

GERMANY

Liability for Misstatements

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I. Primary market – prospectuses

A. Legal basis for claims

Special statutory provisions for liability because of misstatements in prospectuses are

- §§ 44 ff, 55 BörsG (stock exchange act),
- § 127 InvG (code on capital investment corporations) and
- § 13 VerkaufsprospektG (code on prospectuses) combined with §§ 44 ff BörsG.¹

The content of these provisions is essentially the same. Thus, only § 44 BörsG is described in detail further down. If the issuer makes a public offer without prior publishing of a prospectus there is a liability according to § 13a VerkaufsprospektG, which came into force in 2005.

Claims can also be based on **general principles of civil law**. Several articles of the German civil code and of the German criminal code can be mentioned:²

- §§ 311, 280 BGB (allg. zivilrechtliche Vorvertragshaftung, general liability due to pre-contractual obligations).
- § 823 Abs 1, only applicable when so-called absolute rights are infringed.
- § 826 BGB (Haftung aus unerlaubter Handlung, intentional immoral damnification).
- §§ 823 Abs 2 combined with §§ 263, 264a **StGB (Criminal Code)**, or §§ 399, 400 AktG (criminal provisions in the act on public limited companies).
- § 823 Abs 2 combined with various provisions of the WpHG that are deemed to be **protective provisions** (so-called “Schutzgesetze”, e.g. §§ 8, 14, 20, 25, 28_[AH1]).

B. § 44 BörsG

1. Defendants

Defendants are the **issuer** of the shares and in some cases the **directors**. The directors are not already liable because they are mentioned in the prospectus as being responsible for its content according to § 5 Abs 4 S 2 WpPG (code on securities prospectuses). They are only liable if they have an own interest in the publishing of the wrong prospectus, e.g. because they want to sell their own shares.

According to § 44 Abs 1 BörsG in connection with § 30 Abs 2 BörsG **Banks** are also possible defendants when they are involved in the shares issue (i.e. investment bank, underwriter etc). However, **auditors** and **other experts** (such as tax lawyers, solicitors etc) are covered by § 44 BörsG only if they have their **own economic interest** in the issue. The economic

¹ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 222.

² See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 222; see also further down II E.

interest must be more than the mere interest of being paid for preparing the prospectus. Furthermore, the auditor or expert is only liable if he is in charge of the whole prospectus. A person that is responsible for several statements in the prospectus cannot be held liable under this provision.³ Other persons than the mentioned experts can also be liable if they have their own economic interest in the shares issue.⁴

2. Default

Liability under § 44 BörsG requires **recklessness** or **intent**.⁵ Mere **negligence** is not enough. This default rule is the same for all special statutory provisions on the liability for misstatements in the prospectus – § 127 InvG also requires recklessness or intent. [AH2] Even if the issuer is accurate on preparing the prospectus there will always remain a residual risk because of market forecasts, valuations and different developments outside the business. The issuer shall not be liable for these uncertainties which would be the case if the issuer were liable for merely negligent behaviour. This **residual risk** shall be borne by the investor and not the issuer.⁶ It is not yet clear, what default rule applies for the newly introduced § 13a VerkaufsprospektG, when offering securities to the public without the publishing of a required prospectus. Some authors argue that this is a case for strict liability;⁷ the wording of the provision is ambiguous.

3. Burden of proof

Due to § 45 Abs 1 BörsG those **persons** that are **in charge of the prospectus** have to prove that they did not act recklessly. Thus §45 Abs 1 BörsG expressly provides for a **shifting of the burden of proof**. The other special statutory provisions (§ 12 AuslInvestmG and § 20 KAGG) are based on the same principle.⁸

4. Consequences

The claimant is entitled to the **dissolution of the purchase contract only**. Thus the shareholder has to return the shares to the issuer and the issuer has to pay back the share price plus the transaction costs (§ 44 Abs 1 BörsG). The shareholder cannot keep the shares and claim the difference between the share price paid and the price that would have been paid if the prospectus had been right.⁹

C. General principles of civil law

As regards liability for prospectuses the general principles of civil law can only be applied if there is **no applicability of the above mentioned special statutory provisions**. The

³ For a different view see Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 79.

⁴ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 226 ff.

⁵ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 233.

⁶ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 235.

⁷ See Fleischer, WM 2004, 1897, 1901

⁸ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 235.

⁹ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 241.

applicability of the special statutory provisions therefore excludes the application of the general principles of civil law.¹⁰ In 2005 the scope of the statutory provisions was extended so there is no relevant case left for the general principles of civil law. [AH3]

1. Defendants

When relying on general principles of civil law the range of possible defendants is broader than for claims based on the special statutory provisions (e.g. § 44 BörsG). The defendants vary according to the provision used as legal basis for the claim. For instance, due to the so-called protective provisions the defendants can be **issuers, banks** involved in the issue, **auditors, solicitors, brokers** and **others**.¹¹

2. Default

Under the general civil law principles defendants are not only liable for **intent** and **recklessness** but also for **negligence**.¹² Negligent behaviour is only relevant when the civil suit is based on §§ 311 and 280 BGB. These provisions regulate the general liability for prospectuses in civil law. Here the term prospectus does not only mean prospectuses provided for the issue of shares but all kinds of published official statements.

However, **in practice** claims based on § 826 BGB or § 823 Abs 2 BGB in connection with a protective provision are much more important. Thus, persons responsible for prospectuses are mainly held liable for **intent** as both § 826 BGB and most protective provisions used in connection with § 823 Abs 2 BGB require intent.¹³

3. Burden of proof

In general the **claimant** has to prove the causality. However, several cases show that the courts are not too strict on this general principle and therefore in practice **presumptive evidence** is enough.¹⁴ As the prospectus is usually material for the decision to buy shares it is not too difficult to prove causality.

According to § 280 Abs 1 sentence 1 BGB there is a shifting of the burden of proof on the level of default as the defendants have to prove that they did not act with intent, recklessness, or negligence.¹⁵

4. Consequences

Under the general civil law principles the claimant has got two possibilities (see also further down II A 4. for the liability on the secondary market):

1. The investor is entitled to the **dissolution** of the purchase contract. For the consequences see above I B 4..

¹⁰ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 226.

¹¹ For details see Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 230 ff.

¹² See also discussion further down, III B.

¹³ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 236.

¹⁴ For cases see Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, p 237 footnote 231 and p 123.

¹⁵ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 236.

2. The investor can keep the shares and claim the **difference between the share price paid and the lower real value**.¹⁶

II. Secondary market

On the secondary market shares are traded that were issued earlier. Often primary and secondary markets overlap each other.¹⁷

Example that the distinction is not clear cut:

According to §44 Abs 1 BörsG (stock exchange act) not only the **first purchaser** of new issued shares can be a claimant because of a wrong prospectus but also the **legal successors** of the first claimant. However, the legal successors are only included if they acquired the shares within 6 months after the first listing of the new shares. The purchasers that bought old shares during the same period are only protected if the new issued shares and the old shares cannot be distinguished. Thus an investor can be protected by § 44 Abs 1 BörsG (see above I B) and at the same time use the remedies applicable for defaults on the secondary market.

On the secondary market the applicable provisions vary according to the kind of statement that has been made:

- a. Ad-hoc statements – §§ 37b, 37c WpHG (act on trading of securities)
- b. Periodical compulsory statements, eg yearly or half-yearly reports
- c. Voluntary statements, eg newspaper articles, interviews, speeches
- d. Statement in Connection with the “corporate-governance-codex”, § 161 AktG (act on public limited companies)

A. Ad-hoc statements – §§ 37b, 37c WpHG

In **§ 15 WpHG** the **general duty** to publish ad-hoc statements is stated. It was enacted in 1995. The major parts of the article have been remained unchanged till now.

Today the liability for breaches of § 15 WpHG is expressly addressed by **§§ 37b and 37c WpHG**. These two articles were **newly introduced in the year 2002** after several scandals on the German new economy stock exchange called “Neuer Markt” had discredited the German financial market.¹⁸ Before this amendment **§ 15 Abs 6 WpHG expressly stated that**

¹⁶ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformatiionshaftung, 242.

¹⁷ See Hopt/Voigt, Prospekt- und Kapitalmarktinformatiionshaftung, 107.

¹⁸ See Viertes Finanzmarktförderungsgesetz, BGBl 2002 I 2010.

a breach of the duties contained in this article did **not form a legal basis for claims**. Thus § 15 WpHG could not be used to sue for damages neither the company nor its directors. Claims had to be based on the general principles of civil law. The reason for the introduction of these special statutory provision was the non-compliance of companies (especially those listed on the “Neuer Markt”) with the duties set out in § 15 WpHG.¹⁹

The **Market-Abuse-Directive** did not substantially influence this development. The directive was transposed into German law in 2004.²⁰ § 15 WpHG and §§ 37b and 37c WpHG were slightly changed. These changes were merely formal changes and did not actually change the law. For instance, the headings of §§ 37b and 37c were changed from “kursbeeinflussende Tatsachen” (facts influencing the market price) to “Insiderinformation” (insider information).

The so-called TUG²¹ transposes the **Transparency-Directive** into German law. The TUG provides some alterations of the WpHG, especially in § 15 WpHG, which are mainly concerned with the definition of the term “**insider information**” and a distinction between German issuer of shares and foreign issuers listed on a German stock exchange. However, §§ 37b and 37c WpHG are supposed to remain unaltered. The alterations of the WpHG enter into force on January 20th 2007.²²

§ 37b covers situations where the duty to inform the market according to § 15 WpHG by ad-hoc statements is not fulfilled, i.e. information that should have been disclosed was in fact not disclosed. **§ 37c** covers ad-hoc statements that were actually wrong when they were published.

Attention: In 2004 the German legislator wanted to rearrange §§ 37b and 37c of the WpHG. The introduction of a new paragraph § 37a was intended combined with major changes in the following §§ 37b and 37c WpHG. The aim of § 37a was to create a **special statutory provision** for the **liability of managers** because of their misstatements. Therefore, it would not have been necessary to rely on general civil law principles anymore in order to claim damages. The intended new act that should change the WpHG and some parts of the BörsG was called **Kapitalmarktinformationshaftungsgesetz** (KapInHaG; act on liability for misstatements on the capital markets). However, due to the intervention of some influential german managers (e.g. Siemens’ CEO Heinrich von Pierer) the KapInHaG was stopped by

¹⁹ See government’s draft including grounds, BR-Drucks 936/01 v 14.11.2001.

²⁰ See Anlegerschutzverbesserungsgesetz AnSVG, BGBl 2004 I 2630.

²¹ So-called Transparenzrichtlinien-Umsetzungsgesetz of January 5th 2007, see BGBl I 2007 p 10.

²² Art 15 TUG.

the German Finance Minister Eichel in November 2004. A critical statement on this development published by the university of Augsburg can be found on the internet:

http://www.jura.uni-augsburg.de/prof/moellers/aktuelles/kapinhag_gestoppt.html

As the book “Prospekt- und Kapitalmarktinformationshaftung” was finished for publication in October 2004 Hopt/Voigt refer to the intended legislation in some parts of their article. The draft articles are marked **WpHG-E** and **BörsG-E** (E...Entwurf – draft).

1. Protected investors – possible claimants

§§ 37b and 37c protect all investors who sold shares too cheaply or bought shares at an excessive price due to wrong ad-hoc statements. Thus investors are protected only if they set acts and **actually make transactions**. By contrast, investors that remained inactive are not protected. Neither shareholders that postponed the sale of their shares nor new investors that refrained from buying shares are protected (so-called “**prerequisite of a transaction**”). Moreover, shareholders are not protected when they bought shares after a misstatement had been published and sold these share before the misstatement was corrected.²³ The reasons for this prerequisite are that **evidence problems** should be avoided. It is impossible to assess whether the investor only pretends to have had a special plan or if he really had this plan. That’s why only investors are protected that actually made a transaction during the period the market information was imperfect.

Referring to Hopt/Voigt the shareholder should not be protected when the shares are traded on the market above their real value because of a misstatement. The decline of the share price after the disclosure of the correct information leads to the result that the shares are then traded at their real price. The decrease from the higher and artificial value to the lower and real value of the share does not reflect a real loss. The transaction requirement would also have been an element of draft §37a Abs 3 WpHG-E. Hopt/Voigt do not want this prerequisite of a transaction in §§ 37b, 37c to be altered.²⁴

2. Defendants: Issuers only

According to §§ 37b and 37c WpHG 2002 the **issuer** is held liable. Thus, the issuer is liable for the risk that appear in open market transactions without taking part in these transactions.

²³ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 111 and Ehrlicke Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 281.

²⁴ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 112 and Ehrlicke in Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 282.

Members of the board are not covered by §§ 37b and 37c WpHG 2002.²⁵ These paragraphs address the issuer only, i.e. the company. Hence, another legal basis for claims must be found. One possible legal basis is §826 BGB (German civil code). It covers intentional immoral damages (direct translation: vorsätzliche sittenwidrige Schädigung). Applying this section of the German civil code is not very helpful from the investor's point of view due to his **burden of proof**. The investor must prove that he purchased the shares because he relied on the wrong statements made in the ad-hoc announcement. There are a growing number of cases decided by the Federal Bundesgerichtshof where the court indeed rejected a shift of the burden of proof but granted the investors some relief in the single cases.²⁶ If the investor bought the share shortly after the misstatement (approx. during six months) there is the possibility of an interrogation of the claimant, i.e. he can be heard like a witness in his own case on the reasons why he bought the shares and thereby prove his reliance on the misstatement. Furthermore, §823 Abs 2 BGB connected with §400 AktG could be a legal basis for the liability of board members. This legal basis also covers ad-hoc statements if they include financial reports like quarterly reports.

Proposed alteration in 2004: As the application of these provisions is either inconvenient from the investor's point of view or as a whole controversial the German government wanted to introduce §37a Abs 2 WpHG-**E**²⁷ and thus a special statutory provision providing the **liability of board members** for misstatements.²⁸ This statutory infringement of the corporate veil would not have been brand new as there already existed the statutory provision of director's liability for misstatements in prospectuses (§ 44 Abs 1 BörsG, see above I). According to draft § 37a Abs 5 and § 37c Abs 1 directors' liability would have been limited by the last annual salary multiplied by four. **Oral misstatements** would have resulted in director's liability only if the statements had been made in a general meeting or during an information event arranged by the issuer of the shares (the company).

The new provisions would have held the directors responsible for **intent** and **recklessness** only (Vorsatz und grobe Fahrlässigkeit, § 37a Abs 1 WpHG-**E**) as it is **currently provided** for the liability of the **company** in §§ 37b and 37c WpHG (see later 3. Default). Moreover, directors would have been expressly liable for breaches of their duty to control.²⁹

3. Default

²⁵ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformatiionshaftung*, 118.

²⁶ See Bundesgerichtshof, 9.5.2005, II ZR 287/02 – EMTV; 26.6.2006, II ZR 153/05 - Comroad; 26.6.2006, II ZR 206/05.

²⁷ See also Ehrlicke in Hopt/Voigt, *Prospekt- und Kapitalmarktinformatiionshaftung*, 287.

²⁸ For lots of arguments against this new provision, see the scholars quoted by Hopt/Voigt, *Prospekt- und Kapitalmarktinformatiionshaftung*, 120.

²⁹ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformatiionshaftung*, 124.

In general, liability for a misstatement in an ad-hoc announcement occurs only when **intent** (“Vorsatz”) or at least **recklessness** (“grobe Fahrlässigkeit”) is proven. Only negligent behaviour does not lead to liability under §§ 37b and 37c. The reason for the exclusion of negligence is that there are a lot of sophisticated requirements that must be fulfilled before publishing the ad-hoc statement and the directors must immediately decide if these requirements are fulfilled or not.³⁰ Thus it is not unlikely that the later examination of the directors behaviour – as agents of the company – shows that it was not totally precise from a legal point of view.

- a) **Intent:** The defendant only acts with intent if he has the knowledge and the will to cause damages. These two elements must be fulfilled that intent can be proven. The requirement of **knowledge** is fulfilled when the defendant considered the occurrence of the damages actually possible. However, if the defendant deems the occurrence of the disfavoured outcome to be totally implausible he cannot be held liable for intent.³¹ The requirement of **will** is complied with if the defendant consciously accepted the occurrence of the results.³² Thus, put the two described elements together the defendant does not act with intent but only recklessly or negligently if he knows about the possibility of the occurrence of disfavoured result (knowledge – yes) but still trusts in that the disfavoured outcome will not occur (will – no).³³ As soon as the defendant can prove that he trusted in that the actual outcome would not occur he cannot be held liable for intent but only for recklessness or negligence.
- b) **Recklessness:** There are two levels of “Fahrlässigkeit” in Germany. There is the so-called “grobe Fahrlässigkeit” (**recklessness**) and so-called “leichte Fahrlässigkeit” (**negligence**). Only if “grobe Fahrlässigkeit” is proven the defendant is liable to pay damages under the §§ 37b and 37c. The defendant’s acts are „grob fahrlässig“ if the due diligence was grossly neglected.³⁴ The conduct is “grob fahrlässig” if very simple and obvious considerations are not taken into account (e.g. exceeding the speed limit by 100%, driving after having drunk considerable amounts of alcohol). It must be proven on two stages that the defendant’s behaviour was “grob fahrlässig”:³⁵
 - **Objective test.**
 - **Subjective test.** It must be taken into account if the defendant is no professional or not experienced in a certain area. In general, in order to be fulfilled the subjective part requires awareness of the risk of a special situation.

³⁰ For details see Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 125 and Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 291.

³¹ Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 22.

³² Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 22.

³³ Palandt/Heinrichs, Bürgerliches Gesetzbuch, §276 Rn 10; Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 22.

³⁴ Palandt/Heinrichs, Bürgerliches Gesetzbuch, § 276 Rn 14.

³⁵ Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 94.

However, the subjective part can also be fulfilled if the defendant did frivolously not recognise the risky situation.³⁶

Hopt/Voigt do not want to enhance liability to mere negligence (leichte Fahrlässigkeit).³⁷ From their point of view the restriction of liability to intent and recklessness is justified because of the practical difficulty to immediately determine whether all legal prerequisites for the ad-hoc statement are fulfilled or not. Therefore, in 2004 Hopt/Voigt encouraged the German government to enact this solution (no liability for negligence) as it had been suggested in draft § 37a Abs 1 WpHG-E 2004. On the other hand Hopt/Voigt recognize that liability for negligence is common on the European level and refer to Belgian, French, Italian, Luxembourg, Dutch, Portuguese, Swiss, and Spanish Law.³⁸

As regards the meaning of the term recklessness as it is used in US law Hopt/Voigt suggest a translation into German by using the term “bewusste Fahrlässigkeit” (and not “grobe Fahrlässigkeit”).³⁹ This suggestion is based on references to Baums⁴⁰ and Steinhauer⁴¹. These two terms – “bewusste Fahrlässigkeit” and “grobe Fahrlässigkeit” should in theory not be mixed up. While the first one describes a special **kind** of “Fahrlässigkeit” the second one describes a certain **level** of “Fahrlässigkeit”.⁴² This may be an crucial acuteness within the German law. However, this distinction cannot be material as regards a comparison of German and English law as English law seems not to distinguish between a level and a kind of default. Even Staudinger/Löwisch seem to conclude that in practice these two terms of German law lead to the same result.⁴³

4. How are the damages measured?

Distinction between “Kursdifferenzschaden” and “Vertragsabschlussschaden”:⁴⁴

- a) „**Kursdifferenzschaden**“ (share value loss): Difference between the price at which the share were actually bought or sold and the price at which the investor could have bought or sold the shares if the market information had been correct. Thus the **purpose** of the protection is targeted at the **real value of the share**.

³⁶ Palandt/Heinrichs, Bürgerliches Gesetzbuch, § 277 Rn 5.

³⁷ See Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 127.

³⁸ See Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 126.

³⁹ See Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 126.

⁴⁰ See Baums, ZHR 167 (2003), 139, 191.

⁴¹ See Steinhauer, Insiderhandelsverbot (1999), 153.

⁴² Palandt/Heinrichs, Bürgerliches Gesetzbuch, § 276 Rn 13 and 14; Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 104.

⁴³ Staudinger/Löwisch, Kommentar zum Bürgerlichen Gesetzbuch (2004), § 276 Rn 104.

⁴⁴ See Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 128.

- b) **“Vertragsabschlussschaden”** (contract conclusion loss): The investor suffered a loss because he entered into the transaction encouraged by the misstatement. The investor could claim to be treated as if he had never made the transaction. That means the investor who bought shares would get his money back and would have to return the bought shares at the same time. The investor who sold shares is treated the other way round. Here the **purpose** of the protection is targeted at the **decision to make the transaction**.

Based on §§ 37b and 37c WpHG it is very **controversial** if a plaintiff can only claim the difference between the real value of the share and the money paid/received or if he can reverse the whole transaction. Developing pros and cons of the two possible solutions Hopt/Voigt conclude in favour of the first solution.⁴⁵ Due to two different opinions⁴⁶ within one and the same book this question could be worth to be examined more accurately.

In draft § 37a Abs 4 WpHG-E the German government chose the first solution, too. In case of the introduction of §37a Abs 4 WpHG-E the transaction could have nevertheless been reversed as a whole according to the general civil code principle in § 826 BGB.

5. Burden of proof

As regards the burden of proof⁴⁷ the usual civil law mechanisms apply. According to §§ 37b and 37c WpHG the investor has to prove the interrelation between the ad-hoc misstatement and the infringement of his legal interests. Thus §§ 37b and 37c WpHG do not provide for a shifting of the burden of proof on the level of causality. However, §37b Abs 2 and § 37c Abs 2 introduce a **shifting of the burden of proof on the level of default**.⁴⁸

In practice it is questionable whether it is difficult for the investor to fulfil the requirements of the burden of proof **as regards causality**. Hopt/Voigt⁴⁹ suggest that the investor need not actually have taken notice of the wrong ad-hoc statement (using the so-called efficient capital market hypothesis as a basis).⁵⁰ The causality resulting in liability is represented by the wrong market value of the share together with the transaction made by the individual investor. Therefore, the **investor that bought shares** must show that the value of the share would have been lower if there had not been the misstatement. The **investor who sold shares**

⁴⁵ For critical statement of Hopt/Voigt see *Prospekt- und Kapitalmarktinformationshaftung*, 130 – 133.

⁴⁶ Different Ehrlicke who seems to prefer the second solution, see in Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 295.

⁴⁷ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 133.

⁴⁸ See Ehrlicke in Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 291 – 293.

⁴⁹ See Hopt/Voigt, *Prospekt- und Kapitalmarktinformationshaftung*, 134.

⁵⁰ Highly contested; limited relaxation of the causality requirements in *Infomatec*, BGH, 19.7.2004, II ZR 217/03; in contrast OLG Stuttgart, 8.2.2006, 20 U 24/04, AG 2006, 383, where the claimant was unsuccessful as she could not prove causality of the wrong ad-hoc statement and her decision to hold the shares. No presumptive evidence accepted by the court.

must show that the value of the shares would have been higher if the misstatement had not been made. If the value of the share declines or rises shortly after the correction of the misstatement there is **presumptive evidence** that the correction of the statement influenced the value of the share. As a result the defendant has to prove that another fact than the misstatement seriously influenced the share value. Together with § 287 ZPO (code of civil procedure; provision of ease of evidence) the application of the efficient market hypothesis would result in a **shifting of the burden of proof in practice**.⁵¹ So far there are no court decisions on §§ 37b, 37c WpHG but in the rulings on the tort provision of § 826 BGB, the Bundesgerichtshof explicitly rejected the US-concept of fraud-on-the-market which is based on the efficient capital market hypothesis.⁵² For the liability for **prospectuses** the shifting of the burden of proof is expressly stated in § 45 Abs 2 BörsG (see above I B 3.).

B. Periodical compulsory statements

Whereas ad-hoc statements must be made on an occasional basis periodical statements are recurring within certain time periods. Periodical reports protect the investor by published information not only at the time the shares being issued but also during the whole “life” of the company. The duty for listed companies to publish **annual financial reports** is set out in § 37v WpHG. Moreover, they have to publish **half-yearly reports** according to § 37w WpHG and interim management statements according to § 37x WpHG. They may publish quarterly financial reports, in which case the interim management statement is not required. In practice larger companies usually publish their reports quarterly. Whereas the yearly and half-yearly reports are compulsory the **quarterly reports** are only demanded by the listing rules of some stock exchanges.

Legal basis for claims are **general provisions of civil law** providing **liability for prospectuses**.⁵³ Here prospectuses does not mean a prospectus published when new shares are issued. In this context a **general principle of civil law** is meant according to which anybody can be held liable for official statements addressing the public especially in brochures, folders, and journals etc (so-called Prospekthaftung, §§ 311, 280 BGB). Furthermore, the legal basis for liability can be § 823 Abs 2 BGB in connection with special statutory provisions of the German shares act (AktienG; e.g. § 400 AktG or § 403 AktG). [AH4]it is highly controversial if liability for half-yearly reports may be based on § 823 Abs 2 in connection with § 37w WpHG (formerly: § 40 BörsG). The German legislator when implementing the Transparency Directive took the view that implementation of Article 7 was not necessary because the existing tort law would constitute a sufficient level of liability. It

⁵¹ So Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 135.

⁵² Bundesgerichtshof, 26.6.2006, II ZR 153/05 – Comroad.

⁵³ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 303.

remains open if this will lead the courts to be more willing to accept accounting provisions as protective provisions which may trigger a liability according to § 823 Abs 2 BGB.

C. Voluntary statements

Liability for voluntary statements (e.g. newspaper articles, interviews, speeches) is neither covered by the ad-hoc rules nor by the provisions for the periodical reports. Hence, in these cases liability can only be based on **general principles of civil law** particularly §§ 311, 280 BGB.⁵⁴ Only under special circumstances the special statutory provisions can be applied analogically, e.g. where there is a circumvention of the special statutory duties by the issuer.

D. Statement based on the “corporate-governance-codex”, § 161 AktG

The German “corporate-governance-code” mainly consists of recommendations. It is therefore not compulsory. The code itself is **not a statutory provision**. In order to increase its importance §161 AktG obliges the members of the board (managing directors and supervisory directors together) to declare annually whether the recommendations of the code were complied with or not. However, § 161 AktG does not contain a duty to give reasons for the non-compliance (the idea is that it is in the directors’ own interest to give reason; that is why there need not be a duty expressly stated).⁵⁵

§ 161 AktG itself is not a legal basis for a claim. It is contested whether § 161 AktG is a protective provision which could be used in connection with § 823 Abs 2 BGB as legal basis for a claim.⁵⁶

E. Excursus – other legal basis

Even for misstatements that are covered by § 37b and § 37c WpHG claims can be based on the general principles of civil law if the defendant acted intentionally. The investor can choose between these two different ways of claiming his rights (§§ 37b and 37c or general principles of civil law). Within the general principles of civil law the claimant has again two choices. He can claim damages due to

- the privity of contract or
- the general law of torts.

⁵⁴ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 304.

⁵⁵ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 308.

⁵⁶ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 310 – 311.

1. Privity of contract (vertragsrechtliche Ansprüche)

Contractual claims⁵⁷ are usual possible only against the party of the contract and not against the issuer of the shares or the board members. However, § 311 BGB says that even persons who will never become parties of a contract enter into a relationship similar to a contract.⁵⁸ Thus § 311 BGB can be used as a legal basis for a claim (see also further down “bürgerlich-rechtliche Prospekthaftung”). To be precise this liability cannot be really called contractual but it works similar to a contractual liability.

The liability of third persons especially directors can be based on § 311 Abs 3 BGB only in connection with § 280 BGB.⁵⁹

2. Law of torts (Deliktsrecht)

Claims that are not based on a contractual relationship are also available.⁶⁰ However, in practice only a few claims were successful due to the burden of proof connected to these claims.⁶¹ There are many different provisions that can be thought about:

- § 823 Abs 1 BGB; **not** applicable. The application of this article requires that a so-called **absolute right** was infringed. As no absolute right is infringed §823 Abs 1 cannot be applied.
- § 823 Abs 2 BGB for itself can never form a basis for a claim. It can only be used as a basis for a claim when it is connected with another special provision the purpose of which is to protect the individual investor (see the following examples).
 - a) § 823 Abs 2 BGB iVm § 15 (insider information) or § 39 WpHG, **not** applicable. §§ 15 and 39 WpHG are not seen as provisions protecting the individual investor.⁶² Instead §§ 37b, 37c WpHG fulfil the same function.
 - b) § 823 Abs 2 BGB iVm § 20a WpHG (prohibition of market manipulation, former provision § 88 BörsG), **not** applicable, no protective provisions.
 - c) § 823 Abs 2 BGB iVm §§ 3, 4 UWG (act against unfair competition); **not** applicable.
 - d) § 823 Abs 2 BGB iVm § 400 AktG; § 400 is a protective provision.⁶³ According to this provision members of the board are liable to a **fine** or to **imprisonment** of up to three years if they make misstatements on the financial status of their company. However, § 400 is only applicable, when **intent** is proven.

⁵⁷ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 268 – 272.

⁵⁸ See §311 Abs 3 BGB: „Ein Schuldverhältnis mit Pflichten nach §241 Abs 2 kann auch zu Personen entstehen, die nicht selbst Vertragspartei werden sollen. ...“.

⁵⁹ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 271.

⁶⁰ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 272 – 280.

⁶¹ See above II.A.2.

⁶² See also BGH, 19.7.2004, II ZR 217/03 (Infomatec).

⁶³ See Geßler/Eckardt/Hefermehl/Kropff, Aktiengesetz, § 400 Rn 3.

- e) § 823 Abs 2 BGB iVm §§ 263 **StGB** (fraud) or 264a **StGB** (fraud on the capital market, StGB is the **criminal law code**); these provisions are undoubtedly protective rules; only applicable when **intent** is proven. Under these provisions there is no liability for recklessness or negligence. Furthermore, this prerequisite of intent for the criminal offence makes the scope for piggybacking of civil suits very small.
- § 826 BGB (vorsätzliche sittenwidrige Schädigung; intentional immoral damnification); if **intent** is proven this provision is undoubtedly applicable to ad-hoc statements since the decision of the BGH in *Infomatec*.⁶⁴ In *Infomatec* neither § 37b nor § 37c WpHG could be applied as the purchase and the sale of the shares took place between the February 8th and May 17th 2000. The new provisions were introduced later (2002).

In general there can be liability for **negligent behaviour** when the civil suit is based on § 823 Abs 2 BGB and thus on the general principles of civil law. However, if there is liability for negligence in the specific case depends on which special protective provision is used in connection to § 823 Abs 2 BGB.⁶⁵ As these **protective provisions** require **intent** in practice even claims based on the general principles of civil law will only be successful when intent is proven. Only in those cases where the **protective provision does not say anything** about intent, recklessness, and negligence the defendant can be held liable for merely negligent acts according to the general rule in § 823 Abs 2 BGB.⁶⁶

III. Proceedings

A. Code on civil proceedings – ZPO

There are no class actions in Germany as the US Rule 23 Federal Rules of Civil Procedure. According to the general code on civil proceedings there are only very few occasions on which different investors can act coordinated before the civil courts (e.g. §§ 59 ff ZPO “Streitgenossenschaft”, § 66 ZPO “Nebenintervention”, § 148 ZPO “Verfahrensaussetzung”). In practice these provisions are not very useful.⁶⁷

As regards the costs of the proceedings the usual rules of the code on civil proceedings apply.

⁶⁴ See BGH, 19.7.2004, II ZR 217/03 (Infomatec).

⁶⁵ See Rützel, Der aktuelle Stand der Rechtsprechung zur Haftung bei Ad-hoc-Mitteilungen, AG 2003, 69 (77); Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformatiionshaftung, 290.

⁶⁶ See Ehrlicke in Hopt/Voigt, Prospekt- und Kapitalmarktinformatiionshaftung, 290.

⁶⁷ See Hopt/Voigt, Prospekt- und Kapitalmarktinformatiionshaftung, 99.

B. Sample proceedings

Since 1st November 2005 civil law suits can be based on so-called **sample proceedings** according to the **KapMuG**.⁶⁸ The KapMuG can only be applied to securities that are officially regulated and it cannot be applied to unregulated capital investments (grauer Kapitalmarkt).⁶⁹ The functioning of the KapMuG is very similar to the English group litigation provided for in the Civil Procedure Rules 2000, part 19.10 to 19.16.⁷⁰ The KapMuG is seen as a **supplement to the general code on civil proceedings**. Its scope are civil suits based on capital market information. All kinds of statements are covered whereas the following statements are expressly mentioned in § 1 Abs 1 KapMuG:

- statements in prospectuses,
- ad-hoc statements according to § 15 WpHG,
- statements in general meetings according to § 400 Abs 1 Nr 1 AktG and
- statements in annual, half-yearly, quarterly reports.

Prerequisite for the sample adjudication is that there are **at least 10 civil suits** based on the same facts. The petition for the sample proceeding can be filed by either the claimant or the defendant.⁷¹ The appellate court (higher regional court, OLG) is responsible for the sample adjudication. As long as the appellate court has not decided on the sample adjudication claims pending at lower courts are suspended. The sample adjudication is binding for the lower courts as regards both the **facts** of the case and the **legal questions**.⁷² The KapMuG provides for exclusive jurisdiction at the place where the company's seat is situated. According to Article 9 KapMuG the act will be abrogated on the 1st November 2010 and hence is **only valid for 5 years**. The reason for this termination is that this kind of procedure shall be **inserted into the general code on civil proceedings** for all civil suits if it proves to be successful for the enforcement of the capital market law.⁷³

As one of the **reasons** for the introduction of the KapMuG the German government mentioned the **small losses** each individual investor suffers due to a misstatement.⁷⁴ The losses are only small when one looks at each individual investor separately. However, the **accumulated losses** of all investors can be huge. The individual investor does usually not claim damages as his losses are too small to justify a claim economically. The expenses for the proceeding would be much higher than the granted damages because expert opinions

⁶⁸ See Gesetz über Musterverfahren in kapitalmarktrechtlichen Streitigkeiten KapMuG, BGBl 2005 I 2437.

⁶⁹ OLG München, Beschluss 27.7.2006, 31 AR 70/6, AG 2006, 722..

⁷⁰ See also Hopt/Voigt, Prospekt- und Kapitalmarktinformationshaftung, 101.

⁷¹ See § 1 Abs 1 KapMuG, Musterfeststellungsantrag.

⁷² See § 16 KapMuG, Wirkung des Musterentscheids.

⁷³ Main parts of this paragraph taken from the website of the law school at the University of Augsburg, department of commercial law, http://www.jura.uni-augsburg.de/prof/moellers/materialien/5_kapitalmarktrecht/einfq_kapmug/ on 2006/12/10.

⁷⁴ See the governments draft on the KapMuG from 17th November 2004.

are often necessary to solve the complicated capital market issues. In the governments opinion the procedures provided in the general code on civil proceedings do not ensure the enforcement of the capital markets' law.

IV. Bafin

The Bafin is in charge of controlling the compliance of the duties set out in the WpHG.⁷⁵ Thus the Bafin is also responsible to check if ad-hoc statements were correctly published. Non-compliance with the duty to disclose insider information under § 15 WpHG is a mere administrative offence that is fined with up to € 1mio by the Bafin (competent authority).⁷⁶ Customers can file **complaints** at the Bafin. These complaints one main resource for the Bafin in order to get to know that companies do not comply with their legal duties. The Bafin, however, does not and may not support investors before the courts.⁷⁷ The civil courts have a sole competence on these matters.

⁷⁵ See § 4 WpHG.

⁷⁶ See § 39 Abs 4 and § 40 WpHG.

⁷⁷ See http://www.bafin.de/beschwerden/beschwerden_bb.htm on 2007/01/11.

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