

Public vs. Civil Law: The German Controversy about the Interaction between Capital Market Regulation and Contract Law[†]

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The following abbreviations are used hereafter for European legal periodicals and collections: *AcP* = *Archiv für die civilistische Praxis*; *BB* = *Betriebs-Berater*; *BGHZ* = *Entscheidungen des Bundesgerichtshofes in Zivilsachen*; *BKR* = *Zeitschrift für Bank- und Kapitalmarktrecht*; *DB* = *Der Betrieb*; *EBOR* = *European Business Organization Law Review*; *JZ* = *Juristenzeitung*; *NJW* = *Neue juristische Wochenschrift*; *ÖBA* = *Österreichisches Bank Archiv*; *RabelsZ* = *The Rabel Journal of Comparative and International Law*; *WM* = *Wertpapier-Mitteilungen*; *ZBB* = *Zeitschrift für Bankrecht und Bankwirtschaft*; *ZGR* = *Zeitschrift für Unternehmens- und Gesellschaftsrecht*; *ZHR* = *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*; *ZIP* = *Zeitschrift für Wirtschaftsrecht*.

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I. Framing the Controversy

A. The EU and Market Regulation

Financial markets in the European Union (hereafter EU) are to a large extent regulated by Community law. This comes in the form of directives, which are drafted by the European Commission and, after passing the EU legislative proceedings, are duly implemented by the 27 Member States into their national laws. According to some observers, perhaps 80 percent of the national market-related regulation in the Member States

originates today from Community law.

With respect to capital markets, the most important legislative instrument is the *Markets in Financial Instruments Directive*, the so-called MiFID,¹⁾ which is supplemented by two accompanying legislative acts, another Directive (a MiFID Level 2 Commission Directive²⁾) and a Regulation (a MiFID Level 2 Regulation³⁾). Some call this regulatory regime the “basic law” of the EU financial markets. It started a new era for the financial markets in the EU when it went into force in 2007. A revision of the MiFID is currently under way, but the fundamental regulatory architecture of the Directive will not be changed.⁴⁾

This “basic law” governs the provision of investment services in financial instruments by investment firms throughout the European Union. It primarily promotes market integration by granting market access and market integrity by regulating market supervision. As part of this it also emphasizes investor protection as a regulatory goal in its own right. Thus MiFID pursues the two-fold aim of protecting investors and ensuring the smooth operation of securities markets.⁵⁾

1) Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, Official Journal L 145, 30.4.2004, p. 1.

2) Commission Directive 2006/73/EC, Official Journal L 241, p. 26.

3) Regulation (EC) No. 1287/2006, Official Journal L 241, p. 1.

4) For an overview, see BAUM, “Reforming the Regulatory Architecture of the EU Markets in Financial Instruments,” in: Korea Capital Market Institute (ed.), *EU Financial Market Focus* (Seoul 2013) 1–6 (in Korean), 7–14 (in English); FERARINI & MOLONEY, “Reshaping Order Execution in the EU and the Role of Interest Groups: From MiFID I to MiFID II,” *EBOR* 13 (2012) 557–597.

5) Cf. especially Recital 44 of the Directive; for a concise conceptual analysis of

From the traditional German point of view, this regulatory regime qualifies as a regulation that falls into the domain of public law - as opposed to that of private law. The EU, however, does not know such a clear distinction. We will come back to that distinction later.⁶⁾

B. The EU and Unification of Private Law

In sharp contrast to this unified Community law regime for regulating investment services, the area of contract law, and of private law in general, still consists mostly of national laws legislated by the individual Member States of the EU.

Because of substantial conceptual differences between the private law regimes in the Member States, so far the European legislator has mostly refrained from unifying civil law. There are some limited exceptions such as consumer protection or product liability but, in general, the European legislator has been hesitant to interfere in the contractual relations between citizens out of fear of disrupting the consistency of national private law regimes. Perhaps the subsidiarity principle is simply being followed, which means that regulation at the level of the European Union is only justified if it cannot be effected more efficiently at the level of the Member States.

In any case, many Member States would supposedly fiercely resist an attempt to unify European private law. Accordingly,

the Directive, *see* MOLONEY, "Building a Retail Investment Culture Through Law: The 2004 Markets in Financial Instruments Directive," *EBOR* 6 (2005) 341-421; for a recent critical review of the specific aims and means of investor protection, *see* MÜLBERT, "Anlegerschutz und Finanzmarktregulierung-Grundlagen," *ZHR* 177 (2013) 160-211.

6) *Infra* at II. A.

the European Commission cautiously discussed the project of a possible European contract law in a 2010 green paper only in the form of a future *optional* instrument, restricting its proposal to contract law and leaving aside private law in general.⁷⁾ This general skepticism notwithstanding, some private working groups have presented different drafts for a comprehensive European civil code over the course of the last years.⁸⁾

C. MiFID's Conduct of Business Rules

As part of the European legislator's aim to promote market integration and market integrity, MiFID emphasizes investor protection as a regulatory goal in its own right as already mentioned at the beginning.⁹⁾ To achieve this goal, MiFID sets out "conduct of business rules" in its Articles 19 to 24.¹⁰⁾ These rules are one of the cornerstones of the Directive. Among others, the conduct of business rules postulate a number of transparency, information, and fiduciary obligations for investment firms when doing business with customers.

7) Green Paper from the Commission on policy options for progress towards a European Contract Law for consumers and businesses, 1 July 2010, COM/2010/0348 final; for a discussion, see MAX PLANCK INSTITUTE FOR COMPARATIVE AND INTERNATIONAL PRIVATE LAW, "Policy Options for Progress Towards a European Contract Law. Comments on the issues raised in the Green Paper from the Commission of 1 July 2010, COM(2010) 348 final," *RebelsZ* 75 (2011) 373–438.

8) Cf. GANDOLFI (ed.), *Code Européen de Contracts-Avant Project* (Milano 2002); LANDO ET AL. (eds.), *Principles of European Contract Law* (The Hague et al. 2000/2003); VON BAR ET AL. (eds.), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Munich 2009).

9) Cf. *supra* note 5 and accompanying text.

10) In substance, though not formally, Art. 18, dealing with conflicts of interests, can also be counted as part of the conduct rules.

Structurally, this regulatory set-up is characterized by a *gradual* application of the conduct rules depending on the kind of investment service offered and the varying risks that come along with it:

- providing investment advice or portfolio management
- other investment services
- investment services that consist only of execution and/or the reception and transmission of client orders

The most comprehensive duties apply for the first group, the least intense for the execution only business.

Furthermore, the Directive differentiates with respect to the intensity of the protection offered on the investor's degree of professionalism. It distinguishes between:

- retail customers (clients)
- professional customers
- eligible counterparties (securities firms, insurance firms, et al.)

Again, the first group, the retail investors, is most intensively protected.

This conceptual design shows that MiFID intends to guaranty a *general* and *preventive* protection that is granted *ex ante*, which is typical for public law. This contrasts with the *individual* protection courts provide *ex post* in a given case, which is characteristic for private law enforcement. By dealing with the way the firms have to do business in relation to their customers, the conduct rules obviously have at least some connection with the contractual relations between these two parties.

The central question that arises here is whether the conduct of

business rules do actually create civil law effects. The question can be reformulated on a more abstract level as to whether the Member States may implement the conduct of business rules into their national laws in a way that only the national supervisory authorities have the exclusive authority to enforce the rules, or whether the Member States have to provide for additional means of private law enforcement. If one sees the Directive as a legal instrument that creates civil law effects, it would imply, among other conclusions, that investors are entitled to claim damages from the investments firms, which are in breach of the obligations under the Directive.

The MiFID is - somewhat surprisingly - quiet on these matters. Art. 51 of the Directive only postulates that the Member States must ensure in their national laws that appropriate administrative measures can be taken or that administrative sanctions can be imposed against the persons responsible for non-compliance with provisions adopted in the implementation of the Directive. The Member States have to ensure that these measures are effective, proportionate, and dissuasive.

The *European Court of Justice (ECJ)* ruled in May 2013 that the Member States are *free* to decide whether or not they want to implement civil law sanctions against a violation of conduct of business rules.¹¹⁾ If they do, however, the civil law effects have to be effective and proportionate. Spanish courts had submitted the question to the ECJ. Like Germany, Spain has first-hand experience with the differentiation between public

11) Decision of 30 May 2013-Rs. C-604/11 (Juzgado de Primera Instancia n° 12 de Madrid, Spain), ZIP 2013, 1417; see also ECJ, decision of 19 December 2013-Rs. C-174/12 (Handelsgericht Wien, Austria-Hirrmann), AG 2014, 445.

and private law.

In contrast to the Spanish courts, in a much-discussed high-profile decision of September 2013 the *German Federal Court of Justice*, the *Bundesgerichtshof (BGH)*, expressly *denied* any duty to put this question before the European Court of Justice.¹²⁾ Partly supporting the Federal Court's view, the *German Federal Constitutional Court*, the *Bundesverfassungsgericht*, had ruled shortly before that at least for the time period *before* the year 2007 - the date by which the MiFID had to be implemented by the Member States - no such duty existed.¹³⁾

D. Transformation of the Conduct of Business Rules into German Law

Germany implemented the conduct of business rules into national law in the year 2007,¹⁴⁾ well before these three decisions, by amending its Securities Trading Act (*Wertpapierhandelsgesetz, WpHG*).¹⁵⁾ The Act is part of the country's economic su-

12) Decision of 17 September 2013, XI ZR 332/12, *JZ* 2014, 252, with comment by POELZIG, *ibid.*, 256. The decision is also published in: *ZIP* 2013, 2001; *WM* 2013, 1983; *DB* 2013, 2385; *BKR* 2014, 32; for further comments, *see, e.g.*, HARNOS, "Die Reichweite und zivilrechtliche Bedeutung des § 31 d WpHG," *BKR* 2014, 1; KROPP, "Keine zivilrechtliche Haftung im beratungsfreien Anlagegeschäft," *WM* 2014, 640.

13) Decision of 31 July 2013, 1 BVR 130/12.

14) Gesetz zur Umsetzung der Richtlinie über Märkte für Finanzinstrumente und der Durchführungsrichtlinie der Kommission (Finanzmarktrichtlinie-Umsetzungsgesetz-FRUG) of 16 July 2007, Official Gazette (BGBl.) I p. 1330; for an overview, *see, e.g.*, SPINDLER & KASTEN, "Der neue Rechtsrahmen für den Finanzdienstleistungssektor - die MiFID und ihre Umsetzung," *WM* 2006, 1749-1755 (part I), 1797-1803 (part II).

15) *Wertpapierhandelsgesetz*, as published on 9 September 1998, Official Gazette I p. 2708, most recently amended by Art. 6 Para. 3 of the Law of 28 August 2013,

pervisory laws and thus constitutes *public* law. The pertinent regulations are the partly amended, partly new Articles 31 to 37 of the Act, the so - called *Wohlverhaltensregeln* - a somewhat paternalistic German translation of the term ‘rules of conduct.’ Insofar as these provisions deal with the contractual relationship between an investment firm and its customers, they can be qualified as “functional civil law.”¹⁶⁾ This newly created investor protection by the “functional civil law” of the Securities Trading Act does not, however, explore judicial *terra nova* but rather fits squarely with the arcane case law developed by the German courts over the past decades on the basis of *general* private law.

Since the early 1990s, numerous scandals have produced a flood of decisions by the German Federal Court of Justice and appellate courts dealing with the duties of investment firms when providing investment services and especially when giving investment advice.¹⁷⁾ Correspondingly, the courts have elaborated in great detail the rights of investors for damages in case of a violation of the investment firms’ duties. The result is a highly refined structure of rights and obligations in the area of investment services based on private law rules, namely contract law and agency, as interpreted and developed by the courts. Capital markets regulation played only a very marginal and indirect role in this context, if any.

This body of case law ensures a much more dogmatically refined, nuanced, and systematically coherent regime of investor

Official Gazette I p. 3395.

16) The term is explained in detail *infra* at II. D.

17) *See infra* at II. B.

protection than the one that the rather crude EU regulations can provide because these are shaped by diverse legal traditions and political compromise. One question that has been posed asks how the “interaction of supervisory law and civil law” can be managed, to cite the title of a famous article.¹⁸⁾ The relationship between the two fields of law is fuzzy. It has yet to be clarified how functional civil law can be consolidated with the traditional civil law framework. This is important because the scope of investor protection under both sets of rules may diverge. Here two questions of utmost *practical* importance come up: The first is which set of rules should apply if both regulate the same issue in a different and perhaps contradictory way. The second is whether the obligations under the Securities Trading Act shape the private law setting in the context of investment services or whether, to the contrary, the latter have primacy over the first. A leading German civil law expert has recently highlighted these questions as *the* unsolved fundamental issue permeating all capital market regulation at the moment.¹⁹⁾

II. Legal Relationships between Investment Firms, Investors, and Supervisors under German Law

In the background of the present conceptual difficulties in balancing capital market regulation and contract law stands the

18) ROTHENHÖFER, “Interaktion zwischen Aufsichts- und Zivilrecht,” in: Baum et al. (eds.), *Perspektiven des Wirtschaftsrechts. Beiträge für Klaus J. Hopt* (Berlin 2008) 55–86; for an extended discussion, see FORSCHNER, *Wechselwirkungen von Aufsichtsrecht und Zivilrecht* (Tübingen 2013).

19) GRUNDMANN, “Wohlverhaltenspflichten, interessenkonfliktfreie Aufklärung und MIFID II,” *WM* 2012, 1745.

historical distinction between civil and public law.

A. Dichotomy between Public and Private Law

The pronounced dichotomy between public and private law emerged in the early nineteenth century.²⁰⁾ It is a typical feature of the continental European laws and more or less unknown in the UK or Ireland. Accordingly, Community law does not take this distinction into consideration but regulates a given issue regardless of its legal qualification under the national laws of the Member States. A good example of this is the conduct of business rules of the MiFID.

Historically, the separation of both areas of law aimed at freeing civil society and the administration of their traditional paternalistic entanglement and numbness. The separation was seen as an instrument to create economic flexibility by assigning the two areas of social life to structurally opposing legal orders. The initiators hoped to stimulate the economic dynamic by decentralization and by enforcing private autonomy.²¹⁾

Today the separation between private and public law is regarded by some as a mere historical legacy that has lost much of its meaning as private law is increasingly burdened with social obligations. These reduce the incentive to take economic risks: the more private parties are obliged to take care of the interests of their contractual partners, the less they are in-

20) For a classic analysis, see BULLINGER, "Die funktionale Unterscheidung von öffentlichem Recht und Privatrecht als Beitrag zur Beweglichkeit von Verwaltung und Wirtschaft in Europa," in: Hoffmann-Riehm/Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden 1996) 239–260.

21) *Ibid.* at 243.

clined to try to evaluate and use business opportunities.²²⁾

However, these tendencies notwithstanding, so far the structural dualism between both legal subareas still prevails.²³⁾ The German judicial system still sharply distinguishes between administrative courts and ordinary courts for civil matters. Depending on the nature of a legal norm in dispute, one or the other has the sole authority to decide the dispute.

In modern interpretation, the separate areas of public and private law with their different functions are regarded as “mutual default orders.”²⁴⁾ In this sense, today’s legislator often uses a mixture of public and private law. Typical examples can be found in anti-monopoly law or in telecommunication regulation. In both cases, public law rules have direct civil effects by declaring certain contracts *ex lege* void or by granting *ex lege* access rights that can be privately enforced. This new body of law that has emerged over the last few decades is called “functional” or “regulative” civil law.²⁵⁾ A growing number of academics qualify the conduct of business rules as “functional civ-

22) *Ibid.* at 246 ff.

23) Cf. STOLLEIS, “Öffentliches Recht und Privatrecht im Prozeß der Entstehung des modernen Staates,” in: Hoffmann-Riehm/Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden 1996) 41–61.

24) SCHMIDT-ASSMANN, “Öffentliches Recht und Privatrecht: Ihre Funktionen als wechselseitige Auffangordnungen - Einleitende Problemskizze,” in: Hoffmann-Riehm/Schmidt-Aßmann (eds.), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen* (Baden-Baden 1996) 7–40.

25) ASSMANN, “Das Verhältnis von Aufsichtsrecht und Zivilrecht im Kapitalmarktrecht,” in: U. Burgard et al. (eds.), *Festschrift für Uwe H. Schneider zum 70. Geburtstag* (Cologne 2011) 37, 38; KÖNDGEN, “Privatisierung des Rechts. *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung,” *AcP* 206 (2006) 477, 515. The term is explained in detail *infra* at II. D.

il law” that creates direct civil law effects.²⁶⁾

B. Civil Law and Commercial Law Framework for Investment Services

Numerous provisions of the Civil Code, the *Bürgerliches Gesetzbuch* of 1900,²⁷⁾ and of the Commercial Code, the *Handelsgesetzbuch* of 1897,²⁸⁾ are shaping the contractual relationship between investment firms and their customers. The most important are the following:

- general duties of care and corresponding rights for damages in case of violations, §§ 276, 280 Civil Code
- duties of an honest merchant, § 347 Commercial Code
- rules of agency mandate and commission, § 675 Civil Code in connection with §§ 663 ff. Civil Code (information duties, obligation to surrender benefits to the principal)
- rules of commission business, §§ 383 ff. Commercial Code (obligation to take care of the principal’s interests, information duties, obligation to surrender benefits to the principal)

As already mentioned, since the early 1990s German courts have in hundreds of decisions constantly refined and trans-

26) *See infra* at III. B.

27) *Bürgerliches Gesetzbuch* as published on 2 January 2002, Official Gazette I pp. 42, 2909; 2003 I p. 738, most recently amended by Art. 4 Para. 5 of the Law of 1 October 2013, Official Gazette I p. 3719.

28) *Handelsgesetzbuch* as published in Official Gazette Part III, at no. 4100–1, most recently amended by Art. 1 of the Law of 4 October 2013, Official Gazette I p. 3746.

formed this set of private law rules into an elaborate network of contractual and pre-contractual duties of information, care, and advice. The first major decision was the so-called “Bond Judgment” by the Federal Court of Justice in 1993.²⁹⁾ In its decision, the Court formulated the basic duty that investment advice has to be tailored, first, according to the need of the specific investor and, second, to the characteristics of the investment product in question. This rule is still held valid today. The result of this 25 years of lasting development of case law is a detailed, arcane, and consistent concept of rights and obligations in the area of investment services based on private law institutions, namely on contract law.³⁰⁾

29) Decision of 6 July 1993, *BGHZ* 123, p. 126; also published in: *WM* 1993, 1455; *ZIP* 1993, 1148; *NJW* 1993, 2433; confirmed by BGH, decision of 9 May 2000, *WM* 2000, 1441; BGH, decision of 25 June 2002, *WM* 2002, 1683; BGH, decision of 21 March 2006, *WM* 2006, 851; BGH, decision of 25 September 2007, *BKR* 2008, 199; BGH, decision of 19 February 2008, *WM* 2008, 825; for an analysis, see LANG & BALZER, “Die Rechtsprechung des XI. Zivilsenats zum Wertpapierhandelsrecht seit der Bond-Entscheidung,” in: Habersack et al. (eds.), *Entwicklungslinien im Bank- und Kapitalmarktrecht. Festschrift für Gerd Nobbe* (Cologne 2009) 639.

30) Cf., e.g., in addition to the decisions quoted supra in note 29, BGH, decision of 19 December 2000, *BGHZ* 146, p. 235; *NJW* 2001, 962; *WM* 2001, 297; BGH, decision of 19 December 2007, *BGHZ* 170, p. 226; *NJW* 2007, 1876; *WM* 2007, 487; BGH, decision of 20 January 2009, *WM* 2009, 405; *NJW* 2009, 1416; BGH, decision of 12 May 2009, *WM* 2009, 1274; *NJW* 2009, 2298; BGH, decision of 27 October 2009, *WM* 2009, 2306; BGH, decision of 15 April 2010, *ZIP* 2010, 919; BGH, decision of 22. March 2011, *BGHZ* 189, p. 13; BGH, decision of 27 September 2011, *BGHZ* 191, p. 119; BGH, decision of 26 June 2012, *WM* 2012, 1520; BGH, decision of 17 September 2013, *JZ* 2014, 252; *ZIP* 2013, 2001; *WM* 2013, 1983; *DB* 2013, 2385; *BKR* 2014, 32; BGH, decision of 12 November 2013, *WM* 2014, 24; BGH, decision of 8 April 2014, *WM* 2014, 1036.

From the flood of literature, see, e.g., the following recent articles (in order of date of publication): KOTTE, “Keine Aufklärungspflicht der Banken über Rückvergütungen beim Vertrieb konzerneigener Produkte,” *BB* 2014, 1353; SCHLICK,

Another at least theoretically possible venue to address wrongdoing by investment firms is tort law. A possible device is a compensatory claim under § 823 Civil Code - the provision for a general liability in damages - in combination with a violation

“Die aktuelle Rechtsprechung des III. Zivilsenats des BGH zum Kapitalanlagerecht,” *WM* 2014, 581 (part I), 633 (part II); POELZIG, *supra* note 12; KROPF, *supra* note 12; HARNOS, *supra* note 12; FORSCHNER, *supra* note 18; KRÜGER, “Aufklärung und Beratung bei Kapitalanlagen,” *NJW* 2013, 1845; GRIGOLEIT, “Grenzen des Informationsmodells,” in: Habersack et al. (eds.), *Anlegerschutz im Wertpapiergeschäft. Bankrechtstag 2012* (Berlin 2013) 25; GRUNDMANN, *supra* note 19; HELLGARDT, “Praxis- und Grundsatzprobleme der BGH-Rechtsprechung zur Kapitalmarktinformatiionshaftung,” *DB* 2012, 673; HERRESTHAL, “Die Rechtsprechung zu Aufklärungspflichten bei Rückvergütungen auf dem Prüfstand des Europarechts,” *WM* 2012, 2261; ASSMANN, *supra* note 25; SCHUMACHER, “Zur Anwendung des § 31d WpHG auf Gewinnmargen im Finanzinstrumentenvertrieb,” *WM* 2011, 678; BAUM, “Pflichten und Haftung im arbeitsteiligen Vertrieb von Finanzprodukten-Zur Verantwortlichkeit im Verhältnis zwischen selbständigen Vertriebspartnern und depotführendem Kreditinstitut,” *ÖBA* 2010, 278; BUCK-HEEB, “Zur Aufklärungspflicht von Banken bezüglich Gewinnmargen,” *BKR* 2010, 1; HABERSACK, “Die Pflicht zur Aufklärung über Rückvergütungen und Innenprovisionen und ihre Grenzen,” *WM* 2010, 1245; LANG & BAUSCH, “Aufklärungspflichten über Gewinnmargen und Handelsspannen?,” *WM* 2010, 2101; BROCKER & KLEBECK, “Rückvergütungen an ‘unabhängige’ Anlageberater und Haftung beteiligter Dritter,” *ZIP* 2010, 1369; SPINDLER, “Aufklärungspflichten eines Finanzdienstleisters über eigene Gewinnmargen? Ein ‘Kick-Back’ zu viel,” *ZIP* 2009, 1821; VEIL, “Aufklärungspflichten über Rückvergütungen,” *WM* 2009, 2198; ASSMANN, “Die Pflicht von Anlageberatern und Anlagevermittlern zur Offenlegung von Innenprovisionen,” *ZIP* 2009, 2125; MÜLBERT, *WM* 2009, 481; HARNOS, “Rechtsirrtum über Aufklärungspflichten beim Vertrieb von Finanzinstrumenten,” *BKR* 2009, 316; NITTEL & KNÖPFEL, Die Haftung des Anlageberaters wegen Nichtaufklärung über Zuwendungen, *BKR* 2009, 411; ZINGEL & RIECK, *BKR* 2009, 353; SCHÄFER, “Die Pflicht zur Aufdeckung von Rückvergütungen und Innenprovisionen beim Vertrieb von Fonds in Rechtsprechung und Gesetzgebung,” in: Habersack et al. (eds.), *Entwicklungslinien im Bank- und Kapitalmarktrecht. Festschrift für Gerd Nobbe* (Cologne 2009) 725; ELLENBERGER, “MiFID FRUG: Was wird aus Bond?,” in: *ibid.*, 535; LANG & BALZER, *supra* note 29; ROTHENHÖFER; *supra* note 18.

of one of the conduct of business rules. However, this venue is open only if-and that is a big if-the pertinent provision of the Securities Trading Act that was violated qualifies as a “*Schutzgesetz*,” as a “protective norm” in the sense of § 823 Para. 2.³¹⁾ Views are split on whether at least some of the conduct of business rules may qualify as *Schutzgesetze*. A majority in academia holds a positive view.³²⁾ The Federal Court of Justice, however, has repeatedly strictly declined such a qualification.³³⁾ Thus in practice that venue is closed for the time being. An alternative, again rather theoretical possibility is a claim under § 826 Para. 2 Civil Code. This provision grants compensation for damages intentionally caused if these are contrary to public policy. The provision is a special rule for exceptional cases. Accordingly, its preconditions are strict and will seldom be fulfilled. The courts are very reluctant to grant compensation under this rule.³⁴⁾

31) For a detailed discussion, *see, e.g.*, SCHÄFER, *supra* note 30, 725 ff.

32) *Cf.* FUCHS (ed.), Wertpapierhandelsgesetz. Kommentar (Munich 2009), Vor §§ 31 bis 37a, marginal notes 80 ff.

33) BGH, decision of 17 September 2013, *JZ* 2014, 252, at 254 (no. 21); BGH, decision of 19 February 2008, *WM* 2008, 825; for a critique, *see, e.g.* HOPT, “50 Jahre Anlegerschutz und Kapitalmarktrecht: Rückblick und Ausblick,” *WM* 2009, 1873, at 1880; for a consenting view, *see, e.g.*, ROTHENHÖFER, *supra* note 18, 63 ff.

34) An example of a rare decision that *grants* compensation under § 826 Para. 2 BGB is BGH, decision of 19 February 2004, BGHZ 160, p. 149-*Informatic* (comment by FLEISCHER, “Konturen der kapitalmarktrechtlichen Informationsdeliktshaftung,” *ZIP* 2005, 1805). An often-cited example for a decision *declining* compensation under that provision is BGH, decision of 13 December 2011, *DB* 2012, 450-*IKB* (comment by HELLGARDT, *supra* note 30).

C. Capital Market Law Framework for Investment Services

The legal relationships between investment firms and their customers are not exclusively shaped by the private law-based regulatory regime described, however; capital market regulation in the form of supervisory regulation also comes into play. As already mentioned, the conduct of business rules were transformed into German law by amending §§ 31 to 37 of the Securities Trading Act. These so-called *Wohlverhaltensregeln* established in accordance with the MiFID - occasionally with some “gold-plating” - include the following obligations, among others:

- obligation to avoid and neutralize conflicts of interest (§31 Para. 1 No. 2)
- obligation to obtain the necessary information regarding the customer’s knowledge and experience in the investment field relevant to the specific type of product or service, his financial situation and his investment objectives, as well as corresponding information duties (§ 31 Para. 4, 4a & 5)
- obligation to execute orders promptly and on terms most favorable to the client (§ 33a)
- a ban against accepting inducements (monetary or non-monetary benefits, “kickbacks”) offered by third parties (§ 31d).

Depending on the type of investment service and the type of customer, the obligations apply fully, partly, or not at all.

The influence these duties have on shaping the contractual relationship between investment firms and their customers,

however, is only an *indirect* one - at least this is the traditional German view - as the supervisory rules predominantly address the relationship between the supervisory agency and the investment firms.³⁵⁾ As supervisory law, the Securities Trading Act aims at a preventative market regulation by means of stipulating organizational duties and rules for doing business. In contrast to private law, this kind of law is suited for regulating multipolar conflicts of interest involving a plurality of persons.³⁶⁾ The German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin*) has the sole authority to impose sanctions. An appeal against these can only be lodged with the administrative courts and not with the courts in civil matters. Also, the Agency's authority to issue ordinances that interpret the Securities Trading Act indicates the public law nature of the Act.³⁷⁾ In general, the Supervisory Authority acts *only* in the public interest. Individual investors have no redress to force the Authority to take legal steps against a given investment firm, let alone to impose sanctions.

German capital markets regulation does *not* have a general provision granting compensation for "*fraught on the market*" like under the US Securities Acts. As a rule, the investor protection provisions of the Securities Trading Act - again, at least in the traditional understanding - do not grant compensation

35) Recently once more expressively emphasized by BGH, decision of 17 September 2013, *JZ* 2014, 252, at 254 (nos. 16 ff.); BGH, decision of 27 September 2011, *JZ* 2012, 255, at 259 (no. 47); critical KÖNDGEN, "Anmerkung," *JZ* 2012, 260, 261; for details, see ROTHENHÖFER, *supra* note 18, 57 f.; discussion *infra* at III.

36) ROTHENHÖFER, *supra* note 18, 58.

37) FUCHS, *supra* note 32, Vor §§ 31 bis 37a, marginal note 56.

rights for investors in case of its violation but only in exceptional cases. One very narrow exception is compensation for defective “ad hoc statements” pertaining to insider information under §§ 73a, 37b of the Act.

This mostly negative result for compensation under the Securities Trading Act is less problematic than it might appear at first sight if one considers the already-discussed venues the courts opened for compensatory claims for a breach of the contractual duties with which investment firms have to comply.³⁸⁾

D. Divergence of Duties under Private and Capital Market Law (“Functional” Civil Law) Rules

The duties of investment firms based on private law and their obligations under the “functional” civil law rules as part of the supervisory law are overlapping to a certain extent, but they are *not* identical. As a rule, the contractual duties developed by the German Federal Court of Justice for investment firms are more comprehensive than the obligations resulting from supervisory law due to their general and preventive nature. But sometimes it is also the other way round: the obligations under the “functional” civil law are stricter than the ones under general civil law.

§ 31d of the Securities Trading Act may be taken as an example. This provision implements into German law Art. 26 of the EU Commission Directive that supplements the MiFID.³⁹⁾ The rule bans inducements - the so-called “kickbacks”- offered by

38) *See supra* at B.

39) *Supra* note 2.

third parties to the investment firms in relation to business transactions they conduct with their customers. The typical example is an inducement paid by the issuer of a financial instrument to the banks for selling that instrument to their customers. Such a constellation constituted the background for the decision of the Federal Court of Justice of September 2013 already mentioned above.⁴⁰⁾

The matter in dispute in that case was whether the acceptance of a certain form of “kickback” paid by the issuer of a financial instrument to the bank, which sold that instrument to a retail customer, was made in violation of the ban on inducements under § 31d of the Securities Trading Act. According to the elaborate jurisprudence that the Federal Court had developed under general civil and commercial law, this specific kind of “kickback” was allowed. The disputed question was whether the same was true under § 31d of the Securities Trading Act. The Federal Court held that this question was of *no* relevance for the case because § 31d has, in the view of the Court, *no* civil law effects.⁴¹⁾ In this case, the more lenient civil law decided the outcome.

Let us now take a look at the opposite constellation. As already mentioned, in business transactions with so-called eligible counterparties such as insurance companies, the conduct of business rules do *not* apply under MiFID. The corresponding German provision is § 31b of the Securities Trading Act. It is easy to imagine a constellation where, according to the case law of the Federal Court, an undeclared inducement is a viola-

40) *See supra* note 12.

41) *Id.* at 253 (no. 15).

tion against the rules of the commission business under the Commercial Code, the rules of agency mandate and commission under the Civil Code, and the corresponding contractual or pre-contractual information duties. As a rule, this outcome does *not* depend on the type of customer involved. Therefore, under private law the inducement would be a violation that might lead to compensatory claims even if the customer qualified as an eligible counterparty under the Securities Trading Act. Under capital markets law, however, the inducement would be fully legal because transactions with such a customer are exempted according to § 31b of the Act.

Thus the general question is whether the *abstract* categorization of customers under the Securities Trading Act is the *exclusive* guideline for determining the catalogue of applicable duties, or whether, regardless of this, stricter civil law standards apply that are designed for the *individual* case. Put differently, is *only* that behavior legitimate which fulfills *both* the private *and* the public law requirements, or is a behavior legitimate that fulfills at least *one* of the two standards? If so, is the *lighter* or the *stricter* standard the guideline?

III. Solutions Discussed to Solve the Tension between Private and Capital Market Law ("Functional" Civil Law) Rules

In the intense and partially surprisingly aggressive German discussion about how to best solve the tension between the investor protection rules developed by the courts under private law and the protective obligations established by the "functional" civil provisions of the Securities Trading Act, three oppos-

ing views can be observed.

A. Primacy of Civil Law

1. Reasoning

As already discussed, the Federal Court of Justice postulates a strict primacy of civil law in relation to the conduct of business rules of the Securities Trading Act.⁴²⁾ According to the Federal Court, the conduct rules exclusively qualify as public law and establish only public law duties that have absolutely no civil law effects of their own.⁴³⁾ In case of a violation, the Federal Supervisory Authority is the exclusively competent institution to address the investment firm's wrongdoing and to take appropriate sanctions. The Federal Court states that the conduct of business rules can - at most - play only an *indirect* role in the context of interpreting already *existing* contractual and pre-contractual obligations. They can, however, *not* create any kind of obligation *beyond* those already established under private law.⁴⁴⁾

In the view of the Federal Court, the conduct rules thus have neither a limiting nor an enlarging effect with respect to the civil law liability of investment firms. In line with this reasoning, the Federal Court does not qualify the conduct rules as protective norms in the sense of § 823 Para. 2 Civil Code because they are not designed - in its interpretation - to grant civil

42) See especially the Federal Court's reasoning in the decision of 17 September 2013, *supra* note 12, at nos. 15–24.

43) *Id.* at nos. 16–18.

44) *Id.* at no. 20; see also BGH, decision of 27 September 2011, *JZ* 2012, 255, at 259 (no. 47); BGH, decision of 19 December 2006, BGHZ 170, 226, at 232.

law investor protection.⁴⁵⁾ Part of the literature approves this view because otherwise the conduct of business rules would be misused to serve as an instrument of civil law unification within the EU without proper authorization.⁴⁶⁾

If one assumes an unrestricted primacy of civil law, the answer to our initial question is clear: Any business behavior of investment firms that is legitimate under civil law *cannot* be illegitimate under public law and must *not* be sanctioned. Possible legislative contradictions between the two bodies of law have to be cleared by the legislator.⁴⁷⁾

The principle argument for the primacy of civil law is the lack of authority of the EU legislator for unifying civil law in the field of capital markets regulation.⁴⁸⁾ The *Treaty on the Functioning of the European Union* of 2012⁴⁹⁾ does indeed *not* provide a general authority for a unification of private law. Accordingly, MiFID finds its justification only, first, in the freedom of establishment within the EU and, second, in the competence of the European Parliament and the Council to issue directives for the purpose of making it easier for persons to take up and to pursue activities as self-employed persons within the EU – Art. 49 and Art. 53 of the EU Treaty respectively. As a critical

45) Cf. *supra* at II. B.

46) See, e.g., ASSMANN, *supra* note 25, 37 ff.; Id., “Interessenkonflikte aufgrund von Zuwendungen,” *ZBB* 2008, 21, 29 f.; GRIGOLEIT, *supra* note 30, 37 ff.; Id., “Anlegerschutz-Produktinformationen und Produktverbote,” *ZHR* 177 (2013) 264, 271 ff.; ELLENBERGER, *supra* note 30, 535.

47) ASSMANN, *supra* note 25, 53.

48) Cf., e.g., GRIGOLEIT, *supra* note 30, at 37 f.; ASSMANN, *supra* note 25, 49; Id., *supra* note 46, at 30.

49) Official Journal of the European Union, C 326, 26 October 2012.

German commentator puts it: “ ... even using a lot of fantasy, one cannot seriously derive from these limited competences a general competence to regulate the contractual relations in securities transactions.”⁵⁰⁾

However, this argument overlooks the fact that the European Court of Justice tends to interpret Art. 53 of the EU Treaty in a very broad manner and to regard as violating Community law any provision in the Member States' national laws that impedes access to or practice of a profession, regardless of whether the State qualifies the pertinent provision as public or private law. This opinion of the ECJ corresponds somehow with the line taken in the Court's judgment of May 2013 mentioned at the beginning that the Member States are *free* to decide whether or not they want to implement civil law sanctions against a violation of conduct of business rules.⁵¹⁾ Again, the ECJ obviously does not differentiate between public and private law.

As the EU legislator - like the German legislator so far - sharply distinguishes between consumer protection and investor protection, MiFID accordingly makes no reference to consumer protection. Thus a legislative competence for civil law unification in the area of *investor* protection cannot be derived from Art. 169 of the EU Treaty, which grants such a competence for *consumer* protection.⁵²⁾

50) HONSELL, “Die Erosion des Privatrechts durch das Europarecht,” *ZIP* 2008, 621, at 624 f. (*transl. by the author*).

51) *See supra* note 11.

52) For a discussion of this issue, *see* BUCK-HEEB, “Vom Kapitalanleger- zum Verbraucherschutz,” *ZHR* 176 (2012) 66.

2. Counter Arguments

The view of an exclusive primacy of civil law when dealing with the protection of investors in the relationship between investment firms and their retail customers is increasingly challenged. Critics claim that enforcing Community law may not be impeded by the qualification of a certain segment of law as private law by the Member States.⁵³⁾ This would violate the basic principle of the “*effet utile*,” under which Community law must always be interpreted in a way that grants it the greatest possible efficiency.⁵⁴⁾

The ECJ has repeatedly stated that contradictions between Community law and the laws of the Member States have to be solved in such a way that the EU law is impeded neither in its effects nor in its enforcement. This duty to interpret national laws in such a way that it is consistent with Community law comprises all areas of Member State law regardless of its national legal qualification. Thus, critics claim, the missing competence of the EU legislator to unify civil law does *not* free Member States from their duty to design all areas of their relevant laws in a compatible way.⁵⁵⁾

It is interesting to take a look at insurance law. The regulations concerning mandatory insurance in Articles 179 et seq. of the Solvency II Directive of 2009⁵⁶⁾ are aimed at shaping the con-

53) HERRESTHAL, *supra* note 30, at 2263.

54) *Id.* at 2264.

55) *Ibid.*

56) Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Official Journal of the European Union, 2 L 335/1, 17 December 2009.

tractual relations between private parties, though the Directive as such is regarded as supervisory law. In line with this, the German legislator had originally implemented the rules in the German Insurance Supervisory Law⁵⁷⁾ and thus codified it as public law; later on, however, he transferred these rules into the Insurance Contract Law,⁵⁸⁾ which constitutes without doubt private law.

B. Primacy of “Functional” Civil Law (Public Law)

1. Reasoning

A second opinion, diametrically opposed to the first one, emphasizes an unrestricted primacy of the “functional” civil law of the Securities Trading Act over the general civil law. Some proponents of this view argue that the conduct of business rules have to be qualified as general civil law rules - though located outside the Civil Code - because of MiFID’s expressed legislative aim of investor protection.⁵⁹⁾ The conduct rules are regarded in this view as fixing duties for the investment firms to take care of their customers’ interests, which have direct effects in contract law.⁶⁰⁾ Some argue that the Member States are

57) *Versicherungsaufsichtsgesetz*, as published on 17 December 1992, Official Gazette 1993 I p. 2, lastly amended by Art. 16 of the Law of 5 December 2012, Official Gazette I p. 2418.

58) *Versicherungsvertragsgesetz*, Law of 23 November 2007, Official Gazette I p. 2631, lastly amended by Art. 2 Para. 79 of the Law of 22 December 2011, Official Gazette I p. 3044.

59) Cf. Recital 44 of the Directive.

60) See, e.g., GRUNDMANN, *supra* note 19, 1752; KÖNDGEN, “Preis- und Vergütungsgestaltung im Wertpapierhandel-Zur Obsoleszenz des Kommissionsrechts,” in: Heldrich (ed.), *Festschrift für Claus-Wilhelm Canaris zum 70. Geburtstag* (2007) Vol. II, 183, at 206; Id., *supra* note 35, 261.

obliged to adapt *all* of their pertinent law to the objectives of MiFID because of the EU legislator's aim of full or at least maximum harmonization in the field of investment services.⁶¹⁾ The concept of full harmonization means that *all* pertinent national law has to be adapted to the Community law's standard and that no deviation to stricter or less strict regulation is allowed; maximum harmonization means that the Member States may *not* adopt *stricter* national regulation. By contrast, minimum harmonization means that only the fundamental regulatory aims of the Community law have to be implemented into the national laws of the Member States, which have a great deal of discretion.⁶²⁾

Accordingly, advocates of the primacy of "functional" civil law claim that German courts may no longer enforce those parts of their case law that are based on contractual or pre-contractual duties that are *stricter* than the conduct of business rules. An example for this are the specific pre-contractual information duties in the context of investment advisory services developed by the courts. The catch phrase is that the implementation of MiFID's conduct of business rules meant "the end of the 'Bond' precedents."⁶³⁾ This refers to the famous "Bond" de-

61) HERRESTHAL, *supra* note 30, at 2263 f.; Id., "Die Pflicht zur Aufklärung über Rückvergütungen und die Folgen ihrer Verletzung," *ZBB* 2009, 348, 351.

62) The different concepts of harmonization are discussed with reference to the conduct of business rules by, *e.g.*, FORSCHNER, *supra* note 18, at 48 ff.; ROTH, "Die Lehmann-Zertifikate-Entscheidungen des BGH im Lichte des Unionsrechts," *ZBB* 2012, 429, 436 ff.

63) MÜLBERT, "Auswirkung der MiFID-Rechtsakte für Vertriebsvergütungen im Effektingeschäft der Kreditinstitute," *ZHR* 172 (2008), 170, 176 ff; Id., "Anlegerschutz bei Zertifikaten," *WM* 2007, 1149, 1156.

cision of the Federal Court of Justice of 1993 that was previously mentioned.⁶⁴⁾

Some very courageous voices have suggested that when implementing the conduct of business rules into German supervisory law, the German legislator might perhaps also have *implicitly* adapted the general civil law and commercial law to the standards of MiFID even without officially changing it.⁶⁵⁾ This is indeed a courageous assumption that was already vehemently criticized as “methodological anarchy.”⁶⁶⁾

Other commentators qualify the conduct of business rules as so-called “dual rules.”⁶⁷⁾ These are mandatory rules that cannot be set aside by party agreement and that are characterized by their dual function: first, they stipulate the supervisory obligations by which investment firms have to abide and, second, they regulate the firms’ contractual duties when doing business with customers. This specific qualification is regarded as necessary because the conduct of business rules are located at the intersection of public and private law and thus could not be precisely assigned to one of the two areas of law.⁶⁸⁾

The main argument for the primacy of the “functional” civil law of the Securities Trading Act is a perceived full harmonization of MiFID. This is derived from the Directive’s comprehensive

64) *Supra* note 29.

65) *Cf.* SPINDLER & KASTEN, *supra* note 14, at 1798.

66) ASSMANN, *supra* note 25, 52.

67) *See* especially LEISCH, *Informationspflichten nach § 31 WpHG* (Munich 2004) at 44 ff., 68 ff.; LANG, “Doppelnormen im Recht der Finanzdienstleistungen,” *ZBB* 2004, 289; NIKOLAUS & D’OLEIRE, Aufklärung über “Kick-backs” in der Anlageberatung, *WM* 2007, 2129

68) LEISCH, *supra* note 67, at 68 ff.; BALZER, *supra* note 67, at 294.

scope and its aim of creating an integrated internal market for financial services.⁶⁹⁾ This view seeks a further justification in Art. 4 of the supplementary Directive,⁷⁰⁾ which states that the Member States may keep national law that is stricter than MiFID *only* under exceptional circumstances.⁷¹⁾ Furthermore, a non-binding report of the *Economic and Monetary Affairs Committee* of the European Parliament is cited that demands a unified public *and* private law regime for investment services within the EU.⁷²⁾

If one assumes a primacy of “functional” civil law as the answer to our initial question concerning what regulation applies at the end of the day, the outcome is again clear, though it is the opposite to the answer given above: any investment firm business behavior that is legitimate under the Securities Trading Act’s “functional” civil law *cannot* be illegitimate under general civil law. The sanctioning of violations is done in a dual track mode: supervisory law and civil law sanctions are enforced by their respective means and competent authorities. This com-

69) HERRESTHAL, *supra* note 30, at 2262; Id., *supra* note 61, at 351; WEICHERT & WENNINGER, “Die Neuregelung der Erkundigungs- und Aufklärungspflichten von Wertpapierdienstleistungsunternehmen,” *WM* 2007, 627, 628; but *see* FRANCK, “Unionsrechtliche Regulierung des Wertpapierhandels und mitgliedstaatliche Gestaltungsspielräume: Dokumentation der Anlageberatung als Paradigma,” *BKR* 2012, 1, 7.

70) *Supra* note 2.

71) For a discussion, *see* ROTHENHÖFER, *supra* note 18, at 67 f., with further references.

72) MÜLBERT, *supra* note 63, at 185; for a discussion, *see* KÖLLER, “Die Abdingbarkeit des Anlegerschutzes durch Information im europäischen Kapitalmarkt,” in: Baums (ed.), *Festschrift für Ulrich Huber zum siebzigsten Geburtstag* (Tübingen 2006) 821, 839.

plementary enforcement regime is regarded as the most effective way to enhance investor protection.⁷³⁾

2. Counter Arguments

The main argument against the primacy of the “functional” civil law theory is that it is based on faulty assumptions. Critics claim that there is no evidence that the EU legislator - let alone, the German legislator - of the transformation law intended a full harmonization or a creation of “dual rules.” They claim that with respect to the general subsidiarity principle as the underlying principle of all EU legislation, a need for full harmonization may *only* be assumed if this aim is *expressly* stated in the Directive, and that this is *not* the case with MiFID.⁷⁴⁾ This observation is correct; MiFID nowhere mentions full harmonization as its legislative aim.⁷⁵⁾ Also, there is no indication that MiFID is intended to differ in this respect from its predecessor, the Investment Services Directive, under whose regime it was undisputed that national civil law rules that provided a better investor protection were legitimate.⁷⁶⁾

The reference to the supplementary Directive and to a non-binding report of the *Economic and Monetary Affairs Committee*, *neither* of which are reflected in the MiFID, was strongly criticized as a “methodological self-surrender.”⁷⁷⁾ Also, it is

73) KÖNDGEN, *supra* note 35, at 261.

74) GRIGOLEIT, *supra* note 30, at 38; ELLENBERGER, *supra* note 46, at 535 ff.

75) TISON, “The civil law effects of MiFID in a comparative perspective,” in: Grundmann et al. (eds.), *Unternehmen, Markt und Verantwortung. Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010* (Berlin 2010) Vol. II, 2621 2632 f.

76) ROTHENHÖFER, *supra* note 18, at 68.

77) SCHWARK & ZIMMER (eds.), *Kapitalmarktrechtskommentar* (4th ed., Munich

claimed that the “*effet utile*” would *not* demand an inclusion of civil law.⁷⁸⁾ This view was confirmed by the European Court of Justice in its decision of May 2013, in which the ECJ ruled that the Member States are *free* to decide whether or not they want to implement civil law sanctions against a violation of conduct of business rules.⁷⁹⁾ This means that the Member States have the authority to decide on their own in which way they want to transform the Directive into their national laws, and accordingly they are free to qualify the conduct of business rules either as public supervisory law *or* as private law. The legislative proceedings in Germany indicate that the German lawmaker did indeed intend to transform the MiFID *exclusively* in the form of public supervisory law. Though there is no clear overall statement, legislative materials at least show that various provisions were *not* designed to have civil law effects.⁸⁰⁾

Critics of the assumption of a “dual nature” of the conduct of business rules emphasize fundamental structural differences between supervisory and civil law. In their view, supervisory law creates the institutional framework for entrepreneurial undertakings, and aims accordingly at a general steering of business transactions while necessarily abstracting from individual contractual relationships. Civil law, by contrast, provides the necessary means to enable investors to pursue damages claims in individual cases. Supervisory law with its *ex ante* per-

2010) WpHG vor §§ 31ff., marginal note 14.

78) *Ibid.*, marginal note 15.

79) Decision of 30 May 2013, *supra* note 11.

80) ROTHENHÖFER, *supra* note 18, at 69, with further references; GRIGOLEIT, *supra* note 30, at 39; this view was confirmed by the BGH decision of 17 September 2013, *supra* note 12, at 254 (no. 18).

spective is accordingly regarded as insufficient to deliver *ex post* justice.⁸¹⁾

Also, the fact that MiFID stipulates certain minimum requirements for the contractual relations between investment firms and their customers, which may or may not deviate from the general civil law standards, is seen as unproblematic because these requirements could be enforced by means of public law enforcement. In the view of the critics, the mere fact that in the area of economic law interrelationships between public and private law do exist is not regarded as sufficient to justify the assumption of a dual nature.⁸²⁾

C. “Diffusion” Theory (“Ausstrahlungswirkung”)

A third view builds a compromise between the two contradictory views presented so far: it does not claim a primacy of public law in the form of “functional” civil law, but much more modestly assumes a “diffusion”-“*Ausstrahlung*”- of the pertinent public law rules into the general civil law and its application. This is probably the leading opinion in German academia today.⁸³⁾

1. Reasoning

The methodological meaning of the term “diffusion,” howev-

81) SETHE, *Anlegerschutz im Recht der Vermögensverwaltung* (Cologne 2005) 749; BLIESENER, *Aufsichtsrechtliche Verhaltenspflichten beim Wertpapierhandel* (Berlin 1998) 160 f.

82) FUCHS, *supra* note 32, § 31, marginal note 58.

83) For a detailed discussion, see FORSCHNER, *supra* note 18, at 113 ff.; ROTHENHÖFER, *supra* note 18, at 70 ff.; FUCHS, *supra* note 32, vor §§ 31 bis 37a, marginal notes 60 et seq.; each with extensive further references.

er, is less clear than it might appear at first sight.⁸⁴⁾ Legal theory does not use the term.⁸⁵⁾ A certain parallel can perhaps be drawn with the concept of transfer of a legal thought in the context of comparison of law. If one searches the literature, the following picture emerges, though for the time being its contours are still a bit fuzzy:

With respect to the application of the “diffusion” concept, it is undisputed that there is no general answer; instead, it is necessary to investigate whether each individual conduct of business rule is suitable for diffusion into civil law.⁸⁶⁾ It is already less clear which criteria should be applied to decide whether or not a given rule is suitable for diffusion. The first precondition is obviously that the rule actually concerns the *contractual relations* between the investment firms and their customers. This is not the case when the rule stipulates only duties that are clearly aimed at the relationship between the supervisory authority and the investment firm, such as organizational aspects.⁸⁷⁾ A second and related precondition is whether one can observe a corresponding intent on the part of the legislator.⁸⁸⁾ A third and most important precondition is that contract law already recognizes a comparative duty in principle that can re-

84) Cf. FORSCHNER, *supra* note 18, at 114; ROTHENHÖFER, *supra* note 18, at 73 ff.

85) WEBER-REY, “Ausstrahlungen des Aufsichtsrechts (insbesondere für Banken und Versicherungen) auf das Aktienrecht-oder die Infiltration von Regelungssätzen?“, *ZGR* 2010, 543, 565; DREHER, Ausstrahlungen des Aufsichtsrechts auf das Aktienrecht-Unter besonderer Berücksichtigung des Risikomanagement,“ *ZGR* 2010, 496, 501.

86) ROTHENHÖFER, *supra* note 18, at 73.

87) WEBER-REY, *supra* note 85, at 567.

88) ROTHENHÖFER, *supra* note 18, at 73.

defined because the diffusion cannot create any new type of obligations of its own.⁸⁹⁾ This is undisputed.

It is highly disputed, however, what kind of effect the diffusion should have in an individual case when the functional civil law stipulates *stricter* duties than the corresponding rule under general civil law.⁹⁰⁾ This brings us back to our introductory question concerning which of both rules should prevail. One view in academia proposes to assume a basic *independence* of public law duties under the conduct of business rules and civil law obligations under general contract law. The “diffusion” is accordingly reduced to a *potential* but *not* mandatory interaction between both spheres of law. Supervisory law *might* influence contract law, but it does not necessarily do so.⁹¹⁾ The civil courts should have the freedom to deviate from the duties defined in the conduct of business rules as they deem appropriate: they might interpret the general contract obligations more strictly *or* less strictly than the supervisory authority interprets the public law duties.⁹²⁾

Another differing solution discussed is an understanding of the conduct of business rules as setting minimum standards that the courts may not undermine.⁹³⁾ In the past, courts have indeed used the conduct of business rules as interpreted by the Supervisory Authority as minimum standards for conducting investment services. But as the German Federal Court of

89) WEBER-REY, *supra* note 85, at 567; DREHER, *supra* note 85, at 503.

90) See the discussion at FORSCHNER, *supra* note 18, at 115 ff.; ROTHENHÖFER, *supra* note 18, at 75 f.; FUCHS, *supra* note 32, vor §§ 31 bis 37a, marginal note 61.

91) SETHE, *supra* note 81, at 749.

92) GRIGOLEIT, *supra* note 30, at 39 f.; BLIESENER, *supra* note 81, at 159 f.

93) SCHWARK & ZIMMER, *supra* note 77, marginal note 16.

Justice has repeatedly stated, these are at best only non-mandatory guidelines and *not* protective norms in the sense of § 823 Para. 2 Civil Code, the provision for a general liability in damages.⁹⁴⁾

So far we have discussed the scenario when *functional civil law* stipulates stricter duties than the comparative rule under general civil law. But the alternative scenario when *general civil law* adheres to stricter obligations than the conduct of business rules is also disputed.⁹⁵⁾ Some observers argue that if the standards set by the courts under general contract law are so much stricter that they impede cross-border investment services, then MiFID's aim of creating a market integration in this area would be frustrated, and a violation of Community law must accordingly be assumed.⁹⁶⁾ This view is less far reaching than the perceived maximum harmonization and corresponds by and large with the supplementary Directive's policy of allowing stricter national law only as an exception, as mentioned earlier. However, the remaining insecurity for investment firms may be problematic. Some say appeasingly that the duties under the conduct of business rules and the duties under general contract law will often come to similar results in practice because both the courts and the legislator are aware of each other's views when formulating their respective catalogue of obligations for investment firms. A further assumption is that both actors are at least indirectly aware of the necessity of diffusion between the two catalogues of obligations, and that

94) See *supra* text accompanying and references in note 33.

95) Cf. the discussion at FORSCHNER, *supra* note 18, at 123 ff.

96) FRANCK, *supra* note 69, at 5 f., 8.

therefore a further future synchronization between these can be expected.⁹⁷⁾

This optimism may be wishful thinking, however, when one recalls the repeated statements of the Federal Court of Justice that the conduct of business rules have *no binding* impact on civil law. Let us take the previous example of business transactions with so-called eligible counterparties, where the conduct of business rules do *not* apply under MiFID and the correspondent German provision in § 31b of the Securities Trading Act. The question is whether an investment firm can really rely on that exemption. This appears to be doubtful in light of the fact that the Federal Court of Justice has meanwhile extended its strict control of standard contract forms - originally meant to protect *consumers* - to transactions between commercial companies that are active in international business.⁹⁸⁾ If that judicial policy were projected to investment services, with the *same* logic why should the Federal Court not protect a medium-sized insurance company, for example, as a customer of an investment firm, notwithstanding the fact that it qualifies under supervisory law as an eligible counterparty?

2. Counter Arguments

The theory of a non-binding “diffusion” between general civil law and conduct of business rules law is strongly opposed by

97) VEIL, “Aufklärung und Beratung über die fehlende Einlagensicherung von Lehman-Zertifikaten,” *WM* 2009, 1585; GRIGOLEIT, *supra* note 30, at 35 f.; BAUM, *supra* note 30, 281; FUCHS, *supra* note 32, vor §§ 31 bis 37a, marginal note 63.

98) Critical, *e.g.*, DAUNER-LIEB & AXER, “Quo vadis AGB-Kontrolle im unternehmerischen Geschäftsverkehr?,” *ZIP* 2010, 309.

those in favor of a primacy of the general civil law, as well as by those who by contrast favor a primacy of the functional civil law of the Securities Trading Act. This comes as no surprise given the ferocity of the academic discussion so far.

The first group criticizes that the proponents of the fuzzy “diffusion” theory neglect the problem of the missing authority of the EU legislator to regulate civil law matters, and that they accordingly ignore the resulting mandatory primacy of civil law.⁹⁹⁾ Especially the idea that the conduct of business rules, as interpreted by the Supervisory Agency, shape the general civil law duties into concrete forms is deemed illegitimate by the critics because of the assumed violation of the constitutional principle of the separation of powers between the judiciary and the administration.¹⁰⁰⁾

The second group - with their preference for a primacy of public law - criticizes that the metaphorical concept of “diffusion” is nothing but a half-baked compromise that stops half way and ignores the necessary synchronization of the duties arising for investment firms with respect to the contractual relation with their customers under both legal spheres: the public and the private law sphere.¹⁰¹⁾

IV. Resume

The answer to which of the three theories presented here deserves the most credit depends on one’s political views about the opaque situation of harmonization of civil law within

99) ASSMANN, *supra* note 25, at 45, 53; GRIGOLEIT, *supra* note 30, at 37 ff.

100) ASSMANN, *supra* note 25, at 47.

101) KÖNDGEN, *supra* note 35, at 261; Id., *supra* note 60, at 206.

the European Union. On the one hand side, officially, no harmonization takes place; on the other side, we can observe a creeping backdoor harmonization through an ever-expanding concept of consumer protection as a vehicle. This has unquestionable positive results, but also negative ones that are sometimes criticized as “regulation run amok.”¹⁰²⁾ Those who stress the positive effects of civil law harmonization will be in favor of a primacy of the “functional” civil law found in the capital markets supervisory law. Those who rather stress the dangers of an uncoordinated “undercover” harmonization will be in favor of a primacy of general civil law. Those who want to balance both approaches will favor a non-binding mutual diffusion of both spheres of contract-related duties - notwithstanding the German proverb one is tempted to quote, that “in times of hardship, the middle way is the surest road to disaster.”

With respect to the justified needs of the practice for legal security, when it comes to potential damages claims by investors it is perhaps safe to state the following: both catalogues of duties - the one legislated as part of supervisory law and the one developed by the courts under general civil law - correspond to a significant degree with each other. For the remaining potentially conflicting areas, investment firms are well counseled to assume an exclusive primacy of general civil law as stated by the Federal Court of Justice if they want to make sure that no damages claims may be put forward by customers. A violation of the conduct of business rules of the Securities Trading Act may lead to administrative sanctions imposed by the Fi-

102) SCHRÖDER, *Europa in der Finanzfalle. Irrwege internationaler Rechtsangleichung* (Berlin 2012) 75 et passim.

financial Markets Supervisory Authority, but such a violation will in itself not have any civil law consequences as long as no corresponding civil law obligation is violated as well. At least after having become established as common practice with the corresponding justified expectations by investors, the demands of “functional” civil law as interpreted by the Supervisory Authority will play a role in the form of a minimum standard when judging whether an investment firm has fulfilled its contractual and pre-contractual duties.