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Germany's Fourth Financial Markets Promotion Act (4. Finanzmarktförderungsgesetz)

DR. JÖRGEN TIELMANN* AND HANSJÖRG HEPPE**

Germany's Fourth Financial Markets Promotion Act (4. *Finanzmarktförderungsgesetz*; FMP-Act or the Act) became effective on July 1, 2002.¹ First reactions to the Act were generally positive.² Its ultimate goal is to modernize the legal framework of the German financial markets by adapting to the rapid structural changes that have taken place in the global setting.³ The Act contains a complete overhaul of the Stock Exchange Act (*Börsengesetz*; BörsG)⁴ and extensive revisions of the Securities Trading Act (*Gesetz über den Wertpapierhandel*; WpHG),⁵ Banking Act (*Gesetz über das Kreditwesen*; KWG),⁶ and the Investment Companies Act (*Gesetz über Kapitalanlagegesellschaften*; KAGG).⁷ Its main objectives include:⁸

1. Improving the protection of investors by increasing the integrity and transparency of the capital markets;
2. Providing market participants with a broader and more flexible scope for activity; and
3. Closing gaps in the defense system against money laundering and localizing funds that serve the financing of terrorist groups.

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1. Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Viertes Finanzmarktförderungsgesetz), v. 21.6.2002 (BGBl. I S. 2010) [hereinafter FMP-Act]

2. Uwe Schlüter, *Ein insgesamt gelungener Entwurf mit Mängeln im Detail*, BÖRSEN-ZEITUNG, Dec. 6, 2001, at 5.

3. Reasoning of the Government-Bill (*Begr. RegE*), BT-DRUCKS. 14/8017, 62.

4. FMP-Act, *supra* note 1, art. 1.

5. FMP-Act, *supra* note 1, art. 2.

6. FMP-Act, *supra* note 1, art. 6.

7. FMP-Act, *supra* note 1, art. 3.

8. BaFin, Pressemitteilung: ERWEITERTE KOMPETENZEN DER BAFIN DURCH DAS VIERTE FINANZMARKTFÖRDERUNGSGESETZ (Jun. 28, 2002) [hereinafter Press Release], available at <http://www.bafin.de/presse/pm02/020628.htm> (last visited Feb. 13, 2003).

This article will summarize Germany's previous financial markets promotion legislation (Part I), provide a brief overview with regard to the changes made by the Act (Part II), and then focus on the corporate law issues addressed by the Act (Part III).

I. Previous Financial Markets Promotion Legislation

The FMP-Act is said to complete a series of laws regulating the German financial markets. Legislation to promote financial markets is, by nature, non-political legislation. Only few experts in the Department of Finance (*Bundesfinanzministerium*; BMF) and a very small number of the Members of Parliament (*Bundestagsmitglieder*; MdB) have sufficient knowledge of the material involved. The predecessors of the Act may be summarized as follows:⁹

1. The First Financial Markets Promotion Act, which was enacted in 1990, abandoned the stock exchange turnover tax (*Börsenumsatzsteuer*) and lowered the negotiable instrument tax (*Wechselsteuer*) and the company tax (*Gesellschaftsteuer*) in order to decrease transaction costs and make investments, using the organized capital markets, more attractive. Prior to the First FMP-Act, the Stock Exchange Act (*BörsG*) was revised, creating the legal framework for computerized trade at the exchanges.
2. The Second Financial Markets Promotion Act of 1994 was aimed at reforming securities trading supervision. It established the Federal Securities Supervisory Office (*Bundesaufsichtsamt für den Wertpapierhandel*; BAWe). It also brought about the prohibition of insider trading; the duty to publish and disclose price-sensitive information (ad-hoc disclosure) and the duty to notify and disclose changes in the percentage of issuer voting rights were introduced. At that point, the transparency of the German capital markets had substantially improved.
3. The Third Financial Markets Promotion Act became effective on January 1, 1998. It dealt with reforming the disclosure obligations of listed companies. Moreover, for the first time, it allowed the establishment of investment companies. Also, the range of activities for banking companies was broadened by admitting new fund types.

The Fourth Financial Markets Promotion Act sets a temporary end to this series of legislation. Some authors, however, already argue that there is plenty of need for further regulation. For example, a Fifth Financial Markets Promotion Bill should address the obligation to reimburse a company for advantages illegally obtained by contraventions against lock-up periods or directors' dealings rules.¹⁰

II. Overview with Regard to the Changes Made by the Act

The Act focuses on changes in the law governing stock exchanges (section A), securities trading (section B), investments (section C), the banking (section D), and the insurance industry (section E).¹¹

9. See Angela Wefers, *Novelle am Finanzplatz Deutschland*, *BÖRSEN-ZEITUNG*, Oct. 2, 2001, at 3.

10. Stephan Hutter & Michael Leppert, *Das 4. Finanzmarktförderungsgesetz aus Unternehmenssicht*, *NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT* (hereinafter *NZG*) 649, at 657 (2002); Rüdiger von Rosen, *Hase und Igel im Wettlauf um die Aktienkultur*, *BÖRSEN-ZEITUNG*, Nov. 8, 2001, at 3.

11. BMF, *INFORMATIONSPAPIER: GESETZENTWURF FÜR EIN VIERTES FINANZMARKTFÖRDERUNGSGESETZ* (Nov. 14, 2001) [hereinafter *Information Paper*], available at <http://www.unileipzig.de/bankinstitut/dokumente/2001-12-05-01.pdf> (last visited Feb. 13, 2003).

A. STOCK EXCHANGES

The amendments with regard to the stock exchange law are designed to afford the exchanges a greater flexibility in the configuration of their trading, allowing them to respond appropriately to changes in the industry. The amendments comprise the following measures:

1. *De-Coupling Market Segments from Price Determination*

The previous rule that allowed only a single form of price determination (by an official broker or other brokers participating in the official trading (*amtlicher Handel*) or the regulated market (*geregelter Markt*)) depending on the market segment (*Marktsegment*) in which the security was listed has been discontinued. It is now left to the exchanges to decide on the configuration of the trading systems they use (floor trading, computer-assisted or fully computerized trading).¹² The method selected is to be set forth in the exchange regulations.

2. *Exchange Listing Requirements Made More Flexible*

The official market (*amtlicher Markt*) substitutes the previous official trading as first market segment.¹³ The minimum standards provided for in the framework of the regulated market continue to apply in the second segment (regulated market). Furthermore, upon consent by the supervisory authorities, exchanges have the opportunity to introduce additional supervisory or disclosure regulation for certain areas (*Teilbereiche*) of the market segments. Securities that have, until now, been traded only in the regulated unofficial market (*Freiverkehr*) may be admitted to and traded in the regulated market subject to less stringent conditions than in the past.¹⁴ The official market and the regulated market comply with the requirements for a "regulated market" as set forth in the European Investment Services Directive (*Wertpapierdienstleistungsrichtlinie*; WpDiRiLi).¹⁵ Securities that fail to satisfy these conditions may (as before) be traded in the regulated unofficial market.¹⁶

3. *Disclosure of Sales Restrictions (Lock-Up Periods)*

Lock-up periods are to be disclosed in the sales prospectus.¹⁷ This provision is intended to inform the market of any previously negotiated sales restrictions, for instance in connection with the sale of large share packages or portfolios of existing (major) shareholders.¹⁸ The stock exchanges have been authorized to set forth regulations ensuring compliance with these arrangements.¹⁹ However, there is no specific civil liability for misconduct comparable to that found in sections 37b and 37c WpHG.²⁰

B. SECURITIES TRADING

The amendments to the WpHG are intended to reinforce investor protection by improving market integrity. This is to be done by introducing rules governing price and

12. Holger Fleischer, *Das Vierte Finanzmarktförderungsgesetz*, 41 NEUE JURISTISCHE WOCHENSCHRIFT (hereinafter NJW) 2977, at 2982 (2002).

13. Information Paper, *supra* note 11.

14. *Id.*

15. Council Directive 93/22/EEC, 1993 O.J. (L 141) 27.

16. Information Paper, *supra* note 11.

17. *Id.*

18. *Id.*

19. *Id.*

20. See *infra* Parts I. B. 4 and III. B.

market manipulation, centralizing investigative powers with regard to capital markets in federal supervisory authorities (i.e., taking powers away from the states), and imposing greater transparency requirements on the issuers.

1. *New Regulations on Price and Market Manipulation*

A more precise definition of the offense,²¹ broader governmental intervention powers,²² and their centralized allocation with the newly-founded Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*; BaFin) now allows effective action to be taken against price and market manipulation.²³ The BaFin is the result of a merger of the Federal Banking Supervisory Office (*Bundesaufsichtsamt für das Kreditwesen*; BAKred), the Federal Insurance Supervisory Office (*Bundesaufsichtsamt für das Versicherungswesen*; BAV), and the Federal Securities Supervisory Office (BAWe) that was proscribed by the Law on Integrated Financial Services Supervision (*Gesetz über die integrierte Finanzdienstleistungsaufsicht*; FinDAG).²⁴ The BaFin has been authorized to investigate and sanction the manipulation of exchange prices. It is empowered to impose fines of up to 1.5 million Euros for less serious manipulatory offenses, which have, until now, not been prosecuted by state-attorneys.²⁵ The responsibility for taking action to counter price and market manipulation has been assigned to the BaFin as the BAWe already had gained the necessary resources and experience from the prosecution of insider trading.²⁶ The new rules on price and market manipulation also take into account developments at the European level. They already comply with the EU Commission's proposal for a Directive on Market Abuse (*Vorschlag für eine Richtlinie des Europäischen Parlaments und des Rates über Insider-Geschäfte und Marktmanipulation (Marktmissbrauch)*),²⁷ which asks for one single agency in each member state to be responsible for monitoring and prosecuting market manipulation and insider offenses.

2. *More Precise Definition of the Regulations on Ad-Hoc Disclosure*

In order to further the transparency of the German capital markets, the underlying provisions regarding ad-hoc disclosure were more precisely defined.²⁸ New information must be published within a context that permits comparison to previously published data. Incorrect information that had been published and disclosed now has to be corrected without undue delay.²⁹

21. Under the new section 20a Wertpapierhandelsgesetz (WpHG) it is forbidden to make incorrect statements about facts that are relevant to the evaluation of securities—such as the earnings or sales generated by a company—or to withhold such information, for instance by failing to submit compulsory notifications. It is also forbidden to spread rumors or to carry out transactions with the aim of exerting illegal influence on the exchange price.

22. § 20b WpHG.

23. Press Release, *supra* note 8.

24. Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht (Finanzdienstleistungsaufsichtsgesetz), v. 22.4.2002 (BGBl. I S.1310).

25. Andreas Möller, *Die Neuregelungen des Verbots der Kurs- und Marktpreismanipulation im Vierten Finanzmarktförderungsgesetz*, 56 WERTPAPIER-MITTEILUNGEN (WM) 309, at 313 (2002); Jens Ekkenga, *Kurspflege und Kursmanipulation nach geltendem und künftigem Recht*, 56 WM 317, at 317 *et seq.* (2002).

26. Press Release, *supra* note 8.

27. Proposal for a Directive of the European Parliament and of the Council on Insider Trading and Market Manipulation (Market Abuse), EUR. PARL. DOC. (COM 281 final) (2001).

28. Information Paper, *supra* note 11.

29. *Id.*

3. *Disclosure of Dealings by Corporate Insiders (Directors' Dealings)*

The Act sets forth that securities transactions carried out by members of the managing and supervisory boards (or their relatives) in securities of their own company shall be published without undue delay.³⁰ Awareness of such dealings is of major importance for the capital markets, as it can provide hints to the assessment of the future performance of the company by its insiders.³¹ In addition, this kind of disclosure is a significant aid in the prevention of insider trading.³²

4. *Establishing Civil Liability for the Consequences of Misleading Ad-Hoc Disclosure Practices*

Sections 37b and 37c were introduced into the WpHG.³³ They provide a cause of action for investors to claim compensation for losses from their securities transactions based on an issuer's omitted, late, or incorrect disclosure of price-sensitive information. Investors had previously been inadequately protected against misleading issuer publications.³⁴ And disclosure practices of quite a few publicly traded companies had been seriously defective in the past.³⁵ The introduction of sections 37b and 37c WpHG can be regarded as the legislator's reaction to the experiences during the past boom years at the New Market-segment of the Frankfurt Stock Exchange (*Neuer Markt*; NM), where incorrect or exaggerated ad-hoc publications had been deliberately used.³⁶

5. *Revision of the Law Governing Futures Transactions*

The provisions governing futures transactions (*Finanztermingeschäfte*), which were previously contained in the Stock Exchange Act (BörsG) and the German Civil Code (*Bürgerliches Gesetzbuch*; BGB), were recast in sections 37d and 37g WpHG.³⁷ This is to eliminate the defects of the previous arrangement, namely, the uncertainty as to the definition of "futures transactions" and the need to clarify the relationship between stock exchange rules and the provisions of the repealed section 764 BGB on so-called margin trading (*Differenzgeschäfte*).³⁸

6. *New Regulations on Organised Markets Abroad*

In the past, foreign exchanges were allowed to set up their trading screens in the Federal Republic of Germany without being subject to authorization or notification requirements. Abroad, however, the installation of trading screens is generally subject to authorization by the respective national authorities. Legislation concerning the installation of trading screens by foreign exchanges was therefore required in order to adapt to international practice.³⁹

30. *Id.*

31. Press Release, *supra* note 8.

32. See *infra* Part III. A.

33. Information Paper, *supra* note 11.

34. That is only by the general tort law.

35. See *infra* Part III. B.

36. Information Paper, *supra* note 11.

37. FMP-Act, *supra* note 1, art. 2, no. 24.

38. Information Paper, *supra* note 11.

39. *Id.*

7. *Authorization to Prohibit Selling Short*

The BaFin has been authorized to issue regulations prohibiting selling short under circumstances in which there is the danger of the markets being seriously disturbed. This is to provide stability to the financial markets and the international financial system.⁴⁰

8. *Extension of Rules of Conduct to Financial Analysts*

The rules of conduct contained in Title (*Abschnitt*) 6 of the WpHG have been amended. According to section 34b, paragraph 1, sentence 1, WpHG, financial analysts are mandated to observe so-called "basic rules of analysis" (with regard to clarity and comprehensibility, due and proper care, etc.).⁴¹ They also have to inform the public of their economic interest in the securities they are analyzing.⁴² This will help investors identify conflicts of interest. Note, however, that the legal regulations governing financial analysts contained in the WpHG are limited to securities firms (*Wertpapierdienstleistungsunternehmen*)⁴³ and their employees.⁴⁴ The rules are a reaction to the past practice of financial analysts creating exaggerated optimism in future stock price developments.⁴⁵ Violations against these provisions may be punished by the BaFin with fines up to 200,000 Euros.⁴⁶

C. INVESTMENTS

The third point of emphasis in the Act is in the area of investment law. In this respect the Investment Companies Act (KAGG) has been adapted to take account of recent developments. The amendments introduced by the Fourth FMP-Act eliminate those investment restrictions that were deemed outdated, thereby enhancing Germany's status as an investment location. They are meant to improve investor protection and promote orientation to customer needs.⁴⁷

1. *Extension of the Permissible Ancillary Activities of Investment Companies*

Investment companies are now permitted to market and advise on investment-fund products (*units*) of other companies in addition to their own.⁴⁸ The marketing of other companies' units is to enable investors to acquire fund shares of different issuers through a single source. It is geared at consumer needs and enhancing the ability of small and mid-size companies to compete with large investment houses, as smaller firms are able to offer a wide range of products while tailoring them to the demands of their clients.⁴⁹

2. *Investment Fund-Shares Incorporating Different Strategies*

It had previously been impossible for investment funds to incorporate different strategies into one product; i.e., profit-retaining and profit-distributing strategies had to be offered

40. *Id.*

41. FMP-Act, *supra* note 1, art. 2, no. 19.

42. § 34G, para. 1, sent. 2 WpHG.

43. This also applies to companies associated with such firms (*verbundene Unternehmen*).

44. Information Paper, *supra* note 11.

45. Hutter & Leppert, *supra* note 10, at 2212; Fleischer, *supra* note 12, at 2982.

46. § 39, para. 1, no. 4 and para. 4 WpGH.

47. Information Paper, *supra* note 11.

48. FMP-Act, *supra* note 1, art. 3, no. 1

49. Information Paper, *supra* note 11.

in different products. The introduction of differing share categories now enables investment companies to incorporate these different strategies within one fund product.⁵⁰

3. *New Index Funds*

In the past, only stock index products had been allowed. Now, index-fund products can be issued, which follow all securities indices recognized by the Financial Supervisory Authority.⁵¹

4. *Open-End Real Property Funds*

Previously, only a small portion of the assets of open-end real property funds were allowed to be invested in real property located outside the European Economic Area (*Europäischer Wirtschaftsraum*; EWR). This restriction has been largely revoked, subject to a currency-risk cap of 30 percent of the respective fund's assets.⁵² Life estates are now treated as unlimited ownership rights.⁵³ Joint tenancy, tenancy in common, and other forms of concurrent ownership within and outside the EWR are allowed. However, the aim is to improve not only the earning prospects of real property funds but also to increase the protection of investors. This is to be ensured by fixing the share prices on a daily basis and limiting the term a person may serve on the expert committee of such a fund.⁵⁴

D. BANKING

The measures relating to banking reflect the refinement of international standards in banking supervision. Furthermore, the law was brought up to speed with the technological developments, which led to fundamental changes in the banking and financial services industry. The FMP-Act implements the E-Money Directive of the European Union⁵⁵ and closes gaps in the defense system against money laundering.

1. *Basel Core Principles*

There was a need for implementing the "Core Principles for Effective Banking Supervision" as prescribed by the Basel Committee on Banking Supervision in September 1997.⁵⁶ Incorporating these Principles into the German Banking Act (KWG) required specific powers set forth in the law to be more precisely defined and extended. The changed German law now meets the Basel Core Principles and is expected to serve as an example in the international arena.

2. *European E-Money Directive*

The European E-Money Directive⁵⁷ had not previously been fully implemented in the KWG. The provisions on exceptions of section 2 KWG, the determination of the initial capital under section 33 KWG, equity capital according to section 10 KWG, and the

50. *Id.*

51. § 8c, para. 3, no. 1 KAGG.

52. FMP-Act, *supra* note 1, art. 3, no. 20 lit. a) and d) (amending § 27 para. 1, 3, and 4 KAGG).

53. FMP-Act, *supra* note 1, art. 3, no. 20 lit. g).

54. Information Paper, *supra* note 11.

55. Council Directive 2000/46/EC, 2000 O.J. (L 275) 39.

56. BASEL COMMITTEE ON BANKING SUPERVISION, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION (Sept. 1997), available at <http://www.bis.org/publ/bcb30a.pdf>.

57. Council Directive 2000/46/EC, 2000 O.J. (L 275) 39.

creation of a consumer-protective arrangement for the re-convertibility of electronic money in section 22a KWG, needed to be amended.⁵⁸ The enacted changes provide for the full implementation of the E-Money Directive. The changes allow e-money service providers from one EU member state free access to the markets of all EU Member States.⁵⁹

3. Money Laundering and Terrorist Funding

Further changes of the KWG are intended to close gaps in the defense system against money laundering. Payment flows and their provenance are to become clearer to the supervisory authorities. Thus, under section 25a, paragraph 1, number 4 KWG credit institutions are now required to implement organizational provisions, which (consistently applied) enable them to better identify money laundering activities internally and institute the necessary countermeasures.⁶⁰ Furthermore, they are obliged to maintain information about clients' accounts in a separate database that can be accessed by the BaFin by means of automated procedures.⁶¹ The changes brought about by the Act are based on a risk-oriented prevention strategy. They create the prerequisite for protecting the German financial markets against money laundering and identifying funds, which serve the financing of terrorist groups.⁶²

4. Supervision of Shareholders

The reliability of stakeholders and/or owners of major participations in banks, financial service institutions, and insurance undertakings are now subject to homogeneous and stricter requirements. The burden of proof has been shifted to the shareholders who (upon demand) shall state their sources of financing. This change of section 2b KWG⁶³ follows the recommendations of the Work-Group on Significant Ownership Rights to German Financial Institutions (*Arbeitsgruppe bedeutende Beteiligungen an Institutionen*) set up by the Forum for Financial Market Supervision (*Forum für Finanzmarktaufsicht*). The work-group had been installed to harmonize the supervisory rules with regard to monitoring shareholders in the insurance and financial industries and to increase the supervision efficiency. The BaFin may prohibit the purchase of stakes and major participations if the resulting group of companies is non-transparent either economically or due to the structure of cross-shareholdings.

5. Rulemaking Authority in the Areas of Solvency Supervision

Banks must maintain adequate capital (*angemessene Eigenmittel*) enabling them to fulfill their obligations to their creditors and, more importantly, to prevent endangering the safety of the assets entrusted to them in accounts or other forms of investment.⁶⁴ In the past, this

58. FMP-Act, *supra* note 1, art. 6, no. 20.

59. Information Paper, *supra* note 11.

60. FMP-Act, *supra* note 1, art. 6, no. 25. Credit institutions are required to establish internal security systems with respect to transactions in retail banking, electronic banking, or cash-less payment systems that are also relevant with regard to fraud. Thus, it is now possible to monitor business relationships with a view to risk-groups and irregularities and to close gaps in the identification of customers in certain contractual financial services.

61. § 24c KWG.

62. Information Paper, *supra* note 11.

63. FMP-Act, *supra* note 1, art. 6, no. 5. See also the change of § 104 Insurance Supervision Law (*Versicherungsaufsichtsgesetz*; VAG) brought about by FMP-Act, *supra* note 1, art. 16, no. 17.

64. § 10, para. 1, sent. 1 KWG.

rule was merely spelled out through administrative guidelines by the BaFin.⁶⁵ Under the FMP-Act,⁶⁶ the status of these solvency principles, as well as the liquidity principles set forth in section 11 KWG,⁶⁷ is elevated to an ordinance (*Rechtsverordnung*) to be drawn up by the BMF in accordance with the *Deutsche Bundesbank*. This gives it the force of law.

E. INSURANCE INDUSTRY

Article 16 of the FMP-Act reorganized the supervision of re-insurance companies. Because default of a re-insurer can represent a severe threat to the financial situation of primary insurers,⁶⁸ new rules have been introduced to ensure the willingness and ableness of re-insurance companies to meet their obligations to primary insurers at all times. The BaFin is now able to issue binding orders if it fears that a re-insurer is not able to meet its liabilities at all times or has violated existing laws. In addition, and also with regard to the further developments within the EU, re-insurers have to meet regulatory standards regarding the kind of legal entity they conduct their business as,⁶⁹ in what kind of investments they place the insurance premiums,⁷⁰ and how their management and supervisory personnel is qualified.⁷¹ The indirect supervision of the re-insurance companies, however, remains in effect.

III. Corporate Law Issues in Detail

In the following section, two of the already mentioned changes in the law governing securities trading will be discussed.⁷² Directors' dealings and liability towards shareholders for misleading publications of stock price-sensitive information (ad-hoc disclosure) will be reviewed in more detail and evaluated as to their compatibility with German corporate law.

A. PUBLICATION AND DISCLOSURE OF DIRECTORS' DEALINGS TRANSACTIONS

New notification and disclosure obligations regarding the trading of securities by members of the managing and supervisory boards have been introduced. These rules aim at diminishing the advantages members of a company's governing bodies might have from using their potential insider knowledge. The newly established rule somewhat resembles section 16 of the U.S. Security Exchange Act of 1934,⁷³ which requires directors and officers of an issuer to file with the Securities and Exchange Commission (SEC) a statement specifying how much of the issuer's stock is owned by such person and any monthly changes in these ownership interests.

1. Notification and Disclosure Obligations

Addressees of the newly introduced notice and disclosure obligations about the trading in securities of a company are the members of its managing and supervisory boards⁷⁴ as

65. In accordance with § 10, para. 1, sent. 2 KWG.

66. FMP-Act, *supra* note 1, art. 6, no. 9.

67. FMP-Act, *supra* note 1, art. 6, no. 11.

68. As a result, the interests of the policy-holders are affected.

69. § 1a, para. 1, sent. 1 VAG.

70. §§ 1a, para. 2; 54, para. 1, sent. 1 VAG.

71. §§ 8, para. 1, no. 1, 7a, para. 1 VAG.

72. See *supra* II. B. 3. and 4.

73. Hutter & Leppert, *supra* note 10, at 656; Fleischer, *supra* note 14, at 2978.

74. This is in case the company is a joint stock corporations listed on a German official or regulated market.

well as such board members of the parent company. Parent companies are defined in section 290 of the Commercial Code (*Handelsgesetzbuch*; HGB). Also, the personally liable partners of all issuers, whose securities are admitted to the official or regulated market on a German stock exchange, are subject to the disclosure requirement regardless of whether the issuer is domiciled in Germany or abroad. Furthermore, spouses and registered partners pursuant to the Registered Partnership Law (*Lebenspartnerschaftsgesetz*; LpartG),⁷⁵ as well as first degree relatives (e.g., parents and children)⁷⁶ of the aforementioned company insiders, are obliged to notify the issuer about any trades in its securities (hereinafter “notifying persons”).

Under the new amendments, only such trading in securities carried out by the notifying persons themselves would be subject to the notification obligation. Any sale or purchase of securities of companies admitted to the official or regulated market that are carried out through a third person (including a foundation, trust company, participation, or investment company) on behalf of a notifying person would not fall within the scope of the obligation. This will hold true even if the notifying person actually has economic influence on the transactions of the third person. Transactions concluded by an asset manager on behalf of the notifying person, however, are subject to the disclosure requirement—unless they are concluded under an undisclosed fiduciary relationship.⁷⁷

2. Trading Subject to the Disclosure Requirement

The disclosure requirement applies to any sale or purchase of shares of issuers that are admitted to the official or regulated market, as well as other securities, if such sale or purchase grants the creditor an exchange right to shares of the issuer (e.g., convertible bonds (*Wandelschuldverschreibungen*) pursuant to section 221 Stock Corporation Act (*Aktengesetz*; AktG)) or any other right for the sale or purchase of shares of the issuer (e.g., stock options). This includes rights for which the price depends immediately on the stock exchange price of the shares of the issuer.

For the purpose of section 15a WpHG, the purchase or sale of shares of the issuer shall be understood as in the context of insider law (i.e., the transaction does not have to involve the physical transfer of property). Thus, it is sufficient to conclude a contract for sale. Purchase and sale transactions such as repurchase agreements and securities lending transactions—as opposed to the mere pledging of securities—are therefore subject to the disclosure requirement.⁷⁸ Transactions are subject to the disclosure requirement regardless of whether they are concluded on or off a stock exchange, in Germany or abroad.

3. Time, Recipient, Form, and Contents of the Notification by the Notifying Person

The notifying person has to notify the issuer as well as the BaFin immediately (*unverzüglich*) in written form.⁷⁹ According to section 15a, paragraph 2, numbers 1 to 3 WpHG the notification needs to contain the following information:

75. Partnership for homosexual couples in Germany.

76. The offspring (including illegitimate and adopted children) as well as the parents of those members of the management or supervisory boards, who are subject to the disclosure requirements, are deemed to be relatives in the first degree. Stepchildren and stepparents do not fall into this category.

77. BaFin, CIRCULAR: ON THE DISCLOSURE REQUIREMENTS PURSUANT TO SECTION 15A WpHG (Sept. 5, 2002) [hereinafter CIRCULAR], available at http://www.bafin.de/schreiben/020905_e.html (last visited Feb. 13, 2003).

78. See *id.*

79. § 15a, para. 1, sent. 1 WpHG.

1. name (*Bezeichnung*) of the security and the security identification number (ISIN; *Wertpapierkennnummer*);
2. date of the transaction; and
3. the price, the number, and the nominal value of the shares or rights.

In accordance with the general regulation included in section 121 BGB, the disclosure requirement "immediately" is understood to mean "without undue delay." Thus, the disclosure shall be made as soon as the disclosure requirement exists; and this depends on the time the securities or rights were purchased or sold. Therefore, the conclusion of the transaction contract is decisive, not the physical transfer of property. Hence, the disclosure requirement is triggered as soon as the notifying person knows that her transaction went through. Upon the commencement of the disclosure requirement the notifying person shall take all the necessary measures coming within her sphere of influence in order to fulfill her disclosure requirement, even if a third party is involved.⁸⁰

4. *Disclosure Obligation of the Company*

Under section 15a, paragraph 3, numbers 1 and 2 WpHG the issuer is obligated to publish the notification it has received immediately.⁸¹ This disclosure obligation can be complied with by publishing the information on the issuer's Web site for a period not shorter than one month or—if such publication over the internet would result in too great an expense (*unverhältnismässiger Aufwand*) for the company—it may comply by placing a publication in a supra-regional official stock exchange gazette (*überregionales Börsenpflichtblatt*). In the latter case, the issuer is obliged to send a proof for such publication to the BaFin immediately.

5. *Administrative Rights of the BaFin*

According to section 15a, paragraph 4 WpHG, the BaFin may demand from the notifying person as well as from the financial service entities involved in the transaction (such as investment companies, securities firms, and banks) any information and presentation of documents to the extent necessary for monitoring compliance with the notification and disclosure obligations of section 15a WpHG.

6. *Exemptions from the Disclosure Requirement*

The disclosure requirement does not exist if the purchase is carried out on the basis of an employment contract or as part of a remuneration. Exemptions from the disclosure and publication requirement therefore exist for the purchase of staff shares, as in the context of an equity participation program. The granting of stock options on the basis of an employment contract such as stock appreciation rights is also exempt from the disclosure requirement. Their future exercise is, however, subject to it.⁸²

Transactions carried out by notifying persons that do not exceed 25,000 Euro within thirty days are also not subject to the disclosure requirement.⁸³ This limitation takes account of the fact that the publication of every small order is of no informative value for the market participants. For this reason, only those transactions that exceed the above-mentioned

80. CIRCULAR, *supra* note 77.

81. See *supra* Part III. A. 3 (discussing the meaning of "immediately").

82. See CIRCULAR, *supra* note 77.

83. *Id.*

minimum amount within thirty days must be disclosed; and it is the aggregate value of the executed transactions that is decisive, regardless of whether such transactions are purchase or sale transactions. A “setting off” of trades (e.g., purchase and sale of the same shares within the period) is therefore not allowed.⁸⁴ Upon conclusion of the transaction, the notifying party shall check whether transactions exceeding the total amount of 25,000 Euro were carried out within the last thirty calendar days.⁸⁵

7. *Legal Consequences of any Infringement*

If a notifying person acts deliberately or grossly negligent in contravention of section 15a WpHG, she acts disorderly (*ordnungswidrig*).⁸⁶ The same applies if the issuer does not comply with its obligation to disclose and publish the notification.⁸⁷ Disorderly conduct of such kind may be punished by a fine up to 100,000 Euro.⁸⁸

Moreover, it shall be deemed as a disorderly conduct if a demand by the BaFin for information or presentation of documents⁸⁹ is (deliberately or grossly negligent) not being satisfied.⁹⁰ The applicable fine may amount to 50,000 Euro.⁹¹ If and to the extent the issuer does not supply written proof of the publication of the notification to BaFin,⁹² it is also disorderly conduct⁹³ and may be punished by a fine in an amount up to 50,000 Euro.⁹⁴

Note that there is no specific civil liability for misconduct comparable to sections 37b and 37c WpHG for misleading ad-hoc disclosure practices.

8. *Relationship with any other Applicable Notification Obligations*

German law and stock exchange rules have, even prior to the enactment of the Fourth FMP-Act, contained a variety of notification obligations, which in part may overlap.

a. Directors' Dealings pursuant to the Regulation of the New Market

Up to the introduction of the Fourth FMP-Act, joint stock corporations whose shares are listed on the New Market (NM) had, pursuant to section 7.2 of the Regulation New Market (*Regelwerk Neuer Markt*; RWNM), been obliged to notify the German Stock Exchange (*Deutsche Börse AG*⁹⁵) of any trading that the company itself and/or members of its

84. Calendar days (not trading days) shall be taken as a basis. The calculation of the thirty-day-period shall be based on sections 187, para. 1, 188, para. 1 BGB:

Section 187 BGB [Beginning of Limitations]

(1) If an event or a point of time in the course of a day determines the beginning of a limitation, the day, upon which the event or point of time falls, is not included in computing the limitation.

Section 188 BGB [Termination]

(1) A limitation, computed in days, ends upon the expiration of the last day of the limitation.

85. See Fleischer, *supra* note 12, at 2978.

86. § 39, para. 2, no. 1, lit. c) WpHG.

87. § 39, para. 2, no. 2, lit. b) WpHG.

88. § 39, para. 4 WpHG.

89. See *supra* Part III. A. 5.

90. § 39, para. 3, no. 1, lit. a) WpHG.

91. § 39, para. 4 WpHG.

92. See *supra* Part III. A. 4.

93. § 39, para. 2, no. 4 WpHG.

94. § 39, para. 4 WpHG.

95. The company running the Frankfurt Stock Exchange.

managing or supervisory boards did in securities of the company. The newly introduced notification obligation of section 15a WpHG has a broader scope. First, it addresses all companies admitted to the German securities markets, not only companies listed on the NM-segment. Second, section 15a WpHG is a statutory notification obligation rather than a contractual obligation amongst the entity running the exchange and an issuer. Compliance with this statutory obligation is being monitored by the BaFin and contraventions may be prosecuted and punished as a summary offense (*Ordnungswidrigkeit*). Finally, the obligation pursuant to 7.2 Regulation New Market (RWNM) was somewhat less restrictive, as it allowed for a maximum period of three days in which the dealing had to be disclosed, and transactions in stock-options, convertible bonds, and the like were exempted from disclosure. Section 15a WpHG, however, asks for the immediate disclosure of share and other securities transactions.⁹⁶

b. Notification of Voting Rights⁹⁷

According to section 21, paragraph 1, sentence 1 WpHG, which has not been changed by the Act,⁹⁸ any person whose shareholding in a listed company reaches, exceeds, or moves below 5 percent, 10 percent, 25 percent, 50 percent, or 75 percent of the voting rights by purchase, sale, or by any other means, shall immediately and at the latest within seven calendar days, notify the company and the BaFin in writing of having reached, exceeded, or moved below the above-mentioned thresholds. The notification must also include the size of her percentage of the voting rights, by indicating the day on which she has reached, exceeded, or moved below the respective threshold.

The notification period shall begin at the time when the notifying party learns or, in consideration of the circumstances, must have learned that her percentage of the voting rights has reached, exceeded or moved below the above mentioned thresholds.⁹⁹ The listed company must publish a notification (made in accordance with section 21, para. 1, sent. 2 WpHG) immediately,¹⁰⁰ at the latest within nine calendar days of its receipt.¹⁰¹ This disclosure also has to be published in at least one supra-regional official stock exchange gazette.

The notification and disclosure obligations under sections 15a and 21 *et seq.* WpHG are not mutually exclusive. Both provisions address different *disclosure worthy* fact situations. When facts are to be disclosed under sections 15 (ad-hoc disclosure) and 21 WpHG, notification and disclosure obligations under both rules have to be followed.

B. LIABILITY TOWARDS SHAREHOLDERS FOR MISLEADING AD-HOC DISCLOSURE PRACTICES

The Act introduced sections 37b and 37c WpHG, which create a civil cause of action for shareholders against issuers in cases of failure to meet ad-hoc publication and disclosure obligations.¹⁰² The applicability of these provisions is restricted to ad-hoc notifications pursuant to section 15 WpHG, although the Corporate Governance Commission installed by

96. See Hutter & Leppert, *supra* note 10, at 656.

97. §§ 21 *et seq.* WpHG.

98. Only a clarifying reference to section 22, para. 1 and 2 WpHG had been added to section 21, para. 1, sent. 1 WpHG; FMP-Act, *supra* note 1, art. 2, no. 13a.

99. § 21, para. 1, sent. 2 WpHG.

100. See *supra* Part III. A. 3 (discussing the meaning of "immediately").

101. § 25, para. 1, sent. 1 WpHG.

102. FMP-Act, *supra* note 1, art. 2, no. 24.

the Federal Government (*Regierungskommission*; Corporate Governance) had recommended a broader applicability to *any* misleading information communicated by the issuer.¹⁰³ A realization of the Corporate Governance Commission proposal to introduce a general liability of members of the managing and supervisory boards of public companies for any intentional wrong information of the capital markets has been rejected.¹⁰⁴ It might, as some authors argue, have significantly helped to raise issuers' awareness towards what is communicated on other occasions such as quarterly reports,¹⁰⁵ analyst conferences, press interviews, shareholders' meetings, or any other management presentations.¹⁰⁶

1. *Ad-hoc Publication and Disclosure of Price-Sensitive Information*

An issuer of securities admitted to trading on a German stock exchange must immediately publish any new piece of information that comes within its sphere of activity and is not publicly known, if such information is likely to exert significant influence on the stock exchange price of the admitted securities or, in the case of listed bonds, might impair the issuer's ability to meet its liabilities.¹⁰⁷ The figures employed in the context of such publication shall be customarily used in business and permit comparison with previously employed figures.¹⁰⁸ Even in connection with facts that are subject to these publication requirements, further information (which obviously fails to meet these requirements) may not be published. Untrue information published as an ad-hoc notification must be corrected immediately in a new ad-hoc publication even if the prerequisites set forth in section 15, paragraph 1 WpHG do not exist.¹⁰⁹ The BaFin may (on application by the issuer) exempt the issuer from the publication requirement if publication of the information is likely to damage the legitimate interests of the issuer. Before publishing price-sensitive information as an ad-hoc notification, the issuer shall notify:

1. The management of the stock exchanges, on which the securities are admitted to trading;
2. The management of the stock exchanges, on which only derivatives are traded, insofar as the securities are the subject of such derivatives; and
3. The BaFin¹¹⁰

Before the publication has been made, the stock exchange management may use the information it has learned in the course of the ad-hoc notification only for the purpose of deciding whether to suspend or to cancel the determination of stock exchange prices. The BaFin may permit issuers domiciled abroad to effect the ad-hoc notification together with the publication, provided this does not adversely affect the decision of the management on whether to suspend or cancel the determination of stock exchange prices.¹¹¹ An ad-hoc publication shall be effected in the German language,

103. Theodor Baums (ed.), *BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE*, at margin numbers (*Randnummer*; Rn.) 182 (2002).

104. *Compare* Securities Exchange Act of 1934 § 21(a), 15 U.S.C. § 78u-1 (2002), and Sarbanes-Oxley Act, H.R. 3763, 107th Cong. §§ 302, 906 (2002) (enacted) (requiring CEOs and CFOs to certify the accuracy of SEC reports and that the company's SEC reports fully comply with the Securities Exchange Act of 1934).

105. *Id.*

106. Hutter & Leppert, *supra* note 10, at 654.

107. § 15, para. 1 WpHG.

108. *Compare supra* Part II. B. 2 (discussing a more precise definition of ad-hoc disclosure).

109. *Id.*

110. § 15, para. 2, sent. 1 WpHG.

111. § 15, para. 2, sent. 4 WpHG.

1. in at least one supra-regional official stock exchange gazette, or
2. by way of an electronic system for the dissemination of information, which is broadly accessible to credit institutions, enterprises operating under section 53, paragraph 1, sentence 1 KWG, other enterprises domiciled in Germany, which are admitted to trading on a German stock exchange, and insurance undertakings;

it is permitted to make simultaneous publication in the English language; the BaFin may permit issuers domiciled abroad to affect the publication in another language provided that the provision of sufficient information to the public does not seem to be endangered thereby.¹¹² Publication in any other form may not be affected before the publication of the ad-hoc notification. If the volume of information is very extensive the BaFin may permit the publication of a summary. However, the complete information has to be made available free of charge from the issuer's paying agents, which has to be indicated in the announcement.

The issuer shall immediately forward the publication to the management of the stock exchanges and to the BaFin, unless the BaFin has granted a permission to make the notification together with the publication.¹¹³ The BaFin may require the issuer to submit information and documents insofar as this is necessary to monitor compliance with the ad-hoc notification requirements prescribed by section 15 WpHG. During normal business hours, employees of the BaFin and persons commissioned by it shall be permitted to enter the property and business premises of the issuer insofar as this is necessary for the performance of the functions of the BaFin.¹¹⁴ If the issuer fails to comply with these aforementioned ad-hoc requirements it shall be liable to compensate any third party for the damages resulting from such non-compliance subject to the conditions of sections 37b and 37c WpHG.¹¹⁵

Previous to the enactment of the Fourth FMP-Act liability for any failure to comply with the requirements of ad-hoc notifications was expressly excluded.¹¹⁶ The issuer was not to be held liable to compensate any third party for damages resulting from such [i.e., section 15 WpHG] non-compliance.¹¹⁷ However, liability claims on other legal bases (tort, etc.) were never barred.¹¹⁸ This has now been changed by rewording section 15, paragraph 6 WpHG, and introducing sections 37b and 37c WpHG,¹¹⁹ which provide for express causes of action for compensation in case of such non-compliance.

2. *Liability for Compensation Due to Misleading Ad-Hoc Publication Practices*

a. Special Requirement of the Claims

(i) Section 37b WpHG: Failure to Publish Price-Relevant Facts Immediately

According to section 37b, paragraph 1 WpHG, if an issuer of securities fails to immediately publish a new piece of information, that has (1) come within its sphere of activity,

112. § 15, para. 3, sent. 1 WpHG.

113. § 15, para. 4, WpHG.

114. § 15, para. 5, sent. 2 WpHG.

115. § 15, para. 6, sent. 1 WpHG.

116. *Id.*

117. If the issuer fails to comply with the requirements pursuant to paragraphs 1, 2, or 3 (of section 15 WpHG), it shall not be liable to compensate any third party for damages resulting from such non-compliance. § 15, para. 6, sent. 1 WpHG—old version.

118. § 15, para. 6, sent. 2 WpHG—old and new versions.

119. FMP-Act, *supra* note 1, art. 2, no. 7, lit. e), no. 24.

(2) is not publicly known, and (3) is likely to exert significant influence on the stock exchange price of the admitted securities, it shall be liable to compensate a third party for the damage resulting from the omission. The elements for the third party are that he:

1. Has bought the securities after the omission and still owns the securities upon disclosure of the information, or
2. Has bought the securities before the relevant fact has occurred and sells them after the omission.

Thus, in both cases an ad-hoc notification would have resulted in significant price-changes of the issuer's security. In the first scenario the third party would have paid a different price in the acquisition of the security. In the second scenario she would have earned a different sales price.

(ii) Section 37c WpHG: Publication of Untrue Price-Relevant Facts

Under section 37c, paragraph 1 WpHG, if an issuer of securities publishes untrue information in a notification containing price-relevant information within its sphere of activity and it is not publicly known and likely to exert significant influence on the price of the admitted securities, he shall be liable to compensate a third party for the damage incurred by that party in reliance on the correctness of the information, if the third party

1. has bought the securities after the publication and still owns the securities upon disclosure of the fact that the information was incorrect, or
2. has bought the securities before the publication and sells them before disclosure of the fact that the information was incorrect.

Thus, similar to section 37b WpHG, there must be some sort of reliance on the misleading disclosure. The third party either needed to have acquired the securities after the untrue notification and still possess them when the incorrectness of the publicized information became publicly known. Or it had acquired the securities prior to the publication of the untrue notification and sold them before its incorrectness has become known.

b. General Requirements for the Claims

(i) Deliberate Conduct/Gross Negligence

Both causes of action prescribe that the liability will only occur if the failure of immediate publication pursuant to section 37b WpHG or the publication of untrue facts pursuant to section 37c WpHG are carried out neither deliberately nor grossly negligently. However, contrary to the initial bill drafted in September 2001, sections 37b, paragraph 2 and 37c, paragraph 2 WpHG provide for a conversion of the burden of proof. It is the issuer that needs to prove the omission was made neither deliberately nor by gross negligence, or that it did not know about the incorrectness of the information and that such lack of knowledge was not due to gross negligence.¹²⁰

(ii) No Knowledge of the Claimant

Moreover, claims pursuant to sections 37b and 37c WpHG shall not exist if the claimant knew at the relevant points in time about the omission respectively incorrectness of the ad-hoc notification. The claim pursuant to section 37b, paragraph 1 WpHG, shall not exist if, in the case of paragraph 1, number 1 at the time of purchase and in the case of paragraph

120. § 37b, para. 2 WpHG; § 37c, para. 2 WpHG.

1, number 2 at the time of sale, the third party knew about the undisclosed fact. The same limitation applies to claims under section 37c, paragraph 3 WpHG if the third party knew that the information was incorrect.

(iii) Calculation of the Damages

The new law does not contain any regulation on the calculation of the damages. Pursuant to the general principles of German damages law, a claimant is entitled to be put in such a position as if the circumstance that caused her damages had not happened.¹²¹ Or, as *Loewy*¹²² put it, according to section 249 BGB, one who owes indemnity has to restore the condition that would exist if the circumstance causing the indemnity had not occurred.¹²³ If indemnity is to be rendered for injury to a person or for damage done to a thing, the creditor may instead of restoration demand the amount of money required for said restoration.¹²⁴ This results in a *restitutio in integrum*, which is in cases of contractual relationships an annulment of the transaction and its consequences.¹²⁵ Thus, an investor's claim for compensation under sections 37b and 37c WpHG would provide for a claim for (re-)payment against the (re-)transfer of the securities.¹²⁶

However, German corporate law follows in the interest of creditors' protection the principle of share capital maintenance. In order to protect the equity capital, the AktG contains very restrictive rules, under which the issuer is allowed to acquire its own shares and securities. Thus, unless one of the exceptions provided for in section 71, paragraph 1, numbers 1 to 8 AktG applies, an issuer may not acquire its own shares. Thus far, a solution in accordance with the BGB's general principles on the calculation of damages does not seem to be viable. And, according to section 57, paragraph 1 AktG, contributions to the equity (share) capital may not be re-paid to shareholders. As well as section 71 AktG, this rule aims at protecting the equity capital for the sake of the company's creditors. As a result, only payments to shareholders such as dividends (taken from the company's profit and having been determined by the shareholders' meeting) or payments (being a just and market-value remuneration) for services or sale of goods are permissible.¹²⁷ Any other payment would be deemed as a re-payment of the contribution to the equity capital and would result in claims against the shareholders for the (re-re-)payment of the contribution pursuant to section 62, paragraph 1 AktG. It is difficult to make a convincing argument why a payment of damages under sections 37b and 37c WpHG should not be deemed an inadmissible re-payment of the contribution to the share capital. One might argue, similar to prospectus liability, that the provisions of sections 37b and 37c WpHG are *leges speciales* to section 57 AktG.¹²⁸

121. § 249 BGB.

122. WALTER LOEWY, *THE CIVIL CODE OF THE GERMAN EMPIRE* 64 (1997).

123. § 249, sent. 1 BGB.

124. § 249, sent. 2 BGB.

125. BLACK'S LAW DICTIONARY 1315 (7th ed. 1999).

126. Thomas M. J. Möllers & Franz Clemens Leisch, *Haftung von Vorständen gegenüber Anlegern wegen fehlerhafter Ad-hoc-Meldungen nach § 826 BGB*, 55 WM 1648, at 1656 (2001).

127. UWE HÜFFER, *AKTIENGESETZ* § 57 Rn. 2 (5th ed. 2002); MARCUS LUTTER, *KÖLNER KOMMENTAR ZUM AKTIENGESETZ* § 57 AktG Rn. 5 *et seq.* (2d ed. 1998).

128. Georg Maier-Reimer & Anabel Webering, *Ad hoc-Publizität und Schadensersatzhaftung—Die neuen Haftungsvorschriften des Wertpapierhandelsgesetzes*, 56 WM 1857, at 1863 (2002); Jochem Reichert & Marc-Philippe Weller, *Haftung von Kontrollorganen—Die Reform der aktienrechtlichen und kapitalmarktrechtlichen Haftung*, *FESTSCHRIFT FÜR RECHTSPOLITIK (ZRP)* 49, 56 (2002). The authors demand a legislative clarification that the damage payment may only be carried out from the unbound funds and reserve, however, not from the share capital and the statutory reserves. This proposal is not consistent with German corporate law because the

Moreover, a problem occurs with regard to the determination of the hypothetical stock exchange price, which is to be applied to the annulment of the securities trade. The price would need to be estimated, which is almost impossible for the average judge within the framework provided for in section 287 Civil Procedure Code (*Zivilprozessordnung*; ZPO) that expresses the principle of free damage determination by the courts. Help might offer the analogous application of section 44, paragraph 2 BörsG. This section regulates the amount of damages an investor can claim in the case of an incorrect prospectus (for securities offered for sale).

Finally, unresolved and subject to further discussion is the question of whether and to what extent a claimant's failure to minimize her damages by selling or refraining from selling the securities is to be taken into account. If the injured party has contributed to the cause of the injury, the obligation to indemnify as well as the extent of the indemnity to be rendered will depend on the question, whether the injury has been caused mainly by one party or by the other.¹²⁹ This will also be applicable if the fault of the injured party consists of an omission to call the attention of the debtor to the danger of an unusually great injury, which the debtor neither knew nor was obligated to know, or that she omitted to avert or to lessen the injury.¹³⁰ Some authors argue, however, that it cannot be regarded as contributory fault if a claimant pursuant to sections 37b or 37c WpHG chose not to sell the securities when the stock exchange price began to decrease.¹³¹ Nevertheless, the aforementioned argument can be brought, and a more detailed provision addressing this and the other discussed uncertainties would have been preferable.

(iv) Statute of Limitations

The claim pursuant to section 37b, paragraph 1 WpHG shall be time-barred after one year of the date, on which the third party learns of the omission, however, not later than three years after the omission. For claims brought under section 37c, paragraph 1 WpHG the same one year and three year limitations apply, running from the time the third party learns of the incorrectness of the information.¹³² The proscribed maximum three-year periods are absolute time bars. The three-year periods begin to run with the commencement of the act of wrongdoing. However, this leaves uncertainty with respect to the omission of an ad-hoc notification. Does the omission take place at the first *or* at the latest point in time, at which the ad-hoc notification would still have been possible? Applying the scenario of an incorrect notification in an analogous manner, some authors argue that it commences with the beginning of the omission.¹³³

(v) No Conflict with Other Causes of Action

The compensation pursuant to sections 37b and 37c WpHG are to be granted without prejudice to further contractual or tort claims.¹³⁴ Tort claims pursuant to section 826 BGB or section 823, paragraph 2 BGB in connection with the fraud provisions of section 263

capital protection in a German Aktiengesellschaft (as opposed to the statutory rules in the case of a limited liability company (*Gesellschaft mit beschränkter Haftung*; GmbH)) relates to the company's entire assets, not only the share capital.

129. § 254, para. 1 BGB.

130. § 254, para. 2, sent. 1 BGB.

131. Holger Fleischer & Susanne Kalss, *Kapitalmarktrechtliche Schadenersatzhaftung und Kurseinbrüche an der Börse*, DIE AKTIEGESELLSCHAFT (AG) 329, 336 (2002).

132. § 37c, para. 4 WpHG.

133. Maier-Reimer & Webering, *supra* note 128, at 1863.

134. § 37b, para. 5 WpHG; § 37c, para. 5 WpHG.

Penal Code (*Strafgesetzbuch*; StGB) are especially expected to be brought alongside with sections 37b and 37c WpHG.

(vi) Inadmissibility of Reimbursement Waivers

If the issuer is being held liable pursuant to sections 37b or 37c WpHG, it will be entitled to reimbursement against the members of the managing board pursuant to section 93 AktG.¹³⁵ According to sections 37b, paragraph 6 and 37c, paragraph 6 WpHG, any agreement is invalid, which in advance, reduces the claims to be brought by an issuer against the members of the managing board on grounds of compensation claims or relieves the members of the managing board of such claims. These prohibitions correspond to the long-established (equivalent) principle of section 93, paragraph 4, sentence 4 AktG. The new rule therefore does not have an independent relevance and is of a declaratory nature unless the issuer is not a German stock corporation (AG) but an entity of a different legal form or with its seat outside of Germany.¹³⁶ Note, however, that director and officer liability insurance (D&O insurance) covering a potential liability pursuant to sections 37b and 37c WpHG may be obtained for the members of the managing board. Furthermore, it should be noted that the new liability rules do not provide for a direct cause of action for the shareholder against the members of the managing board.¹³⁷ It is the issuer that has to seek the reimbursement. A direct claim would, particularly in cases of the subsequent insolvency of an issuer, be an instrument to complete the shareholders' protection anticipated by sections 37b and 37c WpHG.

c. Interim Regulation

The Act does not contain any express interim provisions for the new liability rules. As the Act became effective on July 1, 2002, according to the general rules of the inter-temporal private law,¹³⁸ any facts having occurred after that date will be subject to the new liability regime. However, the new law does not apply to any incorrect publications having been carried out or omitted before,¹³⁹ as any retroactive effect of the new liability rules would have been unconstitutional under German law.¹⁴⁰

d. Summary

All in all, the introduction of sections 37b and 37c WpHG has created an independent legal basis for damage claims of shareholders if and to the extent that they have suffered damages due to an omitted publication or the incorrect statement of potentially price-relevant facts by the issuer. The BMF, which was responsible for this amendment, deems the newly introduced liability necessary to protect the shareholders and to (self-)regulate the course of dealing of public companies with regard to ad-hoc disclosure.¹⁴¹ Nevertheless, the changes brought about by the Act have created problems as to its compatibility

135. § 93 AktG.

136. Maier-Reimer & Webering, *supra* note 128, at 1863.

137. *Id.* at 1864.

138. Compare art. 170 EGBGB.

139. Maier-Reimer & Webering, *supra* note 128, at 1863.

140. Art. 103, para. 2 Basic Law (*Grundgesetz*; GG) in analogous application.

141. BMF, REGIERUNGSENTWURF: ENTWURF EINES GESETZES ZUR WEITEREN FORTENTWICKLUNG DES FINANZPLATZES DEUTSCHLAND (VIERTES FINANZMARKTFÖRDERUNGSGESETZ) 160 (Sept. 3, 2001), available at <http://www.ftd.de/static/pdf/begruendung-Allgemeine.pdf> (last visited Feb. 13, 2003).

with corporate rules on equity capital protection and with regard to the calculation of the amount of damages to be awarded.

IV. Conclusion

The Fourth Financial Markets Promotion Act is another cornerstone in adapting the legal framework of the financial marketplace "Germany" to international standards. It is, however, regrettable that some changes were drafted in a manner leaving uncertainties with regard to its compatibility with general corporate law or the application of general principles of the civil damages law. Reshaping such provisions, addressing the issue of liability for illegally obtained advantages by contravention against look-up periods or directors' dealings rules, as well as dealing with the phenomenon of the grey capital markets are issues to be dealt with in future legislative acts. Thus, it cannot be expected that German securities and stock exchange law has come to an end with the Fourth FMP-Act. The current state and future development may probably be summarized adequately as "a legislation in permanence."¹⁴²

142. The term was created for the corporate law reforms by Wolfgang Zöllner, *Aktienrechtsreform in Permanenz—Was wird aus den Rechten des Aktionärs?* AG 336 *et seq.* (1994); quoted and modified by Ulrich Seibert, *Aktienrechtsreform in Permanenz?* AG 417 *et seq.* (2002).