PRIVATE LAW

Executives' Liability for Incorrect *Ad Hoc* Announcements – A Comment on the Decision of the German Federal Court of Justice (BGH) in *In re Infomatec AG*, BGH II ZR 217/03, 218/03 and 402/02 of 19 July 2004

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A. Introduction

From March 1997 until 5 June 2003, the Frankfurt Stock Exchange (*Frankfurter Wertpapierbörse, FWB*) maintained the "*Neuer Markt*" as a segment of the over-the-counter-market for new economy/technology companies. The 50 "biggest" companies were admitted to the *Neuer Markt Index* (NEMAX50®) of Deutsche Börse AG, which is now only formally being continued, after termination of the *Neuer Markt*, until the end of 2004, and is already succeeded by the smaller TecDAX30®. Initially a success after rising some 500% from March 1997 to mid 2000, the Index dropped from over 9000 points to below 1000 points in March 2002, a loss of 90% or 200 billion Euros.[1] The reasons for this development are manifold and not primarily to be found in the illegal behavior of the issuers or their officials. Still, legal proceedings concerning companies like Meta@box, EM.TV, Comroad, Biodata and Refugium uncovered that in many cases wrongful acts did occur, especially in the form of incorrect balance sheets and wrong or even fraudulent communication to the market.[2] The three parallel cases[3] the German Federal Court of Justice *(Bundesgerichtshof, BGH)* had to consider, concerned one of these failing - and now insolvent - companies, Infomatec AG. In criminal proceedings[4] the two executives (CEO and

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[1] *See* Merkt, *Empfiehlt es sich, im Interesse des Anlegerschutzes und zur Förderung des Finanzplatzes Deutschland das Kapitalmarkt- und Börsenrecht neu zu regeln?* Börsenrechtliches Teilgutachten, Gutachten G für den 64. Deutschen Juristentag 2002, G 106; Lenenbach, KAPITALMARKT- UND BÖRSENRECHT, 140 (2000). (Page 140 refers to even below 750 points in September 2001 which is due to external effects as well though).

[2] *See* Baums, *Haftung wegen Falschinformation des Sekundärmarktes*, ZHR 167 (2003) 139, 140.

[3] Decisions by the BGH can be found online: http://www.bundesgerichtshof.de/.

[4] LG Augsburg (3 KLs 502 Js 127 368/00) (27 Nov 2003) and (4 May 2004, *on appeal*).

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his deputy) of this company against whom the civil lawsuits had been filed, were convicted of insider trading and market manipulation. One criminal case is still on appeal. The findings of the criminal proceedings, however, were not relevant to the civil proceedings.

B. The Case and the Decisions of the Lower Courts

In the cases at hand, the plaintiffs complained that they had trusted several wrong, ad hoc announcements about business deals which the company had issued. In fact, these announced contracts had never been concluded or were of a far lower scale. The plaintiffs alleged that they had only bought stock in the company because of a belief in the ad hoc announcements, although most plaintiffs only bought shares many months after these announcements. The majority of these plaintiffs had later sold the shares again with a loss, as the share price had dropped. Two plaintiffs still own the shares, the price of which is now only some Euro cents each. Only one investor bought shares about two months after the first wrong ad –hoc announcement of 20 May 1999. However, this investor did not sue the former executives, but assigned his claim to a lawyer who then filed a lawsuit as assignee. This enabled the assignor to testify as a witness. The lower courts found that the executives had deliberately issued these wrong announcements.

Most plaintiffs lost their suits in the lower courts. In one case the courts did not find that the plaintiffs had relied on the ad hoc announcements.[5] In another case the courts did not deliver any remarks on the question of reliance, but held that defendants acted neither deliberately nor with intent to harm the plaintiffs, and that it was basically the investors' own fault to invest in highly speculative shares.[6] Only the plaintiff who sued as assignee was successful in first instance,[7] but this judgment was overruled on appeal.[8]

C. The Ruling of the German Federal Court of Justice (*BGH*)

In its judgment, the BGH, for the first time, answered many questions that had caused debate among courts and scholars in the past. For this reason, this decision

[5] LG Augsburg (9 O 1858/01) (11 Jan. 2002); OLG München (30 U 104/02) (21 Jan. 2003) (Lower instances to BGH II ZR 218/03. Neither of these judgments is published).

[6] LG Augsburg BKR 2002, 236 (6 O 154/01 236) (9 January 2002); OLG München BKR 2003, 504 (30 U 103/02) (20 Dec. 2002) (Lower instances to BGH II ZR 217/03).

[7] LG Augsburg WM 2001, 1944 (3 O 4995/00) (24 Sep. 2001).

[8] OLG München ZIP 2002, 1989 (30 U 855/01) (1 Oct. 2002).

can be seen as one of the most important securities cases in Germany, which will cause ample discussion in the months to come.

The first question the court had to answer was whether ad hoc announcements can be seen as prospectuses, triggering liability under the "allgemeine Prospekthaftung," which is a basis for claim that had been developed by case law. The BGH denied liability for wrong announcements in this respect.[9] It left open the question whether liability for wrong prospectuses could arise at all in cases where the issuance of shares is governed by statutory prospectus requirements, as in this case, or whether it is confined to circumstances where those rules, including special rules for liability, do not govern. Notwithstanding this question, according to the court, an ad hoc announcement normally cannot be seen as a prospectus, because a prospectus was found to evoke the impression of giving information about all facts relevant to making an investment decision. The court held that this requirement was not met by an announcement that only gives information about single events.

The BGH also ruled that no civil liability can arise from the infringement of two statutory provisions that had been in force at the time of the announcements: § 15 *Wertpapierhandelsgesetz (WpHG)* which obliges the company to disclose new material information as soon as possible (ad hoc) and § 88 *Börsengesetz (BörsG)* which is used to prohibit fraudulent acts intended to influence stock prices.[10] For § 15 WpHG, the BGH found that due to paragraph 6 of this section, which explicitly excludes civil liability of the company for infringement of its ad hoc duties, the whole section cannot be read as granting damages. For § 88 BörsG, which has meanwhile been amended and transferred to another statute, the court, following the majority of German scholars[11] and even the German Constitution Court,[12] found that the legislator had not intended to give investors a right of action but only to protect the capital market as such. Following this reasoning, investors are only protected as a "reflex," not giving rise to a right of action. According to the court, no other interpretation of these sections is required by several European directives.

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[9] BGH II ZR 217/03, 5-7; BGH II ZR 218/03, 5-7; BGH II ZR 402/02, 6-7 (now published in ZIP 2004, 1593, 1599 and 1604).

[10] BGH II ZR 217/03, 7-10; BGH II ZR 218/03, 7-9; BGH II ZR 402/02, 8-10.

[11] *See* Rössner and Worms, *in* HANDBUCH DES KAPITALANLAGERECHTS, 2ND ED., § 9 Rn. 8 with Fn. 19 (Assman and Schütze, eds., 1997); Geibel, *in* WERTPAPIERHANDELSGESETZ ETC., § 15 WpHG Rn. 155 (Schäfer, ed., 1999); Ledermann, *in* WERTPAPIERHANDELSGESETZ ETC., 1999, § 88 BörsG Rn. 1 (Schäfer, ed., 1999); SCHWARK, BÖRSENGESETZ, 2ND ED., § 88 Rn. 1 (1994).

[12] BVerfG ZIP 2002, 1986, 1988 (2 BvR 742/02) (24 Sep. 2002).

The court thirdly held that the perpetration of two criminal offences, § 400 Abs. 1 Nr. 1 *Aktiengesetz (German Stock Corporation Act, AktG)* and § 264a *Strafgesetzbuch (German Criminal Code, StGB)*, does not result in civil liabilities in this very case either.[13] Although they can trigger damages in general, according to the BGH an ad hoc announcement does not meet the requirements of these sections. § 400 Abs. 1 Nr. 1 AktG requires, inter alia, that an executive presents wrong statements or surveys of the company's assets. The BGH reasoned that these statements and surveys need to create the impression of stating the company's financial situation comprehensively and held that this was not the case for ad hoc announcements. For surveys, the requirement of completeness had been disputed due to the ambiguous wording of this section.[14] The BGH has now clarified the law in this respect. For § 264a StGB, the court additionally denied that ad hoc announcements can be seen as prospectuses in terms of this section, requiring the impression of completeness as reasoned earlier in the judgment.

Fourthly, the BGH found that a rise in stock prices due to the ad hoc announcements could neither benefit the company nor the executives in a way which directly results from the loss of the defrauded person as is required to qualify as a criminal fraud under § 263 StGB.[15]

Finally, and most importantly, the court turned to liability under § 826 *Bürgerliches Gesetzbuch (German Civil Code, BGB)* for deliberate and immoral detriments. The plaintiffs had been able to prove in the lower courts that the defendants knew about the fallacy of the announcements. As the BGH does not hear evidence and is bound by the findings of the lower courts (§ 559 Abs. 2 *Zivilprozessordnung (German Civil Procedure Code, ZPO)*), these facts had to be accepted as proven. The BGH now had to answer the question as to whether, by these announcements, the defendants deliberately and immorally infringed the plaintiffs. Additionally, the court had to rule on what damages plaintiffs can claim when relying on false announcements and finally, what standard of proof is required to show this reliance.

In two decisions (II ZR 217/03, II ZR 402/02) the BGH overruled the appellate courts' decisions that the defendants had neither acted deliberately nor immorally to infringe the plaintiffs, but only recklessly.[16] As the defendants knew the positive announcements were wrong and had to have been aware of their consequences, i.e.,

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[13] BGH II ZR 217/03, 10-12; BGH II ZR 218/03, 9-11; BGH II ZR 402/02, 10-12.

[14] *See* Baums ed., BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE, Rn. 184 (2001).

[15] BGH II ZR 217/03, 12; BGH II ZR 218/03, 11-12; BGH II ZR 402/02, 12.

[16] BGH II ZR 217/03, 16-21; BGH II ZR 402/02, 18-21.

that they would have likely caused investors to buy shares (and in doing so be harmed through purchases they might not have made without the wrong information), the BGH did not accept the argument of mere negligence. According to the BGH, the fact that some investors seemed to have been guided more by the euphoria that had contaminated stock markets in the late 1990s until the crash was irrelevant, in light of the deliberately wrong announcements. In addition, according to the court, it was clear that defendants had acted immorally not only because they had accepted every (including illegal) means to push the share price also because they had been influenced by self interest, owning a considerable number of shares themselves and benefiting from the increase in price accordingly.

Concerning the scope of damages, the court held that plaintiffs who succeed in proving their reliance on ad hoc announcements are entitled to full compensation of what they had paid for the shares.[17] This is different from the decision of the lower courts, which seemed to have been of the opinion that plaintiffs could only claim the difference between the price they had actually paid and the price that they would have had to pay, had the company issued a correct ad hoc announcement. The BGH now ruled that plaintiffs who only buy shares because of their reliance on a particular wrong announcement, are entitled to claim what is called Naturalrestitution (restitution in kind) under § 249 Abs. 1 BGB. This means that the violator has to put the injured person in the position he would have been in, had the violation not occurred. Therefore, the court found plaintiffs who would not have bought shares without their reliance on the wrong announcement entitled to reclaim the entire money spent on the purchase, in return for the shares to be handed to the violators. Those investors who had already sold their shares again would be entitled to claim the same, except they would have to deduct the selling price from what they had initially paid.

The third important finding concerns the standard of proof that is required from a plaintiff who alleges reliance on a wrong ad hoc announcement.[18] In the cases at hand only the assignee-plaintiff had succeeded in proving his reliance in the lower courts. The other plaintiffs who had only bought shares many months after the announcements, failed to present evidence for their claims. For these plaintiffs, the question then became whether there could be any presumption of reliance on ad hoc announcements, so that plaintiffs don't have to prove actual reliance. This could be the case if there existed prima facie evidence for investment decisions in connection with announcements. As has been established by courts in other cases, prima facie evidence is only applicable if life experience indicates the likelihood of a

[17] BGH II ZR 217/03, 15; BGH II ZR 402/02, 15.

[18] BGH II ZR 218/03, 14-17.

typical causal connection.[19] Courts found this not to be the case in situations where individuals make barely predictable decisions.[20] In the case at hand, the BGH ruled that an investment decision qualifies as such a decision, since investors are influenced by a huge variety of rational and irrational factors. On the other hand, the court did recognize that in many situations it would be impossible to prove actual reliance. For this reason, the BGH went on to consider situations where the causal connection might be likely. In an earlier judgment the court had ruled that there is a presumption of reliance on the share issue prospectus, as this prospectus influences experts and might create what it called "*Anlagestimmung*" (investment atmosphere), which is a disposition to invest.[21] Accordingly, the court had permitted investors to claim damages without proving actual reliance on the prospectus. However, in that decision, the BGH had not set a clear time frame within which the transaction had to be made after the issuance, in order to qualify for the presumption. The law has since been amended to now entirely shift the burden of proof to the company, for transactions that are made within six months after the issuance of the shares. This means that the company has to prove that the investor did not rely on the prospectus, § 45 Abs. 1 Satz 1 BörsG. After these six months the investor is then excluded from making any claim.

In the decision at hand, the BGH held that neither the former rule set by case law nor the new section could be applied to ad hoc announcements. The court's main reason was, again, that contrary to a prospectus, these statements are not intended to give information about all the facts relevant to making an investment decision. Instead, the court qualified the information content of ad hoc announcements as rather short-lived. On the other hand, the BGH did not entirely deny the possibility that ad hoc announcements may create the before-mentioned "*Anlagestimmung*", giving rise to a presumption of reliance. The court neither clearly specified the circumstances when this might be the case, nor did it set any time frame within which the transaction must be made after the announcement. This was held to be a matter placed back in the hands of the legislator, as had been done in § 45 Abs. 1 Satz 1 BörsG. The BGH only indicated that the "*Anlagestimmung*" would end, at the latest, when other company or industry information later becomes more relevant than the ad hoc announcement for assessment of the shares. In the end, the BGH did not find the criteria of prima facie evidence met for those investors who had only bought shares many months after the announcements.

[19] BGH NJW 1996, 1828 (VI ZR 380/94) (19 Mar. 1996).

[20] BGHZ 100, 214, 216 (IV a ZR 205/85) (18 Mar. 1987).

[21] BGHZ 139, 225, 233 (XI ZR 173/97) (14 Jul. 1998).

The BGH delivered three different judgments. As the investor-assignor had witnessed to having bought the shares merely because of his reliance on the false announcements, the BGH overruled the appellate court and granted damages to the assignee as had already been done by the court in first instance (II ZR 402/02).

The court's decisions in both other cases can only be understood with some background of German law of civil procedure. As is self-evident, in order to succeed, a plaintiff has to prove all contested facts that are necessary to give rise to his claim. In civil proceedings, the different types of admissible evidence are visual inspection by the court, witnesses, experts, documents and interrogation of the parties.[22] Under §§ 447, 448 Zivilprozessordnung (ZPO), even the plaintiff may be interrogated. If the defendant does not agree (§ 447 ZPO), the court may order the interrogation ex officio according to § 448 ZPO, provided there is already a certain likelihood for the fact to be proven as being true ("*Anfangswahrscheinlichkeit*").[23] Since the BGH found it to be unlikely that the investors had relied on the ad hoc announcements having only bought stock many months later, the court approved the lower courts' decision in one case (II ZR 218/03) not to interrogate the plaintiffs on this matter. As they had not been able to prove their claim with any other admissible evidence, they lost the case. In the third case (II ZR 217/03) the BGH overruled the decision of the appellate court, since it had erred in denying the intent to harm. As this court had not delivered any remarks on the question of reliance, the BGH instructed it to pay respect to the requirements of § 448 ZPO if interrogating the plaintiffs in the new trial.

D. Discussion

The BGH's decision was celebrated as strengthening investors' rights in the financial and general press in Germany[24] long before the court's judgments were even available in full detail. The following discussion will show that this is true in part, but that the judgment should not make other dissatisfied investors too confident about the chances of securities litigation.

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[22] §§ 371, 373, 402, 415, 445, 447 ZPO.

[23] BGH NJW 1998, 814, 815 (VI ZR 389/96) (2 Dec. 1997).

[24] *Gute Aussichten für geprellte Aktionäre*, FRANKFURTER ALLGEMEINE ZEITUNG, 13 Jul. 2004, at 19; *Hoffnung für Infomatec-Kläger*, BÖRSEN ZEITUNG, 13 Jul. 2004, at 11; *Bundesgerichtshof stärkt Anlegerrechte*, BÖRSEN ZEITUNG, 20 Jul. 2004, at 5.

Although disputed among scholars for considerable time before the judgment,[25] not much needs to be said about the decision that an ad hoc announcement does not qualify as a prospectus, and does not trigger liability under the "*bürgerlichrechtliche Prospekthaftung*" (prospectus liability under BGB law). Whether it is always correct to demand that a prospectus, for whose release and content no statutory regulation exists, has to evoke the impression of completeness or whether there may be a lower standard depending on the means of communication,[26] is open to discussion and cannot be answered here. At least it is evident that a statement concerning only one single fact about a company is too large a deviation from the general requirement of intent, to inform about the entire financial situation. Similarly, the BGH was right to conclude that for meeting the requirements of § 400 Abs. 1 Nr. 1 AktG, § 264a StGB, statements and surveys also need to create the impression of stating the company's financial situation comprehensively.[27] The same is true for ruling that ad hoc announcements do not meet the requirement of a prospectus under § 264a StGB either.

Also, the finding that no civil liability arises from an infringement of § 15 WpHG cannot be criticized and conforms with the opinions of most German scholars before the judgment.[28] The wording of paragraph 6 is very clear, as is the intention of the legislator[29] not to grant civil damages for infringements to investors. This excludes the company's liability[30] and more so, executives' liability.

In contrast, the court's decision to deny a civil right of action for infringement of § 88 BörsG as it was then, is not entirely free of doubt. Although the vast majority of scholars have always been of the opinion that investors cannot claim damages,[31],

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[25] *See* Groß, *Haftung für fehlerhafte oder fehlende Regel- oder ad-hoc-Publizität*, WM 2002, 477, 479-482 with further references.

[26] *See* Assmann, *in* HANDBUCH DES KAPITALANLAGERECHTS, 2ND ED., § 7 Rn. 59 (Assman and Schütze, eds., 1997).

[27] Thümmel, *Haftung für geschönte Ad-hoc-Meldungen: Neues Risikofeld für Vorstände oder ergebnisorientierte Einzelfallrechtsprechung?*, DB 2002, 2331, 2332.

[28] *See* Assmann and Kümpel, *in* WERTPAPIERHANDELSGESETZ, 3RD ED., § 15 Rn. 268 with further references in Fn. 1 (Assmann and Schneider, eds., 2003).

[29] BT-DRUCKSACHE 12/7918, 96, 102.

[30] Now §§ 37b, 37c WpHG do establish civil liability of the company but not of the executives for infringements of § 15 WpHG.

[31] *See* Rössner and Worms, *in* HANDBUCH DES KAPITALANLAGERECHT, 2ND ED., § 9 Rn. 8 and Fn. 19 (Assmann and Schütze, eds., 1997); Geibel, *in* WERTPAPIERHANDELSGESETZ ETC., § 15 WpHG Rn. 155 (Schäfer ed., 1999); Ledermann, *in* WERTPAPIERHANDELSGESETZ ETC., § 88 BörsG Rn. 1 (Schäfer, ed., 1999);

arguments can be found in favor of the contrary opinion as well. In support for granting damages, § 88 BörsG needed to be what is called a "*Schutzgesetz*" under § 823 Abs. 2 BGB. To qualify as such, it must have been the intention of the legislator to not only protect the general public, but also individuals. The problem is that the legislator was not very clear when drafting the law,[32] but only mentioned that an indirect protection of the individual investor was intended.[33] Does this mean that at least an indirect protection was intended - meaning that the legislator did want to protect individuals as well - or is the individual only protected as a "reflex" of the protection of the capital markets? The BGH opted for the latter, if one argues that the protection of individuals is a necessary effect of protecting capital markets one could also argue the former.[34] Be this as it may, the question has now been answered for § 88 BörsG. As § 88 BörsG has been replaced by § 20a WpHG, the question which follows is whether the same conclusions have to be reached under this new law. At least some authors now argue that investors can claim damages for infringements.[35] This question cannot be answered here in full. The German legislator has not indicated any intent to give individual investors the right to claim damages for infringements of § 20a WpHG, nor does new European law[36] require a special method by which member states should protect capital markets and investors. For these reasons there are no compelling arguments that the conclusion of the BGH concerning § 88 BörsG would be different for § 20a WpHG.

The most important findings of the BGH are in connection with the liability for deliberate and immoral infringements under § 826 BGB.

The ruling that the defendants in the case at hand deliberately and immorally infringed the plaintiffs does not require a long commentary. It was more surprising that the lower courts only found that the defendants had acted negligently. It is

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SCHWARK, BÖRSENGESETZ, 2ND ED., § 88 Rn. 1 (1994); Thümmel, *Haftung für geschönte Ad-hoc-Meldungen: Neues Risikofeld für Vorstände oder ergebnisorientierte Einzelfallrechtsprechung?*, DB 2001, 2331, 2332f.

[32] Different from § 15 Abs. 6 WpHG, the legislator did not explicitly state that damages are excluded.

[33] BT-DRUCKSACHE 10/318, 46.

[34] Ekkenga, *Fragen der deliktischen Haftungsbegründung bei Kursmanipulation und Insidergeschäften*, ZIP 2004, 781, 784-786.

[35] Altenhain, *Die Neuregelung der Marktpreismanipulation durch das Vierte Finanzmarktförderungsgesetz*, BB 2002, 1874, 1875; Ekkenga, *Fragen der deliktischen Haftungsbegründung bei Kursmanipulation und Insidergeschäften*, ZIP 2004, 781; Lenzen, *Das neue Recht der Kursmanipulation*, ZBB 2002, 279, 284; Ziouvas, *Das neue Recht gegen Kurs- und Marktpreismanipulation im 4. Finanzmarktförderungsgesetz*, ZGR 2003, 113, 143.

[36] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) O.J. L 96/16 (12 Apr. 2003).

difficult to imagine cases in which self-interested executives act with more intent to defraud in connection with ad hoc announcements than in this one.

Concerning damages, contrary to few authors[37] and apparently also to the appellate court, the BGH was right to conclude that the plaintiffs are not confined to claiming only the difference between what they had paid for the shares and what they would have had to pay had the wrong announcement not been made. As the court stated correctly, the general standard of compensation is "Naturalrestitution" (restitution in kind). If the investor bought the shares only because of the announcement, he has the right to claim the full price he had to pay in return for the shares to be handed to the violator.[38] The fact that the plaintiffs did not buy the shares from the defendants and so cannot give them "back" does not exclude restitution in kind. This matter is simply resolved by the general rule that plaintiffs have to deduct from their claim what they have gained directly from the violation ("*Vorteilsanrechnung*"). The injured has to either accept this deduction if damages and benefits are of the same kind, or has to hand what he has gained to the violator in return for full damages.[39] This result that plaintiffs can claim restitution in kind can only be right, however, if they can prove actual reliance on a particular announcement. In the case where plaintiffs did not rely on an announcement, but are only harmed by buying shares at an artificially inflated price because of a wrong (positive) announcement, they can only claim the difference between the price with and without the wrong information.[40] The problem then is deciding what point in time is relevant for calculating the damages.[41]

The remaining question is whether or not under German law the latter form of damages is relevant at all. This means whether an investor is able to claim these damages with the argument that he did not rely on a specific wrong announcement but was still harmed as he believed the price he paid was correct. Before looking at

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[37] Fuchs and Dühn, *Deliktische Schadensersatzhaftung für falsche Ad-hoc-Mitteilungen*, BKR 2002, 1063, 1068-1069.

[38] Baums, *Haftung wegen Falschinformation des Sekundärmarktes*, ZHR 167 (2003), 139, 185; Hennrichs, *Haftung für falsche Ad-hoc-Mitteilungen und Bilanzen*, *in* RECHT UND RISIKO, FESTSCHRIFT FÜR HELLMUT KOLLHOSSER ZUM 70. GEBURTSTAG, 201, 206 (Bork, Hoeren, and Pohlmann, eds., 2004).

[39] Oetker, *in* MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, VOL. 2A, 4TH ED., § 249 Rn. 267 (2003).

[40] Hennrichs, *Haftung für falsche Ad-hoc-Mitteilungen und Bilanzen*, *in* RECHT UND RISIKO, FESTSCHRIFT FÜR HELLMUT KOLLHOSSER ZUM 70. GEBURTSTAG, 201, 206 (Bork, Hoeren, and Pohlmann, eds., 2004).

[41] One could calculate the difference of the shares prices at the time of purchase, re-sale or correction of the false information, *see* Baums, *Haftung wegen Falschinformation des Sekundärmarktes*, ZHR 167 (2003), 139, 189.

this question it might be helpful to have a quick glance at how the legal situation is in the country with undoubtedly the most developed capital markets: the United States of America.

Under US-American law the most well known prohibition of securities fraud is Section 10b of the Securities Exchange Act 1934[42] together with SEC Rule 10b-5.[43] The details of these rules shall not be of interest here. What is relevant is how American courts have dealt with the question of causation. According to the courts, a plaintiff has to prove two things: transaction causation and loss causation.[44] In general, transaction causation requires that the plaintiff would not have made the transaction without the wrong information.[45] He must have relied on the truth of the defendant's statement.[46] In principle, the plaintiff has to prove his reliance on a particular wrong statement (or omission).[47] The US Supreme Court went one step further though, recognizing that direct reliance may sometimes be difficult to prove.[48] For this reason the court held that an investor who buys stock at the price set by the market does so in reliance on the integrity of that price[49] and by doing so, indirectly relies on the false statement.[50] This "fraud-on-the-market-theory" is based on the semi-strong form of the Efficient Capital Markets Hypothesis,[51] according to which prices reflect all publicly available information.[52] This theory creates a rebuttable presumption of reliance. The problems of loss causation, in par-

[42] 15 U.S.C. § 78j.

[43] 17 C.F.R. § 240.10b-5.

[44] Suez Equity Investors, L.P. v. Toronto-Dominion Bank, 250 F.3d 87, 95 (2d Cir. 2001); Manufacturers Hanover Trust v. Drysdale Securities Corp., 801 F.2d 13, 20 (2d Cir. 1986).

[45] Schlick v. Penn-Dixie Cement Corp., 507 F.2d 374, 380 (2d Cir.1974).

[46] Shores v. Sklar, 647 F.2d 462, 468 (5th Cir. 1981), *cert. denied*, 103 S.Ct. 722 (1983); List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965), *cert. denied*, 382 U.S. 811 (1965).

[47] Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 174 (3d Cir. 2001).

[48] Basic Inc. v. Levinson, 485 U.S. 224, 245 (1988).

[49] *Id*. at 247.

[50] Halkin v. Verifone, Inc. (In re Verifone Sec. Litig.), 11 F.3d 865 (9th Cir. 1993).

[51] According to Langevoort, *Taming the Animal Spirits of the Stock Market: A Behavioral Approach to Securities Regulation*, Working Paper 64, 53-54, Berkeley Olin Program in Law & Economics (2002) the fraud-on-the-market-theory should rather be seen as a practical means of case management.

[52] Cf. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25(2) J. FINANCE 383, 404-409 (1970).

ticular whether the "fraud-on-the-market-theory" also applies in this context,[53] will not be looked at here. The important insights for the discussion here are that American courts allow plaintiffs to either prove actual reliance on a specific statement or reliance on the integrity of the market (price) as such.

In contrast, the BGH did not go as far as the Supreme Court in the case at hand. It required from all plaintiffs proof of actual reliance on the ad hoc announcements. The possibility that plaintiffs were harmed by relying on and buying at the wrong price, does not seem to have been considered in the lower instances as plaintiffs apparently did not even plead this form of reliance.[54] This might be the reason why the BGH did not consider this form of reliance either. Of course, this leads to the problems most plaintiffs had in this case: they had no means by which to prove reliance. Only the assignee-plaintiff succeeded because of the legal trick of the assignment by which the investor was made to testify as a witness. Aware of the problems plaintiffs may have proving reliance, the court discussed whether plaintiffs could benefit from a presumption of (actual) reliance. These considerations have nothing to do with reliance on the integrity of the market, however. On the other hand, there are some considerations in the line of argument of the BGH that are not entirely consistent with this requirement of actual reliance. Considering the criterion of the "*Anlagestimmung*", which had been developed through case law for prospectus liability, the BGH pointed out that a prospectus may influence financial experts' assessment of the stock, and by this create the disposition to invest among investors.[55] Strictly speaking, this is not a case of direct reliance as the "*Anlagestimmung*" is, following the reasoning of the BGH, not directly created through the prospectus but through other market forces. Similarly, the BGH argues that the "*Anlagestimmung*" may decrease when, over time, new information becomes more pertinent in determining the share price.[56] Once again, this argument builds on the price being set by market forces. The court's argument is not that the untruth of the very ad hoc announcement is later discovered and that the investor who had relied on the announcement becomes aware of this. On the contrary, it is held to be sufficient that the market absorbs the information. This seems similar to the "truth-on-the-market" defense under US-American law[57] by which the presumption of reli-

[53] *Compare* Knapp v. Ernst & Whinney, 90 F.3d 1431, 1438 (9th Cir. 1996) *with* Robbins v. Kroger Props. Inc., 116 F.3d 1441, 1448 (11th Cir. 1997).

[54] Leisch, *Vorstandshaftung für falsche Ad-hoc-Mitteilungen - ein höchstrichterlicher Beitrag zur Stärkung des Finanzplatzes Deutschland*, ZIP 2004, 1573, 1575.

[55] BGH II ZR 218/03, 15.

[56] BGH II ZR 218/03, 17.

[57] *See* In re Convergent Technologies Securities Litigation, 948 F.2d 507, 513 (9th Cir. 1991); In re Apple Computer Securities Litigation, 886 F.2d 1109, 1114-1115 (9th Cir.1989), *cert. denied*, 496 U.S. 943 (1990).

ance under the "fraud-on-the-market-theory" is rebutted when the market becomes aware of information that corrects the initial wrong information. For these reasons it seems that the BGH has not established an entirely coherent concept of reliance.

E. Conclusions

The judgments of the BGH do not open the gates for lawsuits from dissatisfied investors. These cases only concerned a straightforward deliberate infringement of the ad hoc duties by two former executives. The standard to claim damages under § 826 BGB is quite high, as this section requires a deliberate and immoral infringement. At least, the BGH has now clarified that the requirements of this section can be met in extreme cases. Even this had seemed doubtful after the decisions of the lower courts.

The requirement of actual reliance does not reflect how investors normally make investment decisions. Investors do not buy shares only because the company makes an announcement but rather because of many different - rational or irrational - reasons, as the BGH itself rightly pointed out.[58] This being the case, it is not coherent to require proof of actual reliance from every investor.[59] Demanding this level of proof would bar even the vast majority of defrauded investors. For this reason it is desirable that German courts in the future will also recognize that reliance is not confined to specific announcements but can also extend to the integrity of the market price. Of course, it is up to the plaintiffs to expressly plead this form of reliance as well.

Probably the German legislator will be faster in developing the law though. The Government Commission on Corporate Governance had suggested changing the law as to impose liability on members of the supervisory and executive board for deliberate or grossly negligent wrong statements and shifting the burden of proof for (non-)reliance on the defendants.[60] The government indicated in its "10 point program, the Federal Government's catalogue of measures on improving corporate integrity and investor protection" to act on this recommendation.[61] Experts have already been consulted on the proposal for this "Kapitalmarktinformationshaftungsgesetz" and it is expected that the draft will be presented towards the end of this year.

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[58] BGH II ZR 218/03, 14.

[59] Baums, *Haftung wegen Falschinformation des Sekundärmarktes*, ZHR 167, 2003, 139, 181.

[60] Baums, ed., BERICHT DER REGIERUNGSKOMMISSION CORPORATE GOVERNANCE, Rn. 186 (2001).

[61] http://www.bundesregierung.de/en/Latest-News/Press-Releases-,10156.471243/pressemitteilung/Federal-Government-to-improve-.htm.