §§ 48ff. WpHG.

Case Study 42. The management of X AG considers applying for listing of the shares of X. The management has the following questions:

[266] Article 17(2)(a), 18(2)(a) TD.
[267] Article 17(2)(b), 18(2)(b) TD.
[268] Article 17(2)(c), 18(2)(c) TD.
[269] Article 17(2)(d) TD.

a) What are the obligations of public disclosure for X AG as of now, i.e., prior to a listing.

b) What are the additional public disclosure requirements that come with a listing? (Paper 2018_1 #2.1)

Notes.

5.2.4 Disclosure of regulated information (chapter IV)

157 Chapter IV TD contains general rules relating to the disclosure of "regulated information", i.e., information that an issuer[270] is required to disclose under the Transparency Directive, article 17 MAR, or under domestic laws implementing the TD.[271] Whenever regulated information is disclosed by an issuer, it shall be filed with the competent authority of the issuer's home Member State.[272] Such disclosure has to be in a language accepted by the home Member State's competent authority, and in case of admission to trading on regulated market in more than one Member State,[273] either in a language accepted in the host Member States, or a language customary in the sphere of international finance.[274] Disclosure of regulated information must be made in a manner ensuring fast access to such information on a non-discriminatory basis, and must be made available through an officially appointed mechanism for the central storage of regulated information.[275] In Germany, the central storage mechanism is the *Unternehmensregister* under § 8b HGB.

5.2.5 Supervision, sanctions and measures (chapters V, VIA and VIB TD)

158 Supervision and public enforcement is dealt with in chapters V, VIA and VIB TD. Member States designate a central authority responsible for carrying out the obligations under the TD;[276] in Germany, this is BaFin.[277] Member States must lay down administrative measures and sanctions that are effective, proportionate and dissuasive,[278] applying at least to failure by an issuer to make disclosures under articles 4–6, 14 and 16 TD, and failures to notify major holdings in accordance with articles 9–13a TD.[279] Sanctioning powers include the well-known mechanisms, e.g., public statements on breaches and responsible persons,[280] cease and desist orders[281] and pecuniary sanctions.[282] NCAs have to publish every decision on sanctions and measures imposed for a breach of the Transparency Directive without undue delay.[283]

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[270] This obligation for an issuer also applies to a person applying for admission of securities to trading on a regulated market, article 2(1)(k) TD.
[271] Article 2(1)(k) TD.
[272] Article 19(1) TD.
[273] Article 20(1), (2)(a) TD.
[274] Article 20(2)(b) TD.
[275] Article 21(1).
[276] Article 24(1) TD.
[277] See https://www.esma.europa.eu/sites/default/files/transparency_directive.pdf (accessed 11 Jun 2025).
[278] Article 28(1) TD.
[279] Article 28a TD.
[280] Article 28b(1)(a) TD.
[281] Article 28b(1)(b) TD.
[282] Article 28b(1)(c) TD, §§ 120 ff. WpHG.
[283] Article 29(1) TD.

159 Pursuant to § 4(4) FinDAG, BaFin exercises supervision only in the public interest, so a breach of supervision requirements arguably does not give rise to investor claims. It is, however, an open question whether this is in line with article 24 TD which can be read to imply that where Member States are required to establish NCAs, this is also in the interest of private investors where the directive itself aims at protecting individual investors.[284] The BGH decision in Wirecard left this question open on the basis that BaFin supervision met all requirements pursuant to the TD.[285]

5.3 Reading assignment

Buck-Heeb, *Kapitalmarktrecht*, §§ 8–10, Veil, *European Capital Markets Law*, §§ 18, 20. Further reading: Case C-605/18 *Adler Real Estate v. Finanzmarktaufsichtsbehörde (FMA)*

[284] The ECJ decision in *Paul* had confirmed compatibility of § 4(4) FinDAG in a different context: Case C-222/02, *Peter Paul v. Bundesrepublik Deutschland*.
[285] BGH, 10 January 2024, III ZR 57/23, NZG 2024, 305 – Wirecard.

6 TAKEOVER BIDS

6.1 Overview

160 Takeover bids are offers to shareholders of a company to acquire all or some of the shares[286] of the target company at a certain price determined by the offeror. Such offers raise conflicting policy issues: on the one hand, a "market for corporate control" is perceived as desirable in that it enables investors to obtain control over mismanaged companies in order to put in place a more efficient management. On the other hand, there is a potential for significant imbalance between the offeror on the one hand and the addressees of the offer on the other hand. These concerns were taken up at EU level as early as 1989 with a Commission proposal for a directive,[287] but, ultimately, the Directive on Takeover Bids (TBD) was only adopted in 2004. It is a framework directive which leaves Member States large discretion as to the implementation in domestic law. This chapter will present the essential building blocks of the TBD, and its implementation in German law by the *Wertpapierangebots- und Übernahmegesetz* (WpÜG).

6.2 EU Takeover Bids Directive

161 One of the regulatory objectives of the TBD is to protect the interests of shareholders of companies when those companies are the subject of takeover bids or of a change of control.[288] The Directive also seeks to create "Community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover bids and to prevent patterns of corporate restructuring within the Community from being distorted by arbitrary differences in governance and management cultures".[289] It facilitates cross-border bids in defining one single competent supervisory authority and applicable law; in this context, most cases will fall under article 4(2)(a) TBD, attributing supervision to the Member State in which the offeree company has its registered office if the shares are admitted to trading on a regulated market in that Member State.

162 The directive covers only bids with certain characteristics: first, a "takeover bid" or "bid" within the meaning of the directive requires that the bid follows, or has as its objective, the acquisition of control of the offeree company.[290] Other offers are not covered by the TBD. Second, as regards the securities involved, the directive defines these as "transferable securities carrying voting rights in a company",[291] i.e., ordinary shares. Accordingly, preference shares and debt instruments fall outside the scope of application of the directive. Last, the directive only regulates transactions where at least some of the shares with voting rights issued by the offeree company are admitted to trading on a regulated market.[292]

163 The directive makes bids subject to a number of general principles: shareholders of the offeree company of the same class must be afforded equivalent treatment, and minority shareholders must be protected.[293] Offerees must have sufficient time and information to make an informed decision

[286] Conceptually, such bids could also relate to debt securities, but this is a rare exception in practice.
[287] COM(88) 823 final – SYN 186, OJ 14 March 1989, C64/8.
[288] Recital (2) TBD.
[289] Recital (3) TBD.
[290] Article 2(1)(a) TBD.
[291] Article 2(1)(e) TBD.
[292] Article 1(1) TBD.
[293] Article 3(1)(a) TBD.

on the bid.[294] The board of an offeree company must act in the interests of the company as a whole and must not deny shareholders the opportunity to decide on the merits of the bid.[295] False markets must not be created,[296] and the offeror may only announce a bid if he has ensured that he can fulfil any consideration offered, whether in cash or in kind.[297] Last, an offeree company must not be hindered in the conduct of its affairs for longer than is reasonable.[298]

164 Under the directive, a takeover bid is either "mandatory" or "voluntary".[299] A mandatory bid is a bid required by article 5(1) TBD whenever a person acquires control of a listed company. The relevant percentage decisive for the acquisition of "control" is to be determined by the rules of the Member State in which the offeree company has its registered office.[300] A mandatory bid is also required whenever control is acquired by a shareholder acting in concert with others.[301] In the event of acquisition of control triggering a mandatory bid, such mandatory bid must be made "at the earliest opportunity".[302]

165 The key element of the regime on mandatory bids under article 5 TBD is the requirement for a mandatory bid to be made at an equitable price[303] as defined in article 5(4) TBD. In principle, the equitable price is determined by the highest price paid by the offeror (or persons acting in concert with the offeror) in a period of at least 6 and at most 12 months preceding the bid.[304]

166 Member States may authorize their authorities to adjust the equitable price resulting from the purchase price rule "in circumstances and in accordance with criteria that are clearly determined".[305] Examples given in the TBD are cases where the highest price was set by agreement between the purchaser and a seller (as opposed to a market transaction involving intermediaries), where the market prices have been manipulated, where market prices have been affected by exceptional occurrences, or where this is necessary to enable a firm in difficulty to be rescued. Criteria suggested in the directive include the average market value over a particular period, the liquidation value of the company, and other objective valuation criteria generally used in financial analysis.[306] The consideration may be securities, cash, or a combination of both; however, where consideration offered does not consist of liquid securities admitted to trading on a regulated market, the mandatory offer must include a cash alternative.[307]

> **Case Study 43.** Bidder B makes a mandatory take-over offer in an EU Member State. According to the local takeover law, the equitable price corresponds to the price paid by the offeror in transactions preceding the offer, unless it is clear that the market price is higher in which case the market price prevails. There is, however, no statutory definition of the "market price". Is this in line with requirements under article 5(4) TBD? (Case E-1/10, *Periscopus AS/Oslo Bors AS and Erika Must*

[294] Article 3(1)(b) TBD.
[295] Article 3(1)(c) TBD.
[296] Article 3(1)(d) TBD.
[297] Article 3(1)(e) TBD.
[298] Article 3(1)(f) TBD.
[299] Article 2(1)(a) TBD.
[300] Article 5(3) TBD.
[301] Article 5(1) TBD. The concept of "acting in concert" is defined in article 2(1)(d) TBD.
[302] Article 5(1) TBD.
[303] Article 5(1) TBD.
[304] Article 5(4)(1) TBD.
[305] Article 5(4)(2) TBD.
[306] Article 5(4)(1) TBD *in fine*.
[307] Article 5(5) TBD.

AS, [2009-2010] EFTA Ct. Rep. 198, Case C-735/19, *Euromin (Holdings) Cyprus) Ltd v. Finanšu un kapitāla tirgus komisija*)

Notes.

167 Articles 6ff. TBD set up a regime for the bidding process. This includes a prohibition for the board of the offeree company to take any action to frustrate a bid ("defensive measures") unless it has obtained prior authorization of the general meeting of shareholders.[308] Article 11(2), (3) TBD removes certain restrictions on transfer of securities and the exercise of voting rights during the time allowed for acceptance of the bid, and article 11(4) extends this "breakthrough rule" to cases where following a bid the offeror holds 75% or more of the capital carrying voting rights. The TBD also contains specific provisions on squeeze-out and sell-out in articles 15 and 16 TBD.

Case Study 44. In order to make German company law more attractive for investors, a lobby group proposes the following legislative changes:

a) increase of the threshold for "control" within the meaning of § 29(2)(1) WpÜG from 30% to 33%, and

b) increase of the threshold for squeeze-out in § 39a WpÜG from 95% to 99%.

Are these proposals compliant with EU law, and why? (Paper 2017_2 #1.2)

Notes.

6.3 German takeover law

168 The German legislator had passed a law on takeover bids already in 2001, the *Wertpapiererwerbs- und Übernahmegesetz* (WpÜG), which entered into force on 1 January 2002. The TBD of 2004 required some changes to the WpÜG, the most important ones relating to rules for the offeree company and its board as regards frustration of the bid, and the European breakthrough rule.[309] The scope of application of the WpÜG is limited to securities admitted to trading on a regulated market,[310] with securities defined as shares and instruments relating to the acquisition of shares and comparable securities.[311]

6.3.1 Types of bids and takeover regimes

169 As regards the types of bids, § 2(1) WpÜG differentiates between bids that are "voluntary", and those that are "mandatory" under the WpÜG.

170 A mandatory bid is triggered by prior acquisition of control (see para. 162 above). Pursuant to article 5(3) TBD, § 29(2)(1) WpÜG defines "control" as holding at least 30% of the voting rights in the target company (see paras 173ff. below).

[308] Article 9(2) TBD.
[309] Cf. articles 9, 11 TBD.
[310] § 1(1) WpÜG.
[311] § 2(2) WpÜG.

The concept of voluntary bids does not only include voluntary *takeover* bids, i.e., bids that have the objective of gaining control of the company, but also any other voluntary bid without the objective of control (i.e., scenarios where the offeror does not intend to reach the control threshold, or where he already has control of the company and intends to increase his shareholding). Unlike for takeover bids, the WpÜG does not stipulate equitable price rules for simple acquisition offers, and also permits partial offers.[312] Special rules apply to offers in the context of delisting (see para. 190 below).

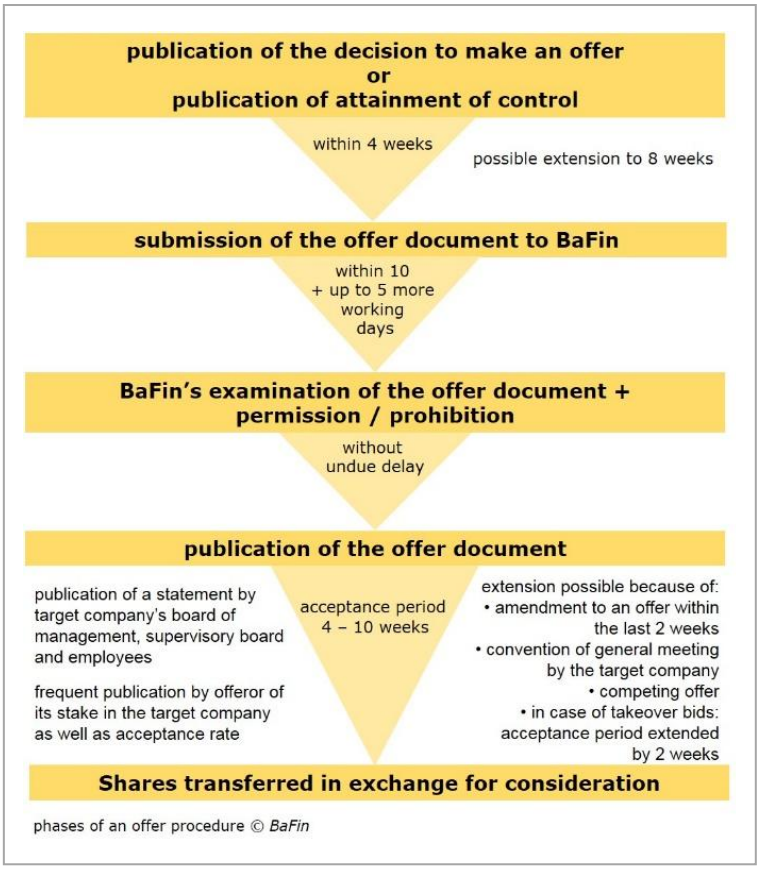
171 Section 1 WpÜG (general provisions) and section 2 (BaFin competence) are followed by section 3 (§§ 10–28 WpÜG) which contains general rules that apply to any offer (see para. 172 below). Section 4 contains special rules applying to takeover bids aimed at the acquisition of control (§§ 29–34 WpÜG, see paras 173ff. below), and section 5 WpÜG deals with mandatory bids following the acquisition of control (§§ 35–39 WpÜG, see paras 179ff. below). Squeeze-out and sell-out rules are contained in section 6 WpÜG (§§ 39a–39c WpÜG).

Types of bids under WpÜG		
Voluntary bids		*Mandatory bids*
Not aimed at acquiring control	Aimed at acquiring control	
Only section 3 WpüG applies (§§ 10–28 WpÜG)	Section 4 WpÜG applies (§§ 29–34 WpÜG), plus the reference to section 3 (§ 34 WpÜG)	Section 5 WpÜG applies (§§ 35–39 WpÜG), plus the reference to sections 3 and 4 in § 39 WpÜG

6.3.2 Steps of the process

172 The steps of an offer process are the following:

- preparation of the offer, e.g., retaining legal and financial advisors, securing financing arrangement, due diligence process as regards financial situation of the target;
- announcement of the bidder's decision to make an offer, § 10(1) WpÜG, or announcement of acquisition of control, § 35(1) WpÜG; note that § 10(6) WpÜG disapplies disclosure obligations for the bidder pursuant to article 17(1) MAR;
- preparation of the offer document with the information required under § 11 WpÜG, with conditions as permitted by §§ 18, 25 WpÜG;



[312] § 32 WpÜG prohibits partial offers in case of takeover bids (and this provision applies also in the context of a mandatory offer, § 39 WpÜG).

- submission of the offer document to BaFin for review/approval/prohibition, § 14(1) WpÜG;
- publication of offer document, § 14(2) WpÜG, unless prohibited, § 15 WpÜG;
- statement from target company, § 27 WpÜG;
- modifications during the acceptance period: § 21 WpÜG;
- publications during the acceptance period: § 23 WpÜG;
- acceptance during the acceptance period (possibly extended: § 16(2) WpÜG);
- settlement (or, in case of an offer that was prohibited or remained unsuccessful: cooling-off period under § 26(1), (2) WpÜG).

For a detailed timeline under the WpÜG, see the flow chart above published by BaFin.[313]

6.3.3 Bids aimed at the acquisition of control (voluntary takeover bids)

6.3.3.1 Concept of control

173 Section 4 WpÜG (§§ 29–34 WpÜG) contains specific rules for bids "aimed at the acquisition of control".[314] These rules include a definition of the concept of "control" which triggers the application of the rules for takeover bids (§§ 29, 30 WpÜG), rules for the equitable price (§ 31 WpÜG), and rules on board neutrality and breakthrough (§§ 33–33d WpÜG).

174 The TBD leaves it to domestic law to define what counts as "control". § 29(2) WpÜG defines control as holding 30% of voting rights in the target company through shares owned by the bidder or attributed to the bidder under the aggregation rules contained in § 30 WpÜG. § 30 WpÜG follows, by and large, the aggregation rules under article 10 TD and § 34 WpÜG (see paras 150ff. above). Aggregation is required, for example,

- under § 30(1) no. 1 WpÜG as regards shares owned by a subsidiary controlled by the bidder (*Tochterunternehmen* as defined in § 290 HGB in conjunction with § 2(6) WpÜG), with certain exceptions for investment firms and asset management companies under § 30(3), (4) WpÜG,
- under § 30(1) no. 2 WpÜG as regards shares owned by a third party for the account of the bidder,
- under § 30(1) no. 5 WpÜG as regards shares that the bidder can acquire by means of a declaration of intent,
- under § 30(1) no. 6 WpÜG as regards shares for which the bidder has discretion to exercise voting rights,
- under § 30(2) WpÜG with regard to shares held by a third party with which the bidder is "acting in concert". "Acting in concert" exists where the bidder or a subsidiary coordinate their conduct in relation to the target company on the basis of an agreement or in any other manner. A concerted practice requires that the offeror or its subsidiary and the third party agree on the exercise of voting rights or cooperate otherwise with the aim of permanently

[313] See https://www.bafin.de/SharedDocs/Standardartikel/EN/bieterpflichten_wpueg_en.html (accessed 11 Jun 2025).
[314] § 29(1) WpÜG.

and significantly changing the entrepreneurial orientation of the target company (§ 30(2)(2) WpÜG). Agreements with regard to one single case do not amount to acting in concert (§ 30(2)(1) WpÜG).

6.3.3.2 Equitable price rules

175 Under § 31(1) WpÜG, any takeover bid, whether voluntary or mandatory, is required to offer adequate compensation (*angemessene Gegenleistung*). This goes beyond article 5(1) TBD which makes equitable price rules compulsory only for mandatory bids following the acquisition of control. As regards voluntary offers, article 5(2) TBD allows exempting any bidder acquiring of control through a voluntary offer from the mandatory bid that would normally be triggered by acquisition of control. This exemption is reflected in domestic law in § 35(3) WpÜG.

176 The basic content of the equitable price rule is that it has to take into account the average stock exchange price for shares of the target, and acquisitions of such shares by the bidder, its subsidiaries, and third parties acting in concert with the bidder, § 31(1)(2) WpÜG. A more detailed framework for price determination is contained in §§ 3ff. WpÜG-AngebotsVO. The minimum price to be offered is the higher of:

(i) compensation paid by the bidder or other relevant persons during the six months prior to the publication of the offer document,[315] and

(ii) the weighted average stock exchange price during the three months preceding the statement of intent under § 10(1) WpÜG.[316]

In certain scenarios, where stock exchange prices are not meaningful, the minimum price will also have to reflect the fair value of the target.[317] The minimum price determined under these principles is increased by compensation paid for acquisitions during the period starting with the publication of the offer document and ending one year after the announcement of the final results of the offer.[318] This also applies to agreements entered into during that period and under which it is possible to claim to transfer of title in shares.[319]

> **Case Study 45.** After an unsuccessful bid, B makes an offer for shares in T at €66 per share. The offer document states that B intends to enter into a "control and profit transfer agreement" (*Beherrschungs- und Gewinnabführungsvertrag*) with T and that the offer requires an acceptance rate of 63%. On 18 August 2017, B announces that the acceptance rate is met. On 30 August 2017, the last day of the extended acceptance period, B enters into an agreement with E, holding 10% in T, under which E commits to vote in favour of the control agreement provided that the agreement includes an exit right for minority shareholders at €74 per share. Can shareholders who accepted the bid claim €74 per share? (BGH, 23 May 2023 – II ZR 219/21, WM 2023, 1356 – *Stada*, overturning OLG Frankfurt, 7 July 2020 – 5 U 71/19, NZG 2020, 1391)
>
> **Notes.**

[315] § 4 WpÜG-AngebotsVO.
[316] § 5(1) WpÜG-AngebotsVO.
[317] § 5(4) WpÜG-AngebotsVO.
[318] § 31(4), (5) WpÜG.
[319] § 31(6) WpÜG.

177 The compensation has to be a cash amount of euros, or liquid shares admitted to trading on a regulated market.[320] A cash compensation is mandatory where the bidder (or other relevant persons) acquired 5% or more of the shares in the target against consideration in cash during the six months preceding the end of the acceptance period.[321]

6.3.3.3 Neutrality principle and non-frustration-rule

178 §§ 33–34 WpÜG stipulate the principle of neutrality, according to which the administration of a company is obliged to be impartial towards the bidder and its takeover and mandatory offer (also referred to as the "non-frustration rule"). The principle of neutrality applies in two different versions: the version preceding the TBD (§ 33 WpÜG) applies by default, and the opt-in version implementing articles 9, 11 and 12 TBD (§§ 33a–33c WpÜG) applies to issuers that opt into this regime in their articles of association (statutes). Under the default rule in § 33, the board of management of a target company is subject to neutrality during the publication of a statement of intent until the announcement of the results at the end of the acceptance period, and may not take measures that are "liable to jeopardize the success of the offer".[322] Exceptions to the neutrality principle exist under § 33(1)(2) WpÜG:

- for measures that a proper and conscientious management would have taken,
- for measures seeking a competing offer, and
- for measures authorized by the supervisory board of the target.

It is also possible for the general assembly of a target to authorize measures taken by management in response to an offer. However, such authorization has to describe the general nature of these measures, can only be granted for a period of 18 months, and are subject to a majority requirement of 75% of the votes and approval of the supervisory board (§ 33(2) WpÜG).[323]

6.3.4 Mandatory bids

179 Section 5 WpÜG deals with mandatory bids (§§ 35–39 WpÜG). The acquisition of control – as defined in § 29(2) WpÜG – over a target company triggers the mandatory bid process under § 35 WpÜG. The aggregation principles to determine whether the relevant threshold was reached are the same as those for takeover bids described above para. 174.

> **Case Study 46.** Bidder B is interested in target T. In 2008, B and T's ultimate parent P enter in to a Sales and Purchase Agreement (SPA) under which B acquires 20% in T, and an option to acquire another 30% later. P and B also enter into a pledge agreement for the shares. Under the SPA, certain shareholder resolutions are subject to B's approval. Under the pledge agreement, P retains shareholder rights but must not exercise those in a way that materially affects the value of the shares. Economically, the SPA and the pledge transfer risks and opportunities in the shares to B. In October 2010, B makes a voluntary takeover bid at €25. Shareholder S accepts the offer. Could S argue that the SPA and the pledge required a mandatory takeover bid? Could S claim additional compensation if a mandatory bid in 2008 had required a higher price than €25? (BGH, 29 July 2014 – II ZR 353/12, WM 2014, 1627 – *Postbank I*; 13 December 2022 – II ZR 9/21, II ZR 14/21 – *Postbank II*; OLG Köln, 23 October 2024, 13 U 231/17)

[320] § 31(2)(1) WpÜG.
[321] § 31(3) WpÜG.
[322] § 33(1)(1) WpÜG.
[323] The TBD regime (implemented in §§ 33a–33c WpÜG) comes with stricter requirements of neutrality for the administration, and with a "breakthrough rule" in favour of the bidder – but is an "opt-in" system which only applies where the statutes of the target so provide. It has no known relevance in German practice.

Notes.

180 A shareholder acquiring control must make this fact public.[324] He has to submit an offer document to BaFin within four weeks and publish the offer document without undue delay.[325]

> **Case Study 47.** M holds 2.3% of the shares of Y AG, a company listed on the General Standard of the Frankfurt Stock Exchange. He intends to increase his stake in the near future through acquisitions from other major shareholders, in a first step to 15%, and later to 35%. a) What are the capital markets obligations resulting from the intended transactions? What are the consequences of non-compliance with these obligations? b) Does your assessment change if M does not acquire the shares himself, but rather, through A GmbH, a company in which he holds 75% of the shares? (Paper 2019_2 #5)
>
> **Notes.**

181 An exemption of immense practical importance applies where control is acquired "on the basis" of a voluntary takeover bid: in such a case, there is no obligation for the bidder to make a mandatory bid.[326]

> **Case Study 48.** B enters into an agreement with A to acquire A's 30% ABIT participation. Under the agreement, actual transfer of the shares to B is deferred to a later moment. At the same time, B also makes a voluntary takeover bid for ABIT through which B acquires 10% in ABIT. After the end of the offer period, A transfers its 30% ABIT participation to B as previously agreed. At the next shareholder meeting of ABIT, a shareholder takes the view that B's acquisition of the 30% stake in ABIT requires B to make a takeover bid, and that, having failed to do so, B's voting rights are suspended. (OLG Düsseldorf, 11 August 2006 – I-15 W 110/05, ZIP 2007, 380)
>
> **Notes.**

182 In certain cases, BaFin can exempt a shareholder from counting certain shares towards the position determining control, e.g., where shares are inherited or acquired through restructuring of a group of companies.[327] In addition, BaFin can exempt a shareholder (on application in writing) from the obligations to announce the acquisition of control and to submit an offer document where the circumstances of the acquisition, taking into account the interests of the applicant and the other shareholders of the target, justify this.[328]

183 In case of mandatory bids, the provisions of sections 3 and 4 (general rules and rules for takeover bids) apply *mutatis mutandis*.[329]

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[324] § 35(1) s. 1 WpÜG.
[325] § 35(2) s. 1 WpÜG.
[326] § 35(3) WpÜG.
[327] § 36 WpÜG.
[328] § 37(1) WpÜG.
[329] § 39 WpÜG.

6.3.5 Squeeze-out and sell-out

184 TBD rules on squeeze-out and sell-out are implemented in section 5a WpÜG (§§ 39a–39c WpÜG). Following a takeover offer or a mandatory bid, a bidder owning at least 95% of the capital with voting rights can apply to have all other outstanding shares with voting rights transferred to him against adequate compensation, and this applies *mutatis mutandis* to non-voting preference shares where the bidder owns 95% of the total capital issued (§ 39a(1) WpÜG). The type of compensation corresponds to that offered in the bid, and always has to include an option for cash compensation. If the bidder acquired at least 90% of the shares on the basis of the offer, the offer price is presumed to be adequate compensation for the purposes of the squeeze-out.[330]

185 Where a bidder can apply for squeeze-out, the minority shareholders have the option to sell their shares within three months following the end of the acceptance period under the terms of the offer.[331] Where the bidder does not comply with the publicity requirements under § 23 WpÜG, the three-months period only starts once these are fulfilled.

6.3.6 Enforcement

186 Public enforcement takes place primarily through review of the offer document by BaFin: Pursuant to § 15 WpÜG, BaFin will prohibit an offer where the offer document is incomplete, where the information in the offer document is in breach of the WpÜG or statutory instruments, where a bidder does not submit or does not publish an offer document as required, or where an offer is in breach of the cool-down period under § 26 WpÜG. In addition, failure by a bidder to comply with the essential requirements under the WpÜG constitutes an administrative offence under § 60 WpÜG which can be subject to pecuniary sanctions (§ 60(3), (4) WpÜG).

187 As regards private enforcement, § 12 WpÜG attaches liability to incorrect or incomplete information in the offer document: shareholders accepting the offer can claim damages resulting from the acceptance of the offer and the delivery of the shares from the person responsible for the offer document, and any person initiating the preparation of the offer document.

188 In addition, § 59 WpÜG suspends rights attached to shares for a period during which a bidder does not comply with the mandatory bid procedure under § 35 WpÜG. As a consequence, the shareholder controlling the company is not entitled to dividends, and also prevented from participating and voting at shareholder assemblies. In addition, a shareholder who acquires control but fails to announce this, fails to make an offer, or to whom the publication of the offer document is prohibited, owes interest on the equitable compensation of 5 percentage points above the base interest rate.[332]

189 Other than that, the WpÜG does not contain rules on private enforcement. A particular debate in this context relates to the rights of shareholder of a target company where an offer does not comply with equitable price rules as described in section 6.3.3.2 on p. 70 above: While it is universally accepted that shareholders accepting an offer have an actionable claim for payment of the difference between the compensation offered and the compensation due under equitable price rules (→ see Case Study 46), this is less clear in cases where no bid is made although there is a legal

[330] § 39a(3) s. 3 WpÜG.
[331] § 39c WpÜG.
[332] § 38 WpÜG.

obligation to do so. Similar issues arise with regard to shareholders that did not accept an offer within the acceptance period where the offer did not comply with equitable price rules.

Case Study 49. S is a shareholder in BKN, a German listed company. S believes that B, through acting in concert with others, acquired control over a 30% stake in BKN. However, B does not make a public takeover bid. Can S claim payment of an "equitable price" from B against delivery of its BKN shares? (BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511 – *BKN*)

Notes.

Case Study 50. Bidder B enters into a share purchase agreement for the purchase of 50% of T shares at a price of €24 per share. T had issued convertible bonds that provided for a conversion right in case of certain events and that had become convertible in January 2014. B acquired 2,000 convertible notes for a purchase price corresponding to €31 per share to be acquired through conversion of the notes. The share purchase deal was closed on 27 January, and B had the notes converted into T shares on 28 January 2014. B subsequently publishes a takeover offer at a price of €24 per share. S, a minority shareholder, believes the equitable price is €31 per share. Can he claim the balance from B? Does it make a difference whether he accepts the offer or not? (BGH, 7 November 2017 – II ZR 37/16, WM 2018, 18 – *Celesio I*, and 23 November 2021 – II ZR 315/19, WM 2022, 16 – *Celesio II*)

Notes.

6.3.7 Delisting

190 There are no specific rules at EU level as regards the "delisting" of shares, i.e., scenarios where an issuer decides to have the admission of shares to trading revoked. Following uncertainty created by diverging case law,[333] the German legislator chose to implement a specific provision in § 39 BörsG affording some protection to shareholders and their legitimate expectations to be in a position to divest through a regulated market: Under § 39(2) BörsG, the operator of a regulated market may revoke the admission to trading only where the delisting application is accompanied by an offer under the WpÜG with regard to the shares the admission of which is to be revoked.[334] Accordingly, minority shareholders can benefit from an opportunity to divest at equitable price rules as in a normal takeover bid. In practice, the offer is typically made by the major shareholder, but in exceptional cases, a "self tender offer" is possible as in Case Study 3, page 8 above (on this particular case, see Guntermann, "Self-Tender Offer und Delisting", (2021) NZG 1621).

6.4 Reading assignment

Buck-Heeb, *Kapitalmarktrecht*, §§ 14–16 and § 3.V.2; Veil, *European Capital Markets Law*, §§ 37–40. Further material: Fuhrmann, "Einführung in das Übernahmerecht", (2021) *JuS* 200–204.

[333] An earlier judgment of the Federal Court of Justice (25 November 2002 – II ZR 133/01, *Macroton*) made delisting subject to shareholder approval and adequate compensation for minority shareholders, but following a decision of the Federal Constitutional Court (BVerfG, 11 July 2012 – 1 BvR 3142/07), *Macroton* was overruled (BGH, 8 October 2013 – II ZB 26/12, *Frosta*).
[334] § 39(2)(1) no. 1 BörsG.

7 GLOSSARY AND ABBREVIATIONS

Accounting Directive Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings

Acting in concert A type of co-ordinated activities among shareholders that requires aggregation of holdings across all persons involved "acting in concert" for purposes of disclosure obligations under the TD and acquisition of control within the meaning of the TBD, see paras 151 and 174

Ad hoc announcement A term used in German practice to refer to publication of → inside information by an issuer

AIF Alternative Investment Fund, a category of → investment funds

AIFM AIF Manager, a company managing investments of an → AIF

AIFM Directive Directive 2011/61/EU of 8 June 2011 on Alternative Investment Fund Managers

Alternative Investment Fund → AIF

BaFin Bundesanstalt für Finanzdienstleistungsaufsicht, the German → NCA for most capital market related issues

Bearer bond/share Transferable securities that are unregistered (without records of the ownership); whoever physically holds the paper certificate is the presumptive owner of the instrument. Also see: → registered bond/share

Begebungsvertrag → Subscription Agreement

BGB Bürgerliches Gesetzbuch

Börsennotierte Gesellschaft → Listed company

BörsG Börsengesetz

BörsO Börsenordnung, see § 16 BörsG

BörsZulV Börsenzulassungsverordnung

Bonds Refers to debt instruments that qualify as → transferable securities

Capital Markets Union The capital markets union (CMU) is a plan to create a single market for capital. See para. 28

Capital Requirements Directive → CRD IV

Capital Requirements Regulation → CRR

CCP Central counterparty, Facilitates capital market transactions through → clearing. Example: Eurex Clearing AG

Central counterparty → CCP

Central Securities Depository → CSD

Central Securities Depositories Regulation → CSDR

CESR Committee of European Securities Regulators, the body preceding → ESMA

CLD Directive (EU) 2017/1132 of 14 June 2017 relating to certain aspects of company law (codification)

Clearing Process by which transactions in → financial instruments are netted between the members of a → CCP clearing house

Closed periods A period preceding disclosure of financial information during which senior management of an issuer is prohibited from dealing in → financial instruments relating to an issuer, see para. 52

Common stock Refers to ordinary shares with statutory dividend and voting rights (also see → preferred stock)

Company Law Directive → CLD

Cornering A specific type of market manipulation through abuse of a dominant position, see para. 119

Corporate Sustainability Reporting Directive → CSRD

Correlation table A tool used by the EU legislator to update references to legislative texts that are repealed, e.g., the correlation table in MiFID II in relation to references to MiFID I provisions.

Counterparty → Eligible counterprty

CRA Regulation Regulation (EU) No 462/2013 of 21 May 2013 on credit rating agencies

CRD IV Directive 2013/36/EU of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, also referred to as Capital Requirements Directive

Credit Rating An opinion on the creditworthiness of an issuer

Credit Rating Agencies Regulation → CRA Regulation

CRR Regulation (EU) No 575/2013 of 26 June 2013 on prudential requirements for credit institutions and investment firms, also referred to as Capital Requirements Regulation

CSD Central securities depository, keeps global certificates in custody on behalf of its clients, e.g., Clearstream Banking AG. Arranges, together with → CCPs, for settlement of capital market transactions.

CSDR Regulation (EU) No 909/2014 of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories

CSRD Directive (EU) 2022/2464 of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting

Debt Refers to money that is borrowed, e.g., under a loan or a bond. Cf. → equity.

Delisting Removal of a → financial instrument from admission to trading on a regulated market or an MTF, see para. 190

Denomination Face value or nominal value of one unit of a series of fungible securities, see para. 32

Derivative A type of → financial instrument, e.g. futures, options, and swaps

Deutscher Rahmenvertrag A framework agreement for → derivative contracts, see para. 45.

Digital securities A term referring to → Securities that are not certificated through paper certificates

Director's dealings a synonym for → managers transactions

EBA European Banking Authority

ECJ European Court of Justice

EEA European Economic Area

EFTA European Free Trade Association

EFTA Court Judicial function within the → EFTA system, interprets Agreement on the → EEA with regard to the EFTA States party to the Agreement

Eigenkapital → equity

EIOPA European Insurance and Occupational Pension Funds Authority

Eligible counterparty A category of clients under → MiFID II, see para. 63

EMIR Regulation (EU) No 648/2012 of 4 July 2012 on OTC derivatives, central counterparties and trade repositories

Emittentenleitfaden Regulatory guidance on capital market law issued by → BaFin, see para. 25

Equity Refers to funding obtained through issuing shares (as opposed to funding provided by → debt), and in the context of a balance sheet, to assets minus liabilities

Equivalence and effectiveness → Principle of equivalence and effectiveness

ESAP European Single Access Point, a centralised repository for regulated financial information, see para. 28

ESEF European Single Electronic Format, a financial reporting format under the → TD

ESFS European System of Financial Stability

ESA European Supervisory Authority, one of → EBA, → EIOPA, and → ESMA

ESG Rating Activities Regulation A regulation on the activities of ESG Rating Agencies, see para. 28

ESMA European Securities and Markets Authority, one of the ESAs

EU European Union

EU Listing Act The EU Listing Act is a package of measures meant to review the PR, MAR, MiFIR and MiFID II. It comprises Regulation (EU) 2024/2809, Directive (EU) 2024/2810, and Directive (EU) 2024/2811. Cf. para. 28.

Eurex A regulated market for derivative contracts

European Market Infrastructure Regulation → EMIR

European Single Access Point → ESAP

European Single Electronic Format → ESEF

European Supervisory Authority → ESA

European System of Financial Stability → ESFS

eWpG Gesetz zur Einführung von elektronischen Wertpapieren

Financial instrument A capital market product, including → transferable securities

FIRDS Financial Instrument Reference Data System, a database with information on financial instruments traded in the EU, see para. 102

Fixed income Refers to → debt instruments (as opposed to → equity instruments)

Frankfurter Wertpapierbörse → FWB

Freiverkehr A type of MTFs under § 48 BörsG

Fremdkapital → debt

Future A type of → derivative contract under which delivery is agreed at a future date for a fixed price; also see → spot transaction

FWB Frankfurter Wertpapierbörse, a regulated market operated by Deutsche Börse AG

Global certificate Certification of transferable securities in one single certificate held by → CSDs on behalf of all individual investors

Goldplating Colloquial term describing excess implementation of EU directives in domestic law, see para. 149

European Green Bonds Standard Regulation Regulation (EU) 2023/2631, laying down uniform requirements for the use of the designation 'European Green Bond'

IFD Directive (EU) 2019/2034 of 27 November 2019 on the prudential supervision of investment firms

IFR Regulation (EU) 2019/2033 of 27 November 2019 on the prudential requirements of investment firms

Implementing technical standard A type of EU capital markets legislation, see para. 22

Initial public offering → IPO

Inside information Non-public information of a precise nature and relating to an issuer or a financial

instrument that would have a significant effect on the prices of an instrument if it became known

Interactive Single Rulebook → ISRB

Investment firm A type of provider of financial services under MiFID II, see para. 53

Investment Firms Directive → IFD

Investment Firms Regulation → IFR

Investment fund A vehicle for collective, pooled investments following a common investment strategy, also see: → UCITS, → AIF

Investment services Services defined under MiFID II as the type of activity of an → investment firm

IPO Initial public offering, describes the initial placement and admission to trading of shares

ISDA Master Agreement A framework agreement for → derivative contracts, see para. 45

ISRB An online tool providing a comprehensive overview of level 2 and level 3 measures adopted in relation to a given level 1 text, see https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook

ITS → Implementing technical standard

Junior → subordinated

KAGB Kapitalanlagegesetzbuch

Lamfalussy process Describes the rule-making process for capital market regulation in the EU, see para. 22

Listed company A company the shares of which are admitted to trading on a regulated market, § 3(2) AktG ("börsennotierte Gesellschaft")

Listing Directive Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities

MAD Directive 2014/57/EU of 16 April 2014 on criminal sanctions for market abuse ("Market Abuse Directive"), see para. 135. Notabene: the term "Market Abuse Directive" is also used to refer to the directives preceding → MAR, see para. 100.

Managers' transactions Transactions by senior management in → financial instruments relating to an issuer that are disclosable under MAR, see para. 132

Manufacturer Investment firms creating, developing, issuing or designing financial instruments, see para. 58

MAR Regulation (EU) No 596/2014 of 16 April 2014 on market abuse ("Market Abuse Regulation")

Market Abuse Directive → MAD

Market Abuse Regulation → MAR

Markets in Financial Instruments Directive → MiFID II

Marking the close A specific type of market manipulation through manipulation of closing prices, see para. 119

MiFID I Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, precedes → MiFID II

MiFID II Directive 2014/65/EU of 15 May 2014 on markets in financial instruments

MiFIR Regulation (EU) No 600/2014 of 15 May 2014 on markets in financial instruments: a framework establishing uniform requirements for the transparency of transactions in markets for financial instruments

MTF Multilateral Trading Facility, a MiFID II trading venue

Naming and shaming Colloquial term describing a requirement under EU capital markets law for NCAs to make public sanctions including identity of the responsible person for the behaviour in question, see, e.g., para. 91

NCA National Competent Authority, a term referring to national authority designated as the competent authority to supervise and implement a specific piece of EU legislation

NFRD Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

Non-Financial Reporting Directive → NFRD

Notes → Bonds

Open Market An → MTF operated by Deutsche Börse AG

Organisierter Markt § 2(11) WpHG terminology for → Regulated Market

OTC Over-the-counter, refers to a transaction outside a MiFID II trading venue, cf. para. 1.2.2.1

OTF Organized Trading Facility, a MiFID II trading venue

Par Latin origin (literally: equal), refers to the face value of an instrument, e.g., the nominal value of a bond, as opposed to the market value which is often referred to as "below" or "above" par.

Pari passu Latin phrase (literally: on equal footing) used to describe creditors that have the same rank as regards distribution following liquidation, insolvency, etc.

Passporting A term describing scenarios where authorization or approval by an → NCA in one EU Member State covers the entire EU

PR Regulation (EU) 2017/1129 of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market

Preferred stock, preference share A type of share that takes precedence over → common stock as regards distribution, but that does not carry voting rights

Primary market Refers to the market on which securities are sold by issuers (typically using investment firms for distribution) to raise financing. Also see → secondary market

Principle of equivalence and effectiveness A principle developed by the ECJ for implementation of EU law which requires that implementing rules must not be less favourable than those concerning similar provisions of national law or arranged in such a way as to make the exercise of rights conferred by the EU legal order practically impossible

Private placement Refers to an exemption under the → PR, see para. 79

Product intervention Powers for NCAs and ESMA to intervene with regard to certain financial instruments or financial activities, see para. 64

Professional Client A category of clients under → MiFID II, see para. 63

Prospectus Regulation → PR

Prospectus Supplement Amendment of an approved prospectus as regards new factors, material mistakes or inaccuracies, see para. 87

Prudential rules Legal framework designed to financial safety and stability of financial institutions, see para. 55

Qualified investor A category of investors under the → PR, see para. 63

Rating → Credit rating

Registered bond/share a type of securities involving a register of ownership; registration creates a presumption of ownership in the security. Also see → **bearer bond/share**

Regulated information A concept regrouping information disclosed by issuers under the → MAR and the → TD, and subject to disclosure rules under chapter IV TD, see para. 157

Regulated market One of the trading venues defined in → MiFID II

Regulatory technical standard A type of EU capital markets legislation, see para. 22

Related Party Transaction Transactions that imply certain approval and disclosure requirements under the → SRD, see para. 37

RTS → Regulatory technical standard

SchVG Schuldverschreibungsgesetz

Secondary market Refers to the market where securities are traded among investors, i.e., without involvement of an issuer

Securities → Transferable securities

Security token → Digital securities

Senior → subordinated

Settlement → Clearing

SFDR Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector

Shareholder Rights Directive → SRD

Short Selling Regulation → SSR

Spot transaction Refers to a transaction for "immediate" delivery (T+2), also see → future

SRD Directive 2007/36/EC of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (as amended) ("Shareholder Rights Directive")

SSR Regulation (EU) No 236/2012 of 14 March 2012 on short selling and certain aspects of credit default swaps ("Short Selling Regulation")

Subordinated Describes distribution claims that in case of insolvency, liquidiation etc. rank below ordinary ("senior") debt

Subscription Agreement Agreement buy which an issuer sells financial instruments to investors or intermediaries

Supplement → Prospectus Supplement

Sustainable Finance Disclosure Regulation → SFDR

Takeover Bid Directive → TBD

Taxonomy Regulation Regulation (EU) 2020/852 of 18 June 2020 on the establishment of a framework to facilitate sustainable investment

TBD Directive 2004/25/EC of 21 April 2004 on takeover bids

TD Directive 2004/109/EC of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market ("Transparency Directive")

Trading venue Refers to → Regulated Markets, → MTFs, and → OTFs

Transferable securities Shares, debt instruments, and derivatives related thereto (cf. art. 4(1)(44) MiFID II), a subcategory of → financial instruments

Transparency Directive → TD

Token, Tokenized securities → Digital securities

UCITS Undertakings for collective investment in transferable securities, cf. → UCITS Directive

UCITS Directive Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)

Undertakings for collective investment in transferable securities → UCITS

VermAnlG Vermögensanlagengesetz

Vorzugsaktie → preferred stock

Wholesale transaction Refers to an exemption under the → PR, see para. 79

WpAV Wertpapierhandelsanzeigeverordnung

WpHG Wertpapierhandelsgesetz

WpPG Wertpapierprospektgesetz

WpÜG Wertpapiererwerbs- und Übernahmegesetz

WpÜG-AV WpÜG-Angebotsverordnung

8 CASE NOTES

Notabene: These notes only serve the purpose of "refreshing" notes taken in class. They are not an equivalent for the reading assignments (see end of each chapter) and the case law referred to in this course booklet.

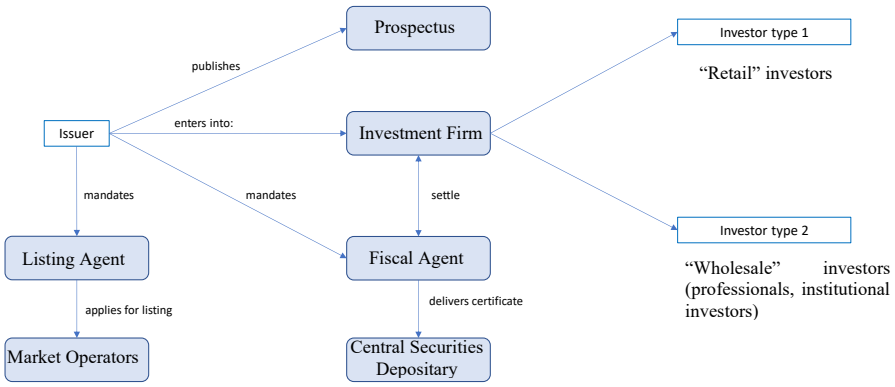
Case Study 1 (p. 4). The case study shows how English language and English legal terminology is important for capital market law and practice: EU legislation is drafted and agreed in English, and translations in other EU languages are often affected by inaccuracies and errors (and, as the example of the Listing Act shows, may only be available with significant delay). In addition, there is a tendency to use English for transactional documents and disclosures whenever possible. Last but not least, some commentary and administrative guidance is prepared in English only, as is the case for the ESMA Single Rulebook.

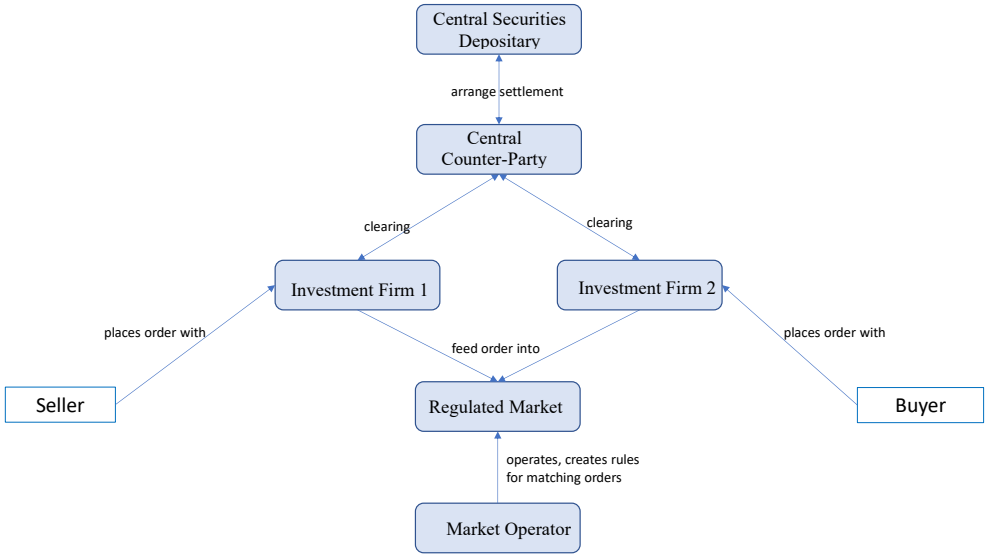
Case Study 2 (p. 5).

Investors' view Type of instrument	Legal texts determining investors' rights	Investors' economic motivation	Investors' exposure to losses	Investors' influence on issuer	Investors' position in issuer's insolvency	Investors' risk by comparison
Ordinary Shares (equity investment)	Stock company law, by-laws or articles of association	Profit participation (dividend, increase in company value), voting right	High (losses will directly affect dividend payment capacity and company value)	High (shareholders vote at shareholder assembly, in particular, as regards supervisory board composition	Shareholders rank last in distribution of dissolution proceeds	High
Standard Bonds (debt investment)	Terms and conditions of the bond	Payment of interest, and redemption of principal at maturity	Low (absent insolvency, losses do not affect bondholder rights)	Low (bondholders have no voting rights at shareholder assembly)	Bondholders rank prior to shareholders in distribution of dissolution proceeds	Low

Case Study 3 (p. 8). The role of regulated markets is not only to provide opportunities for *investment*, but also for *divestment*. Where shares are delisted, the option to sell shares on the regulated market falls away. Typically, this will negatively affect the share price. In situations where events affect the price of financial instruments significantly, the Market Abuse Regulation requires the issuer to make this information public to make sure that existing and potential investors are "on a level playing field". On subsequent litigation in this case, LG Berlin II, 19 April 2024 – 96 O 44/21.

Case Study 4 (p. 9).





Case Study 5 (p. 10). The notes are riskier than a "usual" bond of the type described in Case Study 2, p. 5 above because investors have no actionable claim to payment of interest or principal, and there is no scheduled maturity date. Exposure to risks of this type may be reflected in legislation at various levels: as regards marketing and distribution, one could think of limiting the permissible target markets, and of creating requirements to give advice to prospective investors (see, e.g., MiFID II requirements for investment firms, section 3.3.1.3 p. 24). Distribution and/or admission to trading could also be made subject to disclosure obligations, e.g., a securities prospectus (see chapter 4, p. 31ff.). The issuer of instruments admitted to trading may be subject to subsequent disclosure obligations, e.g., disclosures of recurring information (in particular, financial reports, see chapter 6, p. 55ff.) as well as singular events (in particular, inside information, see chapter 5 p. 40). Certain mechanisms of investor protection may apply in the context of takeover bids and the acquisition of a controlling stake (see chapter 7, p. 62ff.).

Case Study 6 (p. 12).

Lamfalussy process levels	Instrument
Level 1	EU Prospectus Regulation 2017/1129 (PR)
Level 2	Delegated Acts (e.g., regulations 979 and 980/2019)
Level 3	ESMA Guidelines on Risk Factors[335]: https://www.esma.europa.eu/document/guidelines-risk-factors-under-prospectus-regulation ESMA Q&As: https://www.esma.europa.eu/document/qas-prospectus-regulation
Level 4	ESMA peer reviews
Role of German law	Wertpapierprospektgesetz (WpPG)

Case Study 7 (p. 13). Judicial review pursuant to article 263 TFEU is limited to measures with "binding" legal effect.[336] Accordingly, article 263 TFEU does not allow for review of guidelines as these instruments are not binding as is the case for ESMA guidelines pursuant to article 16(3) ESMA Regulation. By contrast, review pursuant article 267 TFEU extends to the validity of any EU act without exception, so is not limited to acts with binding legal effects.[337] Accordingly, it is possible to put forward an argument based on the invalidity of the ESMA guidelines in any domestic litigation which would then allow for a request for a preliminary ruling under article 267 TFEU.

[335] Other relevant guidelines exist for securities prospectuses, e.g., relating to disclosure (https://www.esma.europa.eu/sites/default/files/library/esma32-382-1138_guidelines_on_disclosure_requirements_under_the_prospectus_regulation.pdf) and alternative performance measures (https://www.esma.europa.eu/document/esma-guidelines-alternative-performance-measures-1), accessed 11 Jun 2025.
[336] Case C-911/19, *Fédération Bancaire Française*, para. 36.
[337] Case C-911/19, *Fédération Bancaire Française*, paras 53f.

Case Study 8 (p. 16). The terms 'securities which are negotiable on the capital market' within the meaning of MiFID II must be interpreted broadly and includes shares in companies, provided that the transfer of those securities is not subject to restrictions that would make their negotiability on the capital market impossible or extremely difficult.[338] Such broad interpretation of the concept of 'securities' follows from recital 2 of the MiFID I Directive (MiFID I should encompass the "full range of investor-oriented activities" and recital 12 of the Prospectus Directive (to ensure investor protection, the directive adopts a wide definition of the concept of 'securities') and is consistent with the principles of investor protection and smooth market operation as per recital 44 MiFID I and recital 10 PD.[339] Subject to verification by the referring court, Holding Communal shares do not appear to be subject to restrictions that make their trading between offerors of securities and investors impossible or extremely difficult, since those restrictions do not prevent those shares from being traded with a significant number of potential investors.[340] The offer is not exempt from prospectus requirements as it is not one to "qualified investors" within the meaning of article 2(e) PR.[341]

Case Study 9 (p. 18). Articles 56, 57, 85 CLD "regulate only the legal relationships established between the company and its shareholders which derive exclusively from the memorandum and articles of association and […] are directed solely to internal relations within the company concerned".[342] Accordingly, they are no defence to prospectus liability claims. Prospectus liability does not breach the principle of equal treatment either in that shareholders who relied on the prospectus are not in the same position as those who did not rely on the prospectus.[343]

Case Study 10 (p. 19). Unlike traditional concepts, the EU law definition of securities does not require paper certification. In fact, article 4(1)(15) MiFID II specifically extends the scope of financial instruments to "instruments issued by means of distributed ledger technology". Accordingly, if the legal and economic features of the tokens in question qualify as "bonds" and therefore as securities within the meaning of article 4(1)(44) MiFID II, this triggers a requirement to publish a prospectus under article 3(1) PR.

Case Study 11 (p. 20). The principle is that consent from each and every bondholder is necessary to modify the terms and conditions of the bond. Accordingly, bond-holders who do not agree to a restructuring exercise (colloquially referred to as "hold-outs") can claim what was initially agreed and are not bound by a majority resolution. The problem with this conventional solution is that it discourages investor consent in restructuring scenarios; hence the specific legislative solution under the SchVG (paras 40 ff. above).

Case Study 12 (p. 20). § 5 SchVG does allow for a majority resolution binding on all noteholders. However, restructuring under SchVG principles only applies to notes within the meaning of § 1 SchVG. Outside the SchVG (as in this case), terms and conditions can provide for a majority resolution only within the limits of § 307 BGB. In the decision referred to above, the majority clause in the terms and conditions was held to be invalid pursuant to § 307 BGB.

Case Study 13 (p. 21). The resolution breaches the equality requirement of § 4 SchVG, and is therefore invalid pursuant to § 5(2)(2) SchVG. Noteholders can claim redemption at par in 2011.

Case Study 14 (p. 27). While MiFID II provides for public enforcement mechanisms, it does not contain provisions on civil liability.[344] Accordingly, damage claims are a matter of domestic law. However, domestic law on civil liability for breach of MiFID II provisions is subject to the principles of equivalence and effectiveness as established by ECJ case law.[345] According to German case law, MiFID II requirements are of a public law nature only and do not modify the bases for civil liability,[346] i.e., do not create contractual obligations, nor amount to protective norms within the meaning of § 823(2) BGB.[347] Liability therefore depends on an assessment irrespective of MiFID II requirements to determine whether the conduct in question amounts to a breach of contractual duties (whether express or implied), or gives rise to a claim in tort (see box in para. 67 p. 27 above).

Case Study 15 (p. 29). Article 14b(1)(n), (o) UCITS Directive requires deferment of variable remuneration in order to deter employees from taking excessive risks on behalf of the fund. For this to be achieved, the scope of "remuneration" has be interpreted broadly (article 14b(3): "any benefit of any type"), and thus includes dividend payments made by the management company.

Case Study 16 (p. 32). (Note: the PR is legislation with "EEA relevance" and therefore also applies in Liechtenstein.) a) The requirement to publish a prospectus prior to an "offer to the public" within the meaning of article 2(d) PR is

[338] Case C-627/23, *Commune de Schaerbeek and Commune de Linkebeek v. Holding Communal SA*, para. 33.
[339] Case C-627/23, *Commune de Schaerbeek and Commune de Linkebeek v. Holding Communal SA*, paras 37f.
[340] Case C-627/23, *Commune de Schaerbeek and Commune de Linkebeek v. Holding Communal SA*, para. 39.
[341] Case C-627/23, *Commune de Schaerbeek and Commune de Linkebeek v. Holding Communal SA*, paras 41ff.
[342] Case C-174/12, *Hirmann*, para. 27 (N.B. the judgment refers to directives preceding CLD not yet in force then).
[343] Case C-174/12, *Hirmann*, para. 30.
[344] Case C-604/11, *Genil 48*, para. 57.
[345] Case C-604/11, *Genil 48*, para. 57. Accordingly, domestic law must provide for liability as would be the case for equivalent scenarios, and must not make private enforcement practically impossible.
[346] BGH, 17 September 2013 – XI ZR 332/12, BKR 2014, 32, 33 (para. 16).
[347] BGH, 17 September 2013 – XI ZR 332/12, BKR 2014, 32, 34 (paras 20, 21).

aimed to protect investors, which requires a broad understanding of this provision.[348] An "offer to the public" requires two key elements: communication by any means, and "sufficient information" on terms of the offer.[349] What is "sufficient" depends on the specific facts of the case,[350] and can be the case for promotional messages containing key elements of the transaction.[351] Communication of this type cannot be "disclaimed" by referring potential investors to additional sources of information.[352] The exemption under article 1(4)(b) PR does not apply where an offer is published over the internet as it is then accessible to an undefined number of recipients, even where the issuer has the intention to only share full documentation with less than 150 recipients.[353] b) The competent NCA is the Liechtenstein regulator, cf. article 20(8) PR. c) The Liechtenstein regulator can impose sanctions and measures provided for in article 38 PR, including a public statement and/or a cease and desist order pursuant to article 38(2)(a) and (b) PR. Civil enforcement depends on how prospectus liability under article 11 PR is implemented in domestic law. In this context, it is worth noting that German law provides for a specific basis for liability in cases where a prospectus is missing altogether: see § 14 WpPG.

Case Study 17 (p. 33). Where a prospectus contains a forecast on future profits, this cannot be understood as some kind of a "guarantee".[354] If a forecast later turns out to be incorrect, it is compliant with prospectus requirements if the forecast was based on a sound fact basis and if it was "defendable" ("vertretbar").[355] On this basis, the mere fact that actual profits deviate from the forecast does not make the prospectus "incorrect".

Case Study 18 (p. 33). As regards valuation, the methodology only has to be disclosed if relevant for investors.[356] The valuation result is not incorrect as long as it stays within acceptable boundaries ("*im Rahmen zulässiger Toleranzen*").[357] By contrast, the description of the internal "contribution in kind" as a "sale" is misleading in that the word "sale" suggests incorrectly that the risk of a decrease in value of the participation "sold" has passed to the buyer, while in the present case, the issuer still bears this risk on a consolidated basis.[358] As a result, the prospectus does not meet the disclosure requirements under article 6(1), (2) PR.

Case Study 19 (p. 34). Completeness and correctness of a prospectus do not depend on single, isolated parts, but the "overall picture".[359] A prospectus for a transaction raising capital for re-investment in a subsidiary of the issuer has to explain the subsidiary's business model and attendant risks, but there is no express requirement for a balance sheet.[360] There is no need to indicate the equity ratio if the components of that ratio are part of the prospectus.[361]

Case Study 20 (p. 34). a) The test for correctness of a prospectus depends on the perspective of an "average retail investor" with no special knowledge.[362] Therefore, a prospectus must address the risk of adverse instructions from the controlling company as this would not be something a retail investor would be aware of.[363] b) Liability of a person as an "initiator" (within the meaning of § 9(1) no. 2 WpPG) includes persons who have an own interest in the issuance of securities and who contribute to the preparation of the prospectus,[364] as is the case for M.

Case Study 21 (p. 38). (i) The lack of impact on the market at large is irrelevant under § 12 WpPG. A defence under § 12(2) no. 1 only exists where there is proof that the individual investment decision was not influenced by the prospectus.[365] (ii) Whether the issue price adequately reflected risks is irrelevant under § 12(2) WpPG. A defence under § 12(2) no. 2 WpPG only exists where the undisclosed risks did not materialise and did not cause a reduction in price.[366] (iii) The impact of the discovery of inaccuracies in the prospectus is irrelevant for defences under § 12 WpPG.[367]

Case Study 22 (p. 38). The Prospectus Regulation designed prospectuses as a tool to improve confidence in securities markets, so it is legitimate for any investor to rely on the contents of a prospectus.[368] Article 1(4) PR does not exclude

[348] Case E-10/20, *ADCADA*, paras 31f.
[349] Case E-10/20, *ADCADA*, para. 33.
[350] Case E-10/20, *ADCADA*, paras 36, 37.
[351] Case E-10/20, *ADCADA*, paras 39f.
[352] Case E-10/20, *ADCADA*, paras 41–43.
[353] Case E-10/20, *ADCADA*, paras 44ff.
[354] BGH, 23 April 2012 – II ZR 75/10, WM 2012, 1293, 1295 (para. 17) – *Bavaria Ertragsfonds I*.
[355] BGH, 23 April 2012 – II ZR 75/10, WM 2012, 1293, 1295 (para. 17) – *Bavaria Ertragsfonds I*.
[356] BGH, 21 October 2014 – XI ZB 12/12, NJW 2015, 236, 241 (paras 77, 96) – *Telekom I*.
[357] BGH, 21 October 2014 – XI ZB 12/12, NJW 2015, 236, 245 (para. 105) – *Telekom I*.
[358] BGH, 21 October 2014 – XI ZB 12/12, NJW 2015, 236, 246 (para. 118) – *Telekom I*.
[359] OLG Brandenburg, 1 July 2020 – 7 U 33/19, BeckRS 2020, 17763, para. 38.
[360] OLG Brandenburg, 1 July 2020 – 7 U 33/19, BeckRS 2020, 17763, para. 36.
[361] OLG Brandenburg, 1 July 2020 – 7 U 33/19, BeckRS 2020, 17763, para. 39.
[362] BGH, 18 September 2012 – XI ZR 344/11, WM 2012, 2147, 2150 (para. 25) – *Wohnungsbau Leipzig West*.
[363] BGH, 18 September 2012 – XI ZR 344/11, WM 2012, 2147, 2150f. (paras 29, 30) – *Wohnungsbau Leipzig West*.
[364] BGH, 18 September 2012 – XI ZR 344/11, WM 2012, 2147, 2152 (para. 36) – *Wohnungsbau Leipzig West*.
[365] BGH, 15 December 2020 – XI ZB 24/16, NZG 2021, 457, 463 (paras 76–89) – *Telekom II*.
[366] BGH, 15 December 2020 – XI ZB 24/16, NZG 2021, 457, 460 (para. 55) – *Telekom II*.
[367] BGH, 15 December 2020 – XI ZB 24/16, NZG 2021, 457, 459 (paras 45, 46) – *Telekom II*.
[368] Case C-910/19, *Bankia*, para. 33.

qualified investors from the scope of potential claimants.[369] As regards defences, Member states have discretion as to how they implement liability principles under article 11 PR, subject, however, to the principles of equivalence and effectiveness.[370] If these conditions are met, domestic law on prospectus liability may allow a defence based on the investor's awareness (or negligent failure to be aware) of the issuer's economic situation. Notabene: Unlike Spanish law, German prospectus liability law allows a defence only in case of positive knowledge, § 12(2) no. 3 WpPG.

Case Study 23 (p. 39). A claim under § 823(2) BGB lies where there is a breach of a "protective norm" ("*Gesetz mit Schutzwirkung zugunsten Dritter*"). It is recognised that § 332 HGB qualifies as a protective norm, but only where the audit is compulsory under accounting rules, as opposed to cases such as the present one where the audit requirement is triggered by the issuer's voluntary decision to make a public offer under the Prospectus Regulation which then in turn requires audited financial statements (pursuant to article 13 PR in conjunction with the Regulation 2019/980).[371] Where the audit is voluntary as in the case at hand, a claim pursuant to § 826 BGB exists where auditor's statements lack an appropriate basis in a way that is "reckless" or "unscrupulous".[372]

Case Study 24 (p. 39). Article 72 UCITS Directive requires prospectus updates for "essential elements". The term "essential elemts" is, however, not defined in the Directive.[373] According to the ECJ, "essential elements" covers any information needed for the prospectus to fulfil its purpose, i.e., to allow investors to make an informed decision.[374] In any event, the minimum information required pursuant to article 69(2) of the Directive and its Annex I Schedule A also qualifies as "essential" for the purpose of article 72. Accordingly, the board composition of the management company is an "essential element" within the meaning of article 72 as it is also part of the minimum requirements pursuant to article 69(2), Annex I Schedule A item 1.8 of the Directive. Therefore, the change requires a prospectus update.

0 (p. 40). Whether a prospectus is "correct and complete" is to be determined not on the basis of isolated parts of a prospectus, but the overall picture ("*Gesamtbild*") it conveys.[375] The test is that of an average retail investor, not an inattentive reader.[376] The language in question does not suggest the investment is "risk-free", and accordingly, does not make the prospectus incorrect or misleading.[377]

Case Study 26 (p. 44). The complexity of financial markets may make it difficult to determine the direction of the movement of prices of financial instruments caused by inside information. Accordingly, the requirement for information to be of a "precise nature" does not mean that it must be possible to infer with sufficient probability the *direction* of a price movement.[378] It is sufficient if the information in question is a basis for an assessment by investors, which only excludes information that is "vague" or "general".[379]

Case Study 27 (p. 44). a) The timeliness of the announcement pursuant to article 17(1) MAR depends on when inside information existed within the meaning of article 7(1) MAR. For the various points in time, article 7(2) MAR requires an assessment of both the events *already occurred*, and potential *future* events. Purely private thoughts are not sufficiently precise, but a different assessment may be justified in relation to subsequent discussions on 17 May and/or the June agreement, e.g., as regards future events reasonably expected to occur.[380] The delay of disclosure of inside information existing prior to 28 July 2022 cannot be justified on the basis of article 17(4) MAR as making use of this exception requires a conscious decision by the issuer,[381] corresponding documentation,[382] and disclosure vis-à-vis the regulator (article 17(4)(3) MAR).

b) BaFin can impose fines pursuant to article 30(2)(i) and (j) MAR. The amount of the fine is determined taking into consideration the circumstances identified in article 31(1) MAR, and is subject to the quantitative limits under article 30(2).

c) Additional sanctions include optional sanctions under article 30(2) MAR (e.g., disgorgement of profits, warning), and the compulsory publication of a sanction under article 34 MAR.

d) A damage claim lies against an issuer under § 97 WpHG for failure to publish inside information in a timely manner. However, according to the BGH decision in *Geltl*, the fact that the issuer could have delayed information in compliance with article 17(4) MAR and that this would have resulted in the same damage, is a valid defence to such a damage claim

[369] Case C-910/19, *Bankia*, para. 36.
[370] Case C-910/19, *Bankia*, para. 45.
[371] BGH, 12 March 2020, VII ZR 236/19, NJG 2020, 1030, 1031 (para. 18) – *Infinus*.
[372] BGH, 12 March 2020, VII ZR 236/19, NJG 2020, 1030, 1032 (para. 35) – *Infinus*.
[373] Case C-473/20, *Invest Fund Management*, para. 28.
[374] Case C-473/20, *Invest Fund Management*, para. 37.
[375] BGH, 23 October 2018 – XI ZB 3/16, NJW-RR 2019, 301, 303 (para. 40) – *Morgan Stanley P2 Value*.
[376] BGH, 23 October 2018 – XI ZB 3/16, NJW-RR 2019, 301, 303 (para. 40) – *Morgan Stanley P2 Value*.
[377] BGH, 23 October 2018 – XI ZB 3/16, NJW-RR 2019, 301, 303 (paras 41ff.) – *Morgan Stanley P2 Value*.
[378] Case C-628/13, *Lafonta*, para. 38.
[379] Case C-628/13, *Lafonta*, para. 31.
[380] Ultimately left open in BGH, 23 April 2013 – II ZB 7/09, NZG 2013, 708, 711 (paras. 18ff.) – *Geltl*.
[381] BaFin, *Emittentenleitfaden Modul C*, p. 36.
[382] Article 4(3) Implementing Regulation (EU) 2016/1055.

("*rechtmäßiges Alternativverhalten*").[383] Such defence is not affected by the fact that the issuer did not actively resolve to delay disclosure; it is sufficient for the issuer to show that he would have made the decision to delay if he had determined that inside information existed.[384]

Case Study 28 (p. 46). Article 8 MAR does not define what it means to "use" inside information for a transaction or whether it is necessary to establish some kind of "intention" or other "mental element" on the part of the investor for a trade to qualify as "inside information". In *Spector Photo Group*, the ECJ held that "possession" of inside information creates the presumption in favour of its "use".[385] In the view of the ECJ, this is compatible with human right principles as long as that presumption is open to rebuttal and the rights of the defence are guaranteed.[386] The decision in *Spector Photo Group* relates to earlier EU directives on insider dealing, but should also be applicable to the (substantially unchanged) article 8 MAR.

Case Study 29 (p. 46). According to the ECJ, disclosure "in the exercise of an employment, a profession or other duties" is an exception to the rule, and as an exception must be interpreted strictly,[387] in particular, to avoid the increase link of insider trading created by additional disclosure. On this basis, disclosure is justified only if: (i) it is "strictly necessary" for the exercise of an employment, profession or duties, and (ii) complies with the "principle of proportionality".[388] When assessing this, the national court must 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 insider dealing, and the sensitivity of the inside information in question.[389]

Case Study 30 (p. 47). Whether passing on the information about the article breaches article 10 MAR depends on whether it contains inside information. According to the ECJ, the upcoming publication of a rumour does not as such fall outside the scope of "inside information".[390] What is decisive is the reliability of a rumour, which must be determined "on a case-by-case basis", taking into account the degree of precision of the content of that rumour and the reliability of the source reporting it as well as the reputation of the journalist and the media publishing the article.[391] The fact that the publication did, in fact, have an effect on prices, does not as such establish that the information was "precise", but can be used as "ex post evidence".[392]

As regards the media privilege, the notion "for the purpose of journalism" within the meaning of article 21 MAR must be interpreted broadly to reflect the freedom of speech, and includes investigations by a journalist.[393] Whether these investigations are lawful is to be determined under article 10 MAR: in fact, article 21 MAR does not derogate from article 10 requirements.[394] Accordingly, whether disclosure by a journalist is legal depends on an assessment of article 10(1) MAR, and the exception under article 10(1) for disclosure "in the exercise of an employment, a profession or duties" has to be interpreted strictly, i.e., it must have been strictly necessary and must comply with proportionality requirements as determined in *Grøngaard*.[395] Ultimately, the assessment must be made "in light of the purpose" of article 21 MAR.[396]

Case Study 31 (p. 49). Whether an issuer is in scope of disclosure under article 17(1) MAR depends on whether he meets the test under article 17(1)(2). As regards an MTF, this is the case where the issuer applied for admission as in this case. Accordingly, Z AG has to comply with article 17 MAR.

Case Study 32 (p. 50). A good source for examples are the guidelines issue by BaFin ("*Emittentenleitfaden*"). The vast majority of inside information disclosure relates to transactions (M&A deals, joint ventures) and financial information (results, forecasts). Other examples include product innovations (in particular where they create a monopoly, e.g., where patents/copyrights exist), board appointments (e.g., CEO), as well as investigations and disputes. The purpose of such disclosure is to create a "level playing field" for investors and to limit the potential for insider dealing.

Case Study 33 (p. 53). Nothing suggests that there is inside information relating to N, so the prohibition of insider dealing under article 14 MAR does not prevent V from trading. However, article 19(11) MAR prohibits trading in closed periods as in this case, irrespectively of whether there is inside information. The purpose is to avoid the mere impression of illegitimate trading activities.

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[383] BGH, 23 April 2013 – II ZB 7/09, NZG 2013, 708, 712f. (paras. 32ff.) – *Geltl*.
[384] BGH, 23 April 2013 – II ZB 7/09, NZG 2013, 708, 713 (paras. 35, 36) – *Geltl*.
[385] Case C-45/08, *Spector Photo Group*, paras 35–38.
[386] Case C-45/08, *Spector Photo Group*, para. 44.
[387] Case C-384/02, *Grøngaard*, para. 27.
[388] Case C-384/02, *Grøngaard*, para. 34.
[389] Case C-384/02, *Grøngaard*, para. 48.
[390] Case C-302/20, *Hermès*, para. 46.
[391] Case C-302/20, *Hermès*, paras 48, 51.
[392] Case C-302/20, *Hermès*, para. 57.
[393] Case C-302/20, *Hermès*, para. 71.
[394] Case C-302/20, *Hermès*, para. 75.
[395] Case C-302/20, *Hermès*, para. 78.
[396] Case C-302/20, *Hermès*, para. 81.

Case Study 34 (p. 54). (i) As regards the misleading press release: § 98 WpHG applies where disclosure by an issuer take the form of inside information disclosure under §§ 4ff. WpAV; in particular, it has to be presented as "inside information" pursuant to § 4(1) no. 1 WpAV.[397] By implication, it does not apply to a simple press release as in this case, and given the legislative intent, it is not possible to apply § 98 WpHG by way of analogy.[398] The press release does not create an "overview" within the meaning of § 400 AktG either, so no liability exists under § 832(2) BGB in conjunction with § 400 AktG.[399] Pursuant to the BGH, article 12 MAR does not have the objective to protect investors individually, so does not create liability under § 823(2) BGB either, nor does is as such amount to conduct against good morals within the meaning of § 826 BGB.[400] (ii) As a result, the only conceivable basis for liability in this case is § 97 WpHG, i.e., for failure to disclose inside information. Information on IKB's exposure to subprime products was precise, and whether it was price-relevant depends on a "reasonable investor test" under article 7(4) MAR. Arguably, IKB's exposure to the mortgage products amounted to disclosable inside information already prior to 20 July 2007.[401] The fact that subsequent events of the crises were not foreseeable in July 2007 are no defence under § 97(2) WpHG. Investors can claim full restitution (as opposed to the price difference), provided they can show that they would not have invested at all.[402]

Case Study 35 (p. 55). (i) Where inside information contains a profit forecast, it is only incorrect within the meaning of § 98(1) WpHG if it does not correspond to the forecast the issuer has made at the time, or if it is not sufficiently based on facts and therefore economically not defendable.[403] (ii) On the basis of the decision in *IKB* (Case Study 34), the incorrectness of a (voluntary) press release does not make the issuer liable pursuant to § 98(1) WpHG.[404] The mere fact that a press release is incorrect does not as such create inside information (to the effect that the press release is incorrect), which would create liability pursuant to § 97(1) WpHG if not disclosed. In such a case, § 97(1) WpHG only applies if prior to the press release, inside information existed already that the issuer failed to disclose, or if the incorrectess of the press release exceptionally qualifies as inside information within the meaning of article 7(1)(a) MAR and therefore would have to be disclosed.[405] (iii) The audit report of 7 January qualifies as inside information. Article 17(1) MAR allows issuers some time to assess the facts, but this depends on the facts of the case and can be reduced to zero in obvious cases.[406] The delay (between 7 and 15 January) could not be justified pursuant to article 17(4) MAR either, as the previous press releases are not compatible with the new information so that delay of disclosure would mislead the public within the meaning of article 17(4)(b) MAR.[407]

Case Study 36 (p. 60). Pursuant to § 44 WpHG, rights attaching to shares are suspended while there is a breach of disclosure obligations. As both upwards and downwards crossings create disclosure obligations for H, H is still in breach of disclosure obligations and cannot exercise shareholder rights. The sanction under § 44 WpHG cannot be circumvented either by internal transfers within the same group of (controlled) companies.

Case Study 37 (p. 60). § 34(1) no. 2 WpHG creates, at least potentially, a double disclosure obligations for both a trustee (who has to disclose as the legal owner pursuant to § 33(1) WpHG) and the trust-giver (who is captured by § 34(1) no. 2 WpHG). However, the position held by T in trust does not exceed the disclosable threshold. § 34(2) WpHG creates a disclosure obligation for investors acting in concert by aggregating their positions. However, the acting in concert provisions only apply to the shareholders who are party to the acting in concert arrangement,[408] i.e., in the present case, S1, S2 and S3. This approach is justified by the wording of § 34(2) and considerations of legal certainty.[409] Also, the purpose of §§ 33ff. WpHG is to create market transparency as to material aspects of the ownership structure, for which disclosure by the parties acting in concert is sufficient.[410]

Case Study 38 (p. 61). The solution depends on whether the coordination between S1 and S2 amounts to acting in concert. However, in this case, none of the two scenarios contemplated in § 34(2) WpHG exists: The objective to have an existing strategy applied is not a "*change* in strategy" within the meaning of § 34(2), 2nd sentence, 2nd option.[411] While there is an agreement on the exercise in voting rights (within the meaning of § 34(2), 2nd sentence, 1st option), there is an exception under § 34(2) 1st sentence for an agreement in a "single instance". This is applied in a formal way,

[397] BGH, 13 December 2011 – XI ZR 51/10, para. 16 – *IKB*.
[398] BGH, 13 December 2011 – XI ZR 51/10, para. 17 – *IKB*.
[399] BGH, 13 December 2011 – XI ZR 51/10, para. 18 – *IKB*.
[400] BGH, 13 December 2011 – XI ZR 51/10, paras 19ff. – *IKB.*
[401] BGH, 13 December 2011 – XI ZR 51/10, paras 45f. – *IKB.*
[402] BGH, 13 December 2011 – XI ZR 51/10, paras 47ff. – *IKB.*
[403] BGH, 17 December 2020 – II ZB 31/14, WM 2021, 285, 292 (para. 75) – *Hypo Real Estate*.
[404] BGH, 17 December 2020 – II ZB 31/14, WM 2021, 285, 297 (para. 222) – *Hypo Real Estate*.
[405] BGH, 17 December 2020 – II ZB 31/14, WM 2021, 285, 297 (paras 215–221) – *Hypo Real Estate*.
[406] BGH, 17 December 2020 – II ZB 31/14, WM 2021, 285, 299 (para. 263) – *Hypo Real Estate*.
[407] BGH, 17 December 2020 – II ZB 31/14, WM 2021, 285, 299f. (paras 265ff.) – *Hypo Real Estate*.
[408] BGH, 19 July 2011 – II ZR 246/09, NZG 2011, 1147, 1148 (paras 29ff.).
[409] BGH, 19 July 2011 – II ZR 246/09, NZG 2011, 1147, 1148f (paras 30, 33).
[410] BGH, 19 July 2011 – II ZR 246/09, NZG 2011, 1147, 1149 (paras 32).
[411] BGH, 25 September 2018 – II ZR 190/17, NZG 2018, 1350, 1351 (para. 18).

i.e., it exists whenever shareholders co-operate on one single occasion, whatever the importance of that co-ordination.[412] The formal approach is justified by considerations of legal certainty, and also by the fact that the purpose of §§ 33ff. WpHG is to create transparency in the market as regards continous influence of certain shareholders in a particular issuers (as opposed to constantly changing scenarios).[413]

Case Study 39 (p. 61). This case is not disclosable under § 33 WpHG as options are not shares within the meaning of that provision. The options do qualify as financial instruments captured under § 38, § 2(4) WpHG, but the relevant threshold for such instruments starts at 5%. Accordingly, I would only have to disclose if he converts the options into physical shares, or if he acquires another 1% in instruments. Details for disclosure (manner, time limit) are governed by § 15 WpAV and § 33(1) WpHG.

Case Study 40 (p. 61). The assessment depends on whether C qualifies as a company controlled by the P as the parent company: in this case, P's disclosure would be sufficient (§ 37(1) WpHG). The definition under § 35(1) no. 1 WpHG refers to § 290 HGB. Pursuant to § 290(1) no. 1 HGB, owning a majority in voting rights creates "control" over the target. In the view of the BGH, this applies irrespectively of whether the voting rights can actually be exercised, and therefore, regardless of contractual arrangements limiting the exercise of voting rights.[414] it is not possible to "disclaim" a control relationship where it exists.

Case Study 41 (p. 62). The background for the arrangement between the shareholders is the majority requirement under § 179(2) AktG (75%). As the arrangement provides only for co-ordinated exercise of voting rights on one single occasion, there is no acting in concert within the meaning of § 34(2) WpHG. However, C's acquisition brings C across the 10% threshold, triggering disclosure obligations under §§ 33, 43 WpHG. The breach of § 33 WpHG suspends the exercise of voting rights by C, and given that the breach was intentional, a six-month-restriction applies after the breach is remedied. (§ 44 WpHG).

Case Study 42 (p. 62). Current disclosure obligations for X AG are determined by stock company law and accounting law. In case of a "listing", there are additional capital market disclosure obligations as regards financial reports (articles 4ff. TD), information on major shareholders (article 12(6) TD), information for holders of shares and bonds (articles 17, 18 TD), inside information (article 17 MAR), directors' dealings (article 19 MAR), and prospectuses as required for public offerings and admission to trading on regulated markets (article 3 PR).

Case Study 43 (p. 66). The TBD aims at achieving a high level of predictability and legal certainty.[415] Consequently, for the circumstances and criteria referred to in article 5(4) to be "clearly determined", they must be formulated in a manner which renders the national rule easily applicable.[416] A reference to a "market price" with no further indication how this price is calculated cannot be considered to be "clearly determined" and is therefore incompatible with the TBD. The consequences of the incompatibility of domestic law with an EU Directive depend on general EU law principles. As EU law requires courts of Member States to interpret domestic law in compliance with a directive – the so-called "indirect effect",[417] an argument can be made that shareholders of the target company cannot rely on the market price rule.

Case Study 44 (p. 67). Article 5(3) TBD leaves it to Member States to define the percentage of voting rights triggering "control", so the proposed increase would be in line with the Directive. By contrast, article 15 TBD requires domestic law to trigger a squeeze-out right in certain scenarios, providing for a default threshold of 90% which Member States may increase (in some cases) to 95%, but not above that. The second proposal is therefore not in line with EU law.

Case Study 45 (p. 70). The background of the case is the fact that the control agreement requires a majority of 75% (§§ 291, 293 AktG). B failed to acquire this majority through the offer, but the agreement with E secures the votes needed. The question is whether the compensation offered increases the equitable price pursuant to § 31 WpÜG. The agreement is not an "acquisition" within the meaning of § 31(4) and (5) WpÜG which would require actual transfer of title. However, even absent transfer of title, § 31(6) captures "agreements" that can form the basis of a claim to transfer of shares. Pursuant to the BGH decision in *Stada*, it is not necessary for the agreement to create an enforceable claim for the bidder,[418] so it is irrelevant that in the case at hand, the "exit right" is only a put option for the minority shareholders, but not a call option for the bidder. Rather, the purpose of § 31(6) is to bind the a bidder to the price he deems to be adequate in some kind of agreement, even where the agreement ultimately is not performed.[419] Accordingly, minority shareholders can claim €74 per share. § 31(5)(2) does not exclude this claim as it only to the *statutory* claim for equitable compensation pursuant to § 305 AktG, but not to an amount *contractually agreed* as in this case.[420]

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[412] BGH, 25 September 2018 – II ZR 190/17, NZG 2018, 1350, 1354 (paras 34ff.).
[413] BGH, 25 September 2018 – II ZR 190/17, NZG 2018, 1350, 1351 (paras 35, 36).
[414] BGH, 22 September 2020 – II ZR 399/18, NZG 2020, 1349, 1351 (paras 17ff.).
[415] Case E-1/10, *Periscopus AS*, para. 48, referring to article 5(4) and recital (3) of the directive.
[416] Case E-1/10, *Periscopus AS*, para. 48.
[417] E.g., Case 14/83 *Von Colson and Kamann v. Land Nordrhein-Westfalen.*
[418] BGH, 23 May 2023 – II ZR 219/21, WM 2023, 1356, 1357 (paras 14ff.).
[419] BGH, 23 May 2023 – II ZR 219/21, WM 2023, 1356, 1358 (para. 24).
[420] BGH, 23 May 2023 – II ZR 219/21, WM 2023, 1356, 1361 (paras 39ff.).

Case Study 46 (p. 71). a) Pursuant to Postbank II, an agreement can qualify as "acting in concert" within the meaning of § 30(2) WpÜG even without an express provision to align the exercise of voting rights; it is sufficient that such alignment an indirect legal effect of the agreement.[421] The requirement under § 30(2)(2) WpÜG relating to an objective of materially changing the target's business strategy is only needed for acting in concert through other methods than alignment of voting rights exercise.[422] However, "acting in concert" requires that the parties envisaged influencing the target in a "real and conrete" way.[423]

Likewise, *Postbank II* also confirmed that § 30(1) no. 2 WpÜG requires that risks and opportunities are transferred from the actual shareholder to a third party,[424] and also that the third party is able to influence the exercise of voting rights,[425] e.g., through instructions, or where the shareholder has an legal obligation to align the exercise of voting rights with the interests of that party. Arguably, this could cover the case at hand as the contractual arrangements between B and P imply an obligation for P to align the exercise of its voting rights with the interest of B (ultimately left open by in the BGH decision).

b) Pursuant to *Postbank I*, where an offer is below the minimum equitable price, shareholders can claim the balance in the same way as would be the case for post-offer acquisitions.[426] It would be inconsistent if parallel and subsequent acquisitions created payment claims (pursusant to § 31(4), (5) WpÜG), but not in case the offered price was below minium price requirements from the outset.[427] Preventive control by the regulator would not be sufficient as it is limted to manifest breaches of takeover law requirements (§ 15(1) no. 2 WpÜG).[428] The periods for determining the minimum price would be adjusted, i.e. would apply the moment the bidder acquired control and was under an obligation to make a mandatory bid.[429]

Case Study 47 (p. 72). a) (1) Increasing the stake above 15% would trigger disclosure obligations for M at the thresholds indicated in § 33(1) WpHG. Non-compliance would come with suspension of rights attaching to (all) shares held by M, § 44 WpHG, and administrative sanctions (§ 120(2) no. 2 lit. d WpHG). Crossing 10% and higher thresholds would also require M to make a statement of intent pursuant to § 43(1) WpHG, but there are no sanctions for non-compliance with that requirement. § 43(1) WpHG does not require M to disclose its plans in relation to the acquisition of control, as this is not specifically mentioned in the wording of § 43(1) WpHG and the legislator intentionally excluded intentions for control acquisition from the scope.[430] (2) Crossing 30% would require M to disclose (i) further threshold crossings pursuant to § 33 WpHG, and (ii) the acquisition of control, §§ 35(1)(1), 29(2), 10(1) WpÜG. Note that pursuant to § 10(6) WpÜG, a bidder is not required to disclose activities preparing a bid pursuant to article 17(1) MAR prior to the disclosure of the intention to make a bid under § 10(1) WpÜG. Acquisition of control requires M to make a mandatory bid, § 35(2)(1) WpÜG. Non-compliance with WpÜG requirements will suspend rights attaching to shares (§ 59 WpÜG) and trigger administrative sanctions (§ 60(1) no. 2–5 WpÜG). However, failure to make the mandatory bid does not give shareholders an actionable right to request payment of what would have been the equitable price pursuant to take-over regulations (see the decision in *BKN*).

b) The use of A GmbH as a "vehicle" does not change the assessment as A would be deemed to be a subsidiary of M within the meaning of § 30(1) no. 1 WpÜG, § 34(1) no. 1 WpHG, and accordingly, all shares held by A would be treated as shares held by M. It is important to note that aggregation under § 30(1) no. 1 WpÜG (and also § 34(1) no. 1 WpHG) is not *pro rata*: it does not matter whether M holds 60, 75 or 80% in A GmbH; in all scenarios 100% of the participations of the subsidiary in listed companies will be attributed to the parent. The reason is that once control within the meaning of § 30(1) no. 1 WpÜG exists, this gives the parent control over the entire participation held by the subsidiary.

Case Study 48 (p. 72). This case turns around article 5(2) TBD and § 35(3) WpÜG which exempt cases from a mandatory bid where a shareholder acquires control through a voluntary bid. The *wording* of § 35(3) WpÜG can be read at first sight as requiring causality in the sense that it only covers scenarios where the bid itself enables the bidder to cross the control threshold: e.g., where the bidder holds an initial stake of 5% prior to a voluntary bid, and then acquires another 30% through the bid, no mandatory bid is required. However, it is universally accepted that § 35(3) WpÜG goes beyond this and that it is sufficient that there is a connection in terms of timing and substance between the bid on the one hand and the acquisition of control on the other.[431] On this basis, § 35(3) WpÜG also covers acquisitions in parallel to a the voluntary bid during the period between the publication of an offer and before the end of the offer period. BaFin also accepts that § 35(3) WpÜG applies to acquisitions after the end of the offer period provided the underlying

[421] BGH, 13 December 2022 – II ZR 9/21, WM 2023, 214, 219 (paras 49ff.) – *Postbank II*.
[422] BGH, 13 December 2022 – II ZR 9/21, WM 2023, 214, 219 (paras 56ff.) – *Postbank II*.
[423] BGH, 13 December 2022 – II ZR 9/21, WM 2023, 214, 220 (paras 62ff.) – *Postbank II*.
[424] BGH, 13 December 2022 – II ZR 9/21, WM 2023, 214, 224 (para. 92) – *Postbank II*.
[425] BGH, 13 December 2022 – II ZR 9/21, WM 2023, 214, 228 (para. 124) – *Postbank II*.
[426] BGH, 29 July 2014 – ZR 353/12, NZG 2014, 985, 986 (paras 21ff.) – *Postbank I*.
[427] BGH, 29 July 2014 – ZR 353/12, NZG 2014, 985, 986 (para. 23) – *Postbank I*.
[428] BGH, 29 July 2014 – ZR 353/12, NZG 2014, 985, 987 (para. 24) – *Postbank I*.
[429] BGH, 29 July 2014 – ZR 353/12, NZG 2014, 985, 988 (paras 33ff.) – *Postbank I*.
[430] Brellochs/Buchs, in: *BeckOK Wertpapierhandelsrecht*, 15th ed., 1 Jul 2024, § 43 WpHG mn. 33.
[431] OLG Düsseldorf, 11 August 2006 – I-15 W 110/05, ZIP 2007, 380; Schlitt/Biller, *Münchener Kommentar zum AktG*, 6th ed 2024, § 35 WpÜG mn. 265.

agreement was made during the offer period.[432] On this basis, the case at hand is captured by § 35(3) WpÜG and no mandatory offer is required.

Case Study 49 (p. 74). Pursuant to the decision in *BKN*, § 35(2) WpÜG only creates an obligation to publish an offer whenever control is acquired – but absent such offer, shareholders have no claim against the shareholder that acquired control for payment of the equitable price.[433] The wording of § 35(2) WpÜG does not create a claim for payment of the equitable price, and such a claim is not backed by legislative material either.[434] The existing sanctions for failure to publish an offer (e.g., loss of rights pursuant to § 59 WPüG, and administrative fines under § 60 WpÜG) are sufficient.[435] The provision for interest in case of late offers (§ 38 WpÜG) only applies if ultimately, an offer is made and accepted.[436] Shareholder protection principles pursuant article 3(1)(a) TBD do not require such a claim either.[437] Such payment claims cannot be based on § 823(2) BGB either, because § 35(2) WpÜG was not intended by the legislator to be a provision aimed at the protection of individual shareholders.[438]

Case Study 50 (p. 74). According to *Celesio I*, the purpose of § 31(6) WpÜG is to prevent circumvention of § 31(4) and (5), and to tie the bidder to the purchase price that he deemed equitable in the context of the bid.[439] It therefore includes any type of agreement, such as the acquisition of a convertible *bond* as in this case, even though the subsequent acquisition of *shares* requires further steps (i.e., exercise of the conversion right). Applying § 31(6) WpÜG in this way does not breach article 5(4) TBD either.[440] Accordingly, the minimum equitable price corresponds to the purchase price paid through the conversion of the bond (§ 4 WpÜG-AV), and shareholders who accepted can claim the balance.

However, pursuant to *Celesio II*, shareholders who did not accept have no claim.[441] § 31(1) WpÜG does not create an individual claim to equitable compensation.[442] The wording of § 31(5)(1) WpÜG implies that only shareholders *who accept an offer* have a claim to the equitable price.[443] Also, the sell-out provision in § 39c WpÜG for shareholders who have not accepted a bid suggests that absent acceptance of the offer, shareholders do not have a right to equitable compensation.[444] Non-accepting shareholders cannot base a claim to equitable compensation on a breach of pre-contractual duties either.[445] This conclusion is compatible with the TBD, as article 4(6) TBD leaves it to Member States to determine enforcement mechanisms, and pursuant to article 17, it is sufficient to provide for sanctions that are effective, proportionate and dissuasive.[446] For this, preventive control of the price requirements under §§ 3ff. WpÜG-AV by BaFin (pursuant to § 15(1) no. 2 WpÜG) combined with the enforcement options for accepting shareholders under Celesio I are sufficient.[447]

[432] Available online at https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Merkblatt/WA/mb_070712_35wpueg.html accessed 11 Jun 2025.
[433] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1512 (paras 11ff.) – *BKN*.
[434] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1512 (paras 13–15) – *BKN*.
[435] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1512 (para. 22) – *BKN*.
[436] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1513 (paras 27ff.) – *BKN*.
[437] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1513 (para. 32) – *BKN*.
[438] BGH, 11 June 2013 – II ZR 80/12, WM 2013, 1511, 1514 (paras 33ff.) – *BKN*.
[439] BGH, 7 November 2017 – II ZR 37/16, WM 2018, 18, 20 (para. 23) – *Celesio I*.
[440] BGH, 7 November 2017 – II ZR 37/16, WM 2018, 18, 22 (para. 34) – *Celesio I*.
[441] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 18 (paras 21ff.) – *Celesio II*.
[442] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 18 (para. 22) – *Celesio II*.
[443] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 18 (para. 23) – *Celesio II*.
[444] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 18 (para. 24) – *Celesio II*.
[445] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 19 (paras 29ff.) – *Celesio II*.
[446] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 19 (paras 40, 41) – *Celesio II*.
[447] BGH, 23 November 2021 – II ZR 315/19, WM 2022, 16, 19 (paras 43, 44) – *Celesio II*.