

Liability of the prospectus –
A comparison between South Africa and Germany

by

Jan Hendrik Zschiesche, ZSCJAN001

SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in fulfilment of the requirements for the degree LL.M.

Faculty of Law
UNIVERSITY OF CAPE TOWN

15.09.2007

Prof. Dr. Michael Larkin; Department of Commercial Law; University of Cape Town

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the LL.M. in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of LL.M. dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

The copyright of this thesis vests in the author. No quotation from it or information derived from it is to be published without full acknowledgement of the source. The thesis is to be used for private study or non-commercial research purposes only.

Published by the University of Cape Town (UCT) in terms of the non-exclusive license granted to UCT by the author.

DECLARATION

I, Jan Hendrik Zschiesche, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

I authorise the University to reproduce for the purpose of research either the whole or any content in any manner whatsoever.

Signature:

Date: ...15.09.2007...

UNIVERSITY OF CAPE TOWN

FACULTY OF LAW

PLAGIARISM: DECLARATION TO BE MADE BY STUDENTS

The following declaration is to be completed and included each time an essay is submitted for assessment. The principles contained in the declaration apply also when submitting other forms of written work, but you may be instructed that a declaration is not necessary. In other words, plagiarism in any form is always not allowed, but you may not have to submit a declaration with each piece of written work handed in for assessment in this faculty.

DECLARATION

1. I know that plagiarism is wrong. Plagiarism is to use another's work and pretend that it is one's own.
2. I have used the footnote* convention for citation and referencing. Each contribution to, and quotation in, this **thesis** from the work(s) of other people has been attributed, and has been cited and referenced.
3. This **thesis** is my own work.
4. I have not allowed, and will not allow, anyone to copy my work with the intention of passing it off as his or her own work.
5. I acknowledge that copying someone else's assignment or essay, or part of it, is wrong, and declare that this is my own work.

Signature:.....  Student No...ZSCJAN001

* NB No other convention of referencing is permitted in the Law Faculty.

Table of Contents

Table of Contents	I
I. Introduction	1
II. German Capital Market Law in general.....	3
A. The Market Segments	4
1. The Official Market – The German Big Board.....	4
2. The Regulated Market.....	4
3. The Regulated Unofficial Market.	5
4. The Derivative Market.....	5
III. European Capital Market and Stock Market Law.....	6
IV. South African Capital Market Law in general	9
A. Main Board	9
B. Development Capital Market (“DCM”).....	10
C. Venture Capital Market (“VCM”)	10
V. History of Liability of the Prospectus in Germany	11
VI. Liability of the prospectus at issue of risk-papers in Germany	13
A. Claim in Corporate Law.....	13
1. The Term: Prospectus	13
B. The BörsG (Börsengesetz – Stock Market Law)	14
1. Essential Rules and Regulations	14
a) §§ 44, 45 BörsG (Untrue Prospectus / Liability to pay damages)	14
(1) Objective Requirements of the Provision	15
(a) Guarantor of the Prospectus.....	15
(i) Issuer	16
(ii) Issuing attendant.....	16
(iii) Initiator of the Prospectus	17
(iv) Others	17
(v) BaFin/ Admission Office	17
(b) False or Incomplete Statements	17
(i) Facts, Value Judgements, Prognoses, Overall Impression.....	18
(ii) Criterion	18
(iii) Moment of appraisal	18
(iv) Falseness	18
(v) Incompleteness	19
(vi) Statements of a third Person, Rating, Future relating Statements, As-if-closings	19
(c) Updating and Adjustment	19
(i) Updating.....	20
(ii) Adjustment	20
(iii) Room for adjustments	21
(d) Deficiencies with the design of a Prospectus.....	21
(e) Meaning of Incorrectness/ Incompleteness (Essentiality)	21
(f) Caused by the prospectus issued risk-papers	22
(g) Issued caused by the publication of the prospectus	22
(h) Domestic Business (in Germany)	22
(2) Subjective Requirements of the Provision / Guiltiness.....	22
(3) Size of the compensation	23
(4) Disclaimer	23
(a) Individual Exculpation.....	23

(b)	General Exculpation.....	23
(i)	Exculpation because of proof about lacking liability justifying causation	23
(ii)	Exculpation because of proof about lacking liability expletive causation	23
(iii)	Contributory Negligence.....	24
(iv)	Correction.....	24
(v)	Exculpation only for the Summary	24
(5)	Burden of Proof.....	24
(6)	Other possible basis for claims	25
b)	§ 47 BörsG (No limitation of liability).....	25
C.	The WpPG (Wertpapierprospektgesetz – Risk-Paper Prospectus Act)	26
1.	Essential Rules and Regulations:.....	26
a)	§ 3 WpPG (Duty to publish a prospectus and exceptions according to the kind of offer)	26
(1)	Requirements of the duty of the prospectus § 3 I 1 WpPG	27
(2)	Exceptions for certain kinds of offers § 3 II WpPG	27
(a)	Qualified Investors.....	27
(b)	Limited person subgroup	28
(c)	Division into shares and Minimum purchase price.....	28
(d)	Kleinstemission (Mini issue of share).....	28
(e)	Resale.....	28
(3)	Legal Consequences of breach of Duty of the Prospectus.....	28
(a)	In General.....	28
(b)	Consequences of closed deals.....	29
b)	§ 5 WpPG (The Prospectus).....	29
(1)	Basics	30
(2)	Truth of the Prospectus	30
(3)	Clarity of the Prospectus.....	31
(4)	Summery	31
D.	The VerkProspG (Verkaufsprospektgesetz - Sales Prospectus Law)	32
1.	Structure of the Law.....	32
2.	Applying the law.....	32
3.	Essential Rules and Regulations	33
a)	§ 13 VerkProspG (Liability of the defect prospectus).....	33
(1)	Coverage	33
(a)	Also Applying on the prospectus after the WpPG.....	33
(b)	Prospectus for already licensed Risk-Papers	33
(2)	Regulation of liability	34
(3)	Variations in § 13 I Nr.1, 2 and 3 VerkProspG.....	34
(4)	Temporal Coverage.....	35
b)	§ 13a VerkProspG (Liability in the case of a non existant prospectus).....	35
(1)	History.....	36
(2)	Requirements of the provision	37
E.	Claim in Civil-Law	37
1.	The Term Prospectus in Civil-Law.....	37
2.	§ 823 II BGB i.V.m. § 264a StGB.....	39
a)	Elements of § 823 II BGB i.V.m. § 264a StGB.....	39
(1)	Violation of a Protective Law	39
(2)	Unlawful	41
(3)	Intention	41

(4) Causation.....	41
(5) Damage/ Loss.....	41
b) Legal Consequences.....	41
3. § 826 BGB	42
a) Elements of § 826 BGB	42
(1) Violation of Good Faith / Act Contra Bonus Mores.....	42
(2) Intention	42
b) Legal Consequences.....	43
VII. Liability of the prospectus at issue of risk-papers in South Africa.....	44
A. Claim in Corporate Law.....	44
1. The Term: Prospectus	44
2. Liability for Falsification in Prospectuses	44
3. Statutory Civil Liability	45
4. Essential Rules and Regulations	45
a) Section 144 Offers not being offers to the public.....	45
Objective Requirements of the Provision - The single exemptions.....	46
(1) Paragraph a.....	46
(2) Paragraph b	46
(3) Paragraph c.....	46
(4) Paragraph d	47
(5) Paragraph e.....	47
(6) Paragraph f.....	47
(7) Paragraph g	47
b) Section 160 Liability for Untrue Statements in the Prospectus	47
(1) Objective Requirements of the Provision	49
(2) Disclaimer	50
(3) Legal Consequence	52
c) Section 161 Liability of Experts and Others.....	52
(1) Objective Requirements of the Provision	53
(2) Exemptions	53
d) Section 162 Offences in respect of false statements in prospectus.....	53
(1) Objective Requirements of the Provision	54
(2) Exemptions	54
B. Common Law Civil and Criminal Liability.....	55
1. Criminal Liability.....	55
a) Misrepresentation.....	56
b) Prejudice	56
c) Causation.....	57
d) Intention	57
e) Legal Consequences.....	58
2. Civil Liability.....	58
a) Fraudulent Misrepresentation	58
(1) Precontractual false statement of fact	59
(2) Wrongful / Unlawful misrepresentation	59
(3) Causation.....	59
(4) Other Party	59
(5) Intention	59
(6) Legal Consequences.....	59
b) Negligent Misstatement	60
(1) Negligence	60
(2) Duty.....	60

(3) Legal Consequences.....	61
VIII. Varieties	62
A. Burden of Proof.....	62
B. Liability of Experts	63
C. Exemptions	64
D. Material Facts.....	65
E. Knowledge of Misrepresentation	66
F. In Criminal Law	67
G. Distinction of acquirer	67
IX. Conclusion	70
Bibliography	72
Books/ Commentaries	72
Cases	75
Articles/ Journals	78

I. Introduction

A levelled basis of information for all market participants, market transparency as well as the integrity of the market are indispensable prerequisites for the protection of financial investors. However, any legislative protection of investors does not aim to reduce the typical investment risks of risk papers but rather to lower risks which exceed those typical risks.¹

In Germany several instruments like stock exchange supervision, supervision of admission or market segmentation have been created in order to protect investors. The protection of investors and their rights has become a central element of the capital market law, supplementing sections of the corporate law.²

Regarding the protection of investors a distinction has to be drawn between the protection of the individual and the protection of collectives.

The Sections about the formation of a company including the liability of the incorporators and the tiers in the German Stock Corporation Law as well as the sections about investment in the German Group Law to protect minorities are legal tools for the protection of individuals.³

However, the legal order of the stock market is also affected by the protection of the investors, albeit the aim of the protection is the function of the capital market and the institution "Stock Market" and the protection of the individual is excluded explicitly.⁴

Nevertheless the protection of the function of the capital market is also the protection of investors, because even the perfect protection of the investor legal position is useless, if the stock market is endangered and can not fulfil its role in an adequate way.

In Germany protection of investors is a combination of both protected areas, the protection of the individual in first place on the one hand and the protection of the "Stock Market as a whole" on the other.

One of the most important legal tools for the protection of individuals is the liability for prospectus.

The prospectus, which is necessary for the admission of papers into the trade market, has to inform the investor truthfully and completely about the paper itself as well as the issuer.⁵ Hence the liability for the prospectus protects the investor against unfair offers of papers.

¹ Fleischer, Gutachten F für 64. DJT, 2002, S.F13 (Expertise F for 64. GJC); Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 77

² Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 77

³ Kübler, Gesellschaftsrecht (Company Law), 2004, §§31 I 1 and 18 II; Clausen/ Korth, Köln. Komm. z. AktG, (Cologne Commentary for Companies Act) 2. Aufl., § 264 HGB Rn 14

⁴ Kumpel, Bank- und Kapitalmarktrecht, 2004., Rn. 8.173 ff.; Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 77

⁵ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 80.

Dogmatically the liability for the prospectus is a liability *ipso iure*, in other words a liability resulting from reliance by virtue of law, because of the lack of a contract between the claimant and the tortfeasor.⁶

Because of the reformation of the relevant laws there are some open questions regarding the relationship between these new specialised sections of the German *Börsengesetz* (Stock Exchange Law) as well as the new *Verkaufsprospektgesetz* (Sales Prospectus Law) and *Wertpapierprospektgesetz* (Securities Prospectus Law) (laws which are based on the Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003) to German *Bürgerliches Gesetzbuch* (Civil Law) or German *Handelsgesetzbuch* (Commercial Law).

In South Africa on the one hand the source for the liability of the prospectus is the common law and on the other hand the company code.

This thesis aims to elaborate on the aforementioned liability for the prospectus. The first part of the work will describe the new system of liability for the prospectus in Germany with its historical background as well as its development and question the need for the fairly new regulations. For this purpose the differences between the liability for the prospectus according to the German Stock Exchange Law and the general German civil liability for the prospectus as well as the *Verkaufsprospektgesetz* and *Wertpapierprospektgesetz* will be examined. To ease the understanding of the German system I will focus on the sections which deal only with the liability. Therefore I will summarize the objective and subjective requirements, and how they are linked as well as their legal consequences.

Subsequently the second part will draw a comparison between the legal situation in South African and Germany. Intensive attention to the source of liability and the scope of liability in South Africa will thus be paid.

⁶ Canaris, *Bankvertragsrecht*, 2005, Rn. 2277; Siol, in *Bankrechts- Handbuch*, 2006, § 45 Rn. 25.

II. German Capital Market Law in general

The term “Kapitalmarktrecht” (Capital Market Law) is sourced in the anglo-saxon area. Object of regulation of the capital market law is, the market, where capital investments/ assets are offered and demanded, primarily the stock market.

However, the German Capital Market Law is not confined to the stock market, otherwise known as the secondary market, it also includes the initial process whereby the company makes investment opportunities, by means of shares or debentures, available to investors, the primary market.⁷

The Capital Market Law not only regulates the capital market itself, but also the right of admission to the market, the deals on the market and the monitoring and observation of the traders.

The aim of the Capital Market Law is to maintain fair conditions for all competitors, to protect investors and to support the efficiency of the market. It is protection of the individual and protection of the function.⁸

Capital market law is part of commercial law, because of the governmental duty to regulate the entire economy of Germany, to secure justice. Capital market law is public law as well as private law.⁹ Capital market law is unlike the **German Companies Act (Aktengesetz AktG)**, which is directed to each and every participant of the capital market no matter what kind of legal form.

Every product which is traded on an official governmental stock market is included by the German Capital Market Law.

The governing laws of the Stock Market are the **German Stock Exchange Law (Börsengesetz)** and the **German Securities Trading Act (Wertpapierhandelsgesetz WpHG)**. These are supplemented by the **Stock Market Admission Directive (Börsenzulassungsverordnung)** which regulates the listing requirements of risk-papers at the Stock Market.

Because the expectations of issuers and investors differ so markedly from each other in terms of risk-chance relation, that risk-papers vary in quality. A number of different markets for these risk-papers also exist. The multiplicity of market segments is a characteristic of the German Stock Market, albeit not always a positive one.¹⁰ The separation of the segments is flawed: the process by which all the risk-papers are separated has been designed inaccurately,

⁷ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 1a.

⁸ Hopt, in ZHR (Journal for Trade Law) 141 (1977), S.429, 431.

⁹ Kümpel, Kapitalmarktrecht, 2004, p. 88 ff.

¹⁰ Hansen, in AG-Report 2002, S. R 76.

there are too many segments for the 1000 listed German shares, the system has not been met with international approval as of yet.¹¹

The Cash Market is divided into three segments, while the Official Market subdivided into “General Standard”, “Prime Standard”, the Regulated Market, and the Regulated Unofficial Market.¹² Alongside the Cash Market the Unregulated Market exists which is not related to the Stock Market and the Derivatives Market. At the Derivative Market the risk-papers are traded at a fixed date in the future and not on a buy and deliver immediately basis.

It is important, however, not to mistake the trading segments with the market segments. Trading segments refer to the ways in which the trading and pricing is regulated either by electronic methods, like XETRA, or intermediary methods with lead brokers.

A. The Market Segments

1. The Official Market – The German Big Board

A supervisory institution of a stock market licenses risk-papers before they are traded at the Official Market. This means that the risk-paper has to go through a licensing procedure. The supervisory institution determines whether there “are no circumstances, which will lead to a overreaching of the public or a damnification of significant general interests by licensing the risk-paper”, (§ 30 III Nr.3 BörsG).

The supervisory institution therefore checks the validity of the application and whether any special risks need to be considered.¹³

Only shares of companies formed in Germany and those companies with global importance usually choose to trade on this market.

2. The Regulated Market

In 1988 the Regulated Market was founded to strengthen the appeal of the German Financial Community.¹⁴

Much more important, however, was the aim to restrict access to the Stock Market for small to medium-sized businesses and to cover the lack of equity capital in these businesses.¹⁵

The stringent criteria as well as the high costs of the license, were too much for small to mid-sized businesses and curtailed their access to the Stock Market.¹⁶ Enter the Regulated Market,

¹¹ Hansen, in AG-Report 2002, S. R 76; Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 40

¹² Till 31.12.2003 existed a further market the New Market, this segment was reorganised in the mid of 2002 and was included to the Regulated Market completely from the 1st January 2004

¹³ Schwark, in NJW 1987, 2041; Horn, in ZIP 1987, 1225, 1232; Bruns/ Rodrian/ Stoeck, 1990, §36 BörsG, Anm.27ff.

¹⁴ BT-Dr. 10/4992 (Official Statement in Bundestag Drucksachen)

¹⁵ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 43

¹⁶ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 44

with its less prohibitive regulations, no prospectus is necessary a company report is sufficient, and less expensive licensing costs, not more than 50% of the fees for admission to the Official Market.

These “less strict” regulations should not be confused with the deregulation of the **German Small Companies Act (Gesetz für kleine Aktiengesellschaften und zur Deregulierung des Aktienrechts, BGBl.I 1994, S.1961)**, an amendment of the AktG (Companies Act).

Most companies, that want to claim on the deregulation for small companies, are debarred and do not have access to the Regulated Market.

3. The Regulated Unofficial Market.

This segment is, as its name suggests, dominated by liberality. The Regulated Unofficial Market is partly regulated in § 57 AktG (Companies Act). This Section refers to trade-directives. In § 57 III AktG (Companies Act) the supervisory authority is empowered to enjoin the risk-paper from trading in this segment.

Risk-papers, that are not authorised to be traded on the Big Board or on the Regulated Market, but have been included by the Committee for the Regulated Unofficial Market (Freiverkehrsausschuss), are allowed to be traded between brokers and credit institutions.¹⁷

These trades are based on the German Civil Law.

As authorisation to the Regulated Unofficial Market is heavily simplified, the perpetual disclosure requirements are simplified as well.¹⁸

It is, for example, completely sufficient for the decision of authorisation for a risk-paper of the Committee for the Regulated Unofficial Market to be placard on the trading floor or for the table of prices to be published in a newspaper, neither a prospectus nor a company report is necessary.

Furthermore, according to the Stock Market Law, only the lead broker in charge for price fixing and the editing committee has to be informed about general meetings, dividend distributions, and capital increases.

4. The Derivative Market

The Derivative Market, unlike the other markets, does not trade risk-papers on a buy and deliver immediately basis. The day on which a deal is made and the date of implementation could be a separated by a lengthy period of time.

¹⁷ Brechmann, Wertpapiere in Theorie und Praxis, 2006, p. 58

¹⁸ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 50

Future trading is a trading transaction with deferred implementation. In other words, it is a legal transaction which is to be implemented on a certain date,¹⁹ speculation and hedging giving appreciation to this segment.²⁰

Example: A wants to acquire shares of company X to the actual quotation but does not want to use the full amount. Therefore A buys call options of these shares at the 1. January 2006 as at 19. June 2007 (single bargain). In such a manner A secures the present price for himself.

III. European Capital Market and Stock Market Law

In Europe the Capital- and the Stock Market Law of the member states of the European Union is subject to supervision of the European Lawmaker. In future there will be no significant changes without the influence of European legislation.²¹

The legal basis of the European Capital- and Stock Market Law is Art. 2 EWGV / EEC (Vertrag zur Gründung der Europäischen Wirtschaftsgemeinschaft/ European Economic Community Treaty) which regulates the creation of a common market, and Art. 3 lit. c which assigns the task of capital transfer between the member states to the European Community.²²

Furthermore, Art. 54 II, III lit. g EGV / ECT (Vertrag zur Europäischen Union / Treaty of European Community) regulates the protection of the shareholders, creditors and obligees.

This Article effectively integrates capital market law in the EC.²³ All these directives were introduced with the aim of assimilating the Capital and Stock Market Law of the member states of the EC. To create European internal market, a European Currency Union is not possible without an integrated Capital Market.²⁴ It is believed that an assimilated framework of laws is better suited to the European Capital Market in terms of optimal money raising and allocation in just one market because of increased financial solvency and fewer transaction costs. This will hopefully influence the creation of an equivalent counterpart in the US- Stock Market, Wall Street.²⁵ These aims of an integrated Capital Market are rather accomplishable with assimilated laws as with a different legal system in every member state.

¹⁹ BGHZ 92, 317, 320; Bundschuh, WM 1986, 725, 726.

²⁰ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 53.

²¹ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 11.

²² Assmann, Europäisches Wirtschafts- und Steuerrecht, 1990, p. 110; Seidel, in FS Lukes, 1989, p. 575.

²³ Onderka, in Hading/ Schneider, Beiträge zum Börsenrecht, 1987, p. 9-22.

²⁴ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 11.

²⁵ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 11.

However, for this intention of integration absolute assimilation of the Capital Market Law, the Capital Market System in the EU, like a single European Stock Market or a single Supervisor of Risk-papers is not mandatory.²⁶

The aims of the regulations of the Capital and Stock Market Law of the EU is the protection of investors; the creation of a network of all the European Stock Markets; a broader range of products and a increase of profits.²⁷ Creation of freedom to provide service and freedom of establishment are aims alongside the aims mentioned before.

Ironically, however, its liberalisation beyond national boundaries is, at the same time an act of deliberalisation within national boundaries.

However, the whole structure of the European Capital Market Law is based on the principle of subsidiarity, Art. 3 b II EGV/ ECT, Art B EUV/EUT. The following are the main aims:

A Minor aim of European Capital Market Law is to create a single Stock Market authority. Risk papers authorised at one Stock Market of the EC are automatically deemed valid by all EC Stock Markets because of the “Single-license-princip” – also known as “Europa- Pass” in the European Law System.²⁸

Mutual acceptance of pre-listing statements have been in effect since 1987. This has been brought about by a directive of the EC. The quality standard of the pre-listing statement is an essential condition, however.²⁹

This standard is regulated by the European legislation by the directive for the prospectus of issue, which sets minimum requirements for prospectus which are issued to the public for the first time.³⁰

Besides this basic principle of simultaneous authorisation, the protection of the investor forms a further characteristic of the European legislation.

In 1982, it became compulsory for the issuer to publish at least one interim report per a business year.³¹

This was followed by the directive on insider trading in 1989³² and the directive on security services in 1993³³, the latter regulating the markets and investment firms, such as broker and other market participants. Furthermore there is a directive circumscribing the amount of capital of investment firms and credit institutions which determines assets and funds according to

²⁶ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 11.

²⁷ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 13.

²⁸ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 14.

²⁹ Richtlinie 87/345/EWG, ABl. Nr. L 185 v. 4 Juli 1987, S. 81 (Directive 87/345/EEC, ABl. Nr. L 185 4. July 1987, P. 81)

³⁰ ABl. Nr. L 124 v. 5 Mai 1989, S. 8

³¹ ABl. Nr. L 48 v 20 Februar 1982, S. 26.

³² Directive 89/592/EEC.

³³ Directive 93/22 EEC, Abl. EC 1993, L 141/27.

the daily business of the broker.³⁴ These institutions can receive the “Euro-Pass” as soon they provide proof of the existence of sufficient available funds.

The directive on transparency protects investors through the notification requirement for acquisition of shares and the voting rights and code of conduct for security services.³⁵

An improvement of the integration of the Stock Market Law is expected due to the implementation of the “Financial Services Action Plan” and the Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of February 2001, the so called “Lamfalussy Report”. Both the report and the plan deal with comprehensive proposals for further schemes to create a uniform domestic market for financial services.

The integration of several European supervisory bodies for risk papers and the subsequent creation of the Forum of European Securities Commission (FESCO), founded in 1997, of which the International Organisation of Securities Commissions (IOSCO),³⁶ is one such example, is another contributing factor to the integration of the Stock Market.

In future the standards and recommendations designed by FESCO will become increasingly relevant in the European Union.

³⁴ Directive 93/6 EEC, Abl EC 1993 L 141/1

³⁵ Directive 97/9 EC of the European Parliament and of the Council of 3 March 1997; Directive 88/627 EEC, Abl. EC 1988, L 248/62.

³⁶ Clausen, Bank- und Börsenrecht, 2003, §9 Rn. 15.

IV. South African Capital Market Law in general

In South Africa the Capital Market Law is part of the Company Law. The capital market is separated into primary and secondary markets.

The Primary market is the market through which the company, makes investment opportunities available to investors and subsequently receives proceeds in return.³⁷

The secondary market is the market where the investors trade their shares or debentures and get the proceeds and not the company.³⁸ These two markets are totally separate, although the success of the primary market depends on the efficacy of the secondary market, and notwithstanding the sections of both are placed close in the Companies Act.³⁹

In South Africa the secondary market is organised at the stock exchange in Johannesburg.⁴⁰ At the stock exchange an association of persons trade for themselves or on behalf of others in shares contained in a list maintained by the association.⁴¹

The stock exchange was regulated by the Stock Exchange Control Act 1 of 1985, and is now regulated by the Securities Services Act 36 of 2004.

Only listed securities are allowed to be traded on the JSE, this list is kept by the committee of the JSE added to which are the requirements for securities.⁴²

There are three lists, also called "boards", with different requirements for listing to meet the needs of different kinds of companies.⁴³

A. Main Board

For listing on the main board the company needs a subscribed capital of at least R 2.000.000 in the form of not less than 1.000.000 equity shares in issue, and a satisfactory profit record for the preceding three years, with a current audited profit level of at least R 1.000.000 before taxation.⁴⁴

Furthermore 10% of each class of equity must be held by the public, and the number of public shareholders must be at least 300 for equity shares, 25 for preference shares and 10 for debentures.⁴⁵

The minimum price of securities for an initial issue must be at least 100c.⁴⁶

³⁷ Cilliers&Benade, 2005, p. 16.03.

³⁸ Cilliers&Benade, 2005, p. 16.03.

³⁹ Cilliers&Benade, 2005, p. 16.03.

⁴⁰ Cilliers&Benade, 2005, p. 16.19.

⁴¹ Cilliers&Benade, 2005, p. 16.19.

⁴² Cilliers&Benade, 2005, p. 16.20.

⁴³ Cilliers&Benade, 2005, p. 16.20.

⁴⁴ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁴⁵ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁴⁶ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

B. Development Capital Market ("DCM")

The requirements for the DCM are less rigid, for this board the company needs a subscribed capital of at least R 1.000.000 in the form of not less than 1.000.000 shares in issue. The profit record has to be satisfactory for the last 2 years, with a current audited profit level of at least R 500.000, before taxation.⁴⁷

Similarly shares held by the public, are required to comprise 10% of each class of equity share.⁴⁸

Here the number of public shareholders must be at least 75 for equity shares, 25 for preference shares and 10 for debentures.⁴⁹

For this board the minimum initial issue price of securities must be at least 50c.⁵⁰

C. Venture Capital Market ("VCM")

For this market the requirements are the easiest to meet of all the three markets. The subscribed capital has to be at least R 500.000 in the form of not less than 1.000.000 equity shares in issue, and no record of profit. It is sufficient to list an above average expectation of future earnings.⁵¹

Furthermore, only 5% of each class of equity shares must be held by the public and these shares have to be separated in such a way that at least 75 shares are equity shares, 25 preference shares and 10 debentures.⁵²

The minimum initial issue price of securities must be at least 50c.⁵³

However, there are some additional requirements. The majority of directors and managers should hold successful records of achievements, and the prospectus or pre-listing statement must contain a warning about the speculative nature of an investment in such a company.⁵⁴

⁴⁷ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁴⁸ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁴⁹ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁵⁰ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁵¹ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁵² See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁵³ See s. 4 of The Johannesburg Stock Exchange Listing Requirements.

⁵⁴ See s. 6 and s. 7 of The Johannesburg Stock Exchange Listing Requirements.

V. History of Liability of the Prospectus in Germany

The duty and liability of the prospectus have been delineated in the §§ 38 II, 43, 44 BörsG of 1896, in which the authorisation of risk-papers for the so called Official Market, is discussed.⁵⁵

However, the duty of a prospectus for risk-papers which belong in the Regulated Unofficial Market or when no stock exchange trading was planned are not broached in the 1896 Act.⁵⁶

It was realised early on that there specialised regulations failed to meet the needs and an all-encompassing system can therefore not be created.⁵⁷

Already in 1974 a commission against white-collar crime emphasized the responsibility of the prospectus in financial investment as well as the expertise by Hopt for the 51st Deutsche Juristentag (German Jurist Day).⁵⁸

The issue of the introduction of a Government bill based upon this expertise was not discussed during the legislative period nor was it dealt with during the following years.⁵⁹

It was in 1990, with the conversion of the DIR 89/298/EEC, coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (Emissionsprospektrichtlinie) into the *Verkaufsprospektgesetz* (Sales Prospectus Law), that progress was finally made in this regard.

For the first time in Germany the liability of the prospectus for all risk-papers which are offered to the public for the first time, and are not licensed on a national stock exchange come into effect.⁶⁰

With the introduction of the Sales Prospectus Law change took place within the BörsG, VerkProspG and the now called InvG (formerly known as KAGG/AuslInvG). This trias was now responsible for the liability of the prospectus of risk-papers.⁶¹

In 1998 the liability of the prospectus of the BörsG and of the VerkProspG was substantially changed by the Third Financial Market Development Act (Finanzmarktförderungsgesetz). By the time the third Financial Market Development Act (Finanzmarktförderungsgesetz) was passed, the former claim for liability of the prospectus, regulated in § 45 BörsG a.F. and § 46 BörsG a.F. and the circumstances and requirements to assert a claim were altered significantly. The fourth Financial Market Development Act reformed the census, and informs today.

⁵⁵ Schäfer, in ZGR 2006, 40, 40.

⁵⁶ Schäfer, in ZGR 2006, 40, 40.

⁵⁷ Schäfer, in ZGR 2006, 40, 41.

⁵⁸ Kohl/ Kübler/ Walz/ Wüstrich, in ZHR 138 (1974), 1ff.; Hopt, Gutachten G, 1976, S. G 130ff.

⁵⁹ Assmann, Prospekthaftung, 1985, p.77f.; Wiedmann, Gesellschaftsrecht (Company Law), Bd. I, 1980, 475;

Schäfer, in ZGR 2006, 40, 41.

⁶⁰ Schäfer, in ZGR 2006, 40, 42.

⁶¹ Schäfer, in ZGR 2006, 40, 42.

These changes in terms of investment law have all aided in the formation of contemporary regulations regarding the prospectus.⁶²

However, the passing of the *Anlegerschutzverbesserungsgesetz AnSVG (Improvement of Protection of Investors Act)* in October 2004 was of utmost importance.⁶³

Finally, 30 years after the recommendations of Kohl/ Kübler/ Walz/ Wüstrich, Hopt were made and the 51st German Jurist Day occurred in Germany the liability of the prospectus for risk-papers in the “Grey Market” also known as the Regulated Unofficial Market, was promulgated in 1976.

At the same time the AnSVG curtailed the flagrant disregard for the protection of investors at the Official Market as well as the Grey Market.⁶⁴ For the first time this law state explicit that the liability of the prospectus by a missing prospectus, and extended investments in closed funds.

Per legislation over the last 15 years the law of the prospectus was completed significantly and is covering now all fundamental areas of the trade of investments.

Whether this is the final aim or not is debatable. In Detail certain regulations contain inconsistencies in weighting facts, spurious exceptions, deficit of regulation and protection as well as regress compared to the standards developed by jurisdiction.

⁶² Schäfer, in ZGR 2006, 40, 42.

⁶³ Schäfer, in ZGR 2006, 40, 42.

⁶⁴ Schäfer, in ZGR 2006, 40, 43.

VI. Liability of the prospectus at issue of risk-papers in Germany

To understand the liability of the German system it is important to understand the separation of the particular laws and the way how they interact. The WpPG (Wertpapierprospektgesetz – Risk-Paper Prospectus Act) is the basic law, in this regard. This law regulates all issues concerning a risk-paper. Whenever a legal issue involves a risk-paper, this law applies. The BörsG (Börsengesetz – Stock Market Law) deals with risk-papers which are dealt with on the regulated market. The main purpose of the VerkProspG (Verkaufprospektgesetz - Sales Prospectus Law) is to deal with offers of not in risk-papers certified financial assets to the public (Trust funds, or a membership on a closed corporation for example). Only §§ 13, 13a VerkProspG apply for risk-papers as well.

These laws interact in a certain way, the WpPG is the basic and only law if a risk-paper is offered to the public. If the risk-paper is supposed to be traded on the stock market, the BörsG comes into play with its specialised sections. From that moment on the regulations of the BörsG apply in addition to the WpPG. In the case that a section in both laws deals with the same issue, the section of the specialised BörsG applies. For the VerkProspG counts the same.

A. Claim in Corporate Law

1. The Term: Prospectus

The core of each liability of the prospectus is the prospectus itself. In Germany the law counts hereunto – without definition by law – the prospectus of authorisation to the exchange market (Börsenzulassungprospekt) according to § 30 II 2 BörsG, the company report (Unternehmensbericht) according to § 51 I 2 BörsG, the sales prospectus (Verkaufprospekt) according to §§ 1, 8 f. VerkProspG as well as the written report according to §§ 44 IV BörsG, 13 I VerkProspG publication of which replaces the issuer's duty to publish a prospectus (Prospektersatz).

Because of the clear language and formulation used in the regulations, the term prospectus does not suits for interim reports (Zwischenbericht), according to § 40 BörsG, publications according to § 39 I 3 BörsG in connection with §§ 63 to 68 BörsZulV (Börsenzulassungsverordnung/ **Stock Market Admission Directive**), Ad-hoc-reports according to § 15 WpHG (Wertpapierhandelsgesetz/ **German Securities Trading Act**) and comparable publications like invitations of subscriptions and subscription rights.⁶⁵

⁶⁵ BGH NJW 1982, 2827ff.; Assmann, in AG 1996, 508, 512ff.

B. The BörsG (Börsengesetz – Stock Market Law)

The German BörsG of 1896, was a forerunner in European Stock Market regulations.⁶⁶

Whether marginal or fundamental, the more than thirty amendments to this law, turned it into what it is today.⁶⁷

1. Essential Rules and Regulations

a) §§ 44, 45 BörsG (Untrue Prospectus / Liability to pay damages)

§ 44 BörsG (own translation)

(1) The acquirer of risk-papers, which were admitted to quotation on the stock market on base of a prospectus that for valuation of the risk-papers essential, statements, are false or incomplete, is entitled to claim from

1. these persons, who have taken responsibility for the prospectus and
2. these persons, who have issued the prospectus,

the acquisition of the risk-papers for compensation of the purchase price, in as much as the purchase price is not higher than the first issuing price, and the costs which are usually connected to the acquisition, if the acquisition took place after publication of the prospectus and within 6 months after the first issue of the risk-papers. In the case that an issuing price is not fixed, the first price established or formed on the stock market after issuing the risk-paper will be considered as issuing price, in the case of simultaneous established or formed prices on several German stock markets shall the highest price become the considered issuing price. The acquisition of risk-papers of the same issuer, which can not be separated from the risk-papers mentioned in sentence 1, the sentences 2 and 3 are also applicable.

(2) In the case that the acquirer is not any longer owner of the risk-papers, he is entitled to claim compensation for the difference between the acquisition price, in as much as the purchase price is not higher than the first issuing price, and the amortisation price of the risk-papers, and the costs which are usually connected to the acquisition. Subsection 1 sentences 2 and 3 are applicable.

(3) If risk-papers of the issuer, with a domicile abroad are listed on a stock market overseas as well, the claim mentioned in subsection 1 and 2 only exist, if the risk-papers were acquired completely or partly in Germany fulfilled by a risk-paper-service.

(4) A written report is considered as prospectus, if this report frees the issuer of his obligation of issuing a prospectus.

§ 45 BörsG (own translation)

(1) The claim in § 44 is not applicable against, who can proof, that he did not know about the false or incomplete statements in the prospectus and this ignorance was based on gross negligence.

(2) The claim in § 44 does not exist, if

1. the risk-papers were not acquired because of the prospectus,
2. the factual situation, the false and incomplete statements in the prospectus are related to, did not caused the decrease of the stock market price of the risk-paper,
3. the acquirer knew about the falseness and incompleteness at the time of acquisition,
4. before the acquisition deal was closed, a clear correction was published in Inland either within the annual report or an interim report by the issuer, or a publication in terms of § 15 WpHG or a comparable publication or

⁶⁶ Groß, Kapitalmarktrecht, 2006, Vorbm. BörsG Rn.1.

⁶⁷ Groß, Kapitalmarktrecht, 2006, Vorbm. BörsG Rn.1.

5. the claim only results from statements in the summary or from a translation, unless the summary is misleading, false or inconsistent, when it got read in connection with other parts of the prospectus.

(1) Objective Requirements of the Provision

Subject of the liability of the prospectus of the Stock Market law is the prospectus by which the risk-papers got admission to quotation according to § 44 I 1 BörsG.

Indeed, there is no statutory definition of the prospectus of the Stock Market law in § 44 BörsG. According to § 44 I BörsG, however, only these kind of descriptions are prospectuses, in which the risk-papers got admission to quotation.⁶⁸

Prospectuses as outlined by § 44 BörsG are only regarded as the **stock exchange admission prospectus** according to §§ 30 III Nr.2 in connection with the WpPG.⁶⁹ Thereby it is only important that the admission was allowed by virtue of the prospectus, irrespective of whether a duty of a prospectus consists and whether the prospectus meets all the necessary requirements.⁷⁰

Similarly § 44 BörsG states that written descriptions by virtue of their publication the issuers were exempt from the duty of publishing of a prospectus while gaining admission to the Stock Market.⁷¹

This explicit definition of the prospectus as a Stock Market admission prospectus in § 44 IV BörsG justifies the fact that the liability of the Stock Market prospectus, chosen to avoid that all information and information carrier which are connected with the preparation of an offer of risk-papers is covered by the liability of the Stock market prospectus.⁷²

For this reason reference bids, subscription calls, research-reports, interim reports or ad-hoc-notes are not considered prospectus' in terms of the stock market law.⁷³

(a) Guarantor of the Prospectus

According to §§ 44 f. BörsG are accountable to the Stock Market for liability of the prospectus all persons who take responsibility for the prospectus, and all persons who issue prospectus.

It should be noted that people who issue prospectus are deemed responsible for those prospectus' that they issue, as are people who sign them.⁷⁴

⁶⁸ Ehrlicke, in Hopt/ Voigt, p. 187, 193f.; Ellenberger, 2001, p. 11.

⁶⁹ Mülbart, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.8.

⁷⁰ see § 1 III WpPG

⁷¹ Pöttsch, in WM 1998, 949, 951

⁷² Ehrlicke, in Hopt/ Voigt, p. 187, 194; Mülbart, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.12.

⁷³ Assmann, in Hdb. KapitalanlageR, § 7, m.49ff.; Hopt, HGB, 2006, § 44 BörsG, Rn.6; Mülbart, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.12; Schwark in Schwark, 2004, §§ 44, 45 Rn.15f.

(i) Issuer

According to § 5 III 2 WpPG in connection with § 30 II 1 BörsG the issuer signs the licensing of the risk-paper.

(ii) Issuing attendant

The issuing attendant also signs the license, according to § 5 IV 2 WpPG in connection with § 30 II 1 BörsG. In § 5 IV 2 WpPG it is stated that there is no separation between the Official Market and the Regulated Market.

Credit institutions and single financial service providers are issuing attendants, albeit concerning larger issues usually, however, a consortium consisting of a few issuing attendants is the issuing attendant.⁷⁵

The members of the consortium, rather than the consortium itself, are the guarantors of the prospectus.⁷⁶

If different regional consortiums are formed, not all the members of each consortium have to become guarantors of the prospectus.⁷⁷ One reason for this is that not all the members of a consortium fit the criteria of § 30 II 2 BörsG.⁷⁸ Because of this, certain banks with global consortiums form German consortiums, whereby their members can apply for permission to act as issuing attendants and sign the prospectus according to § 5 IV 2 WpPG.⁷⁹

The other members of the consortium can still become guarantors of the prospectus, like their German counterparts, if they are listed on the prospectus according to § 5 IV 1 WpPG. The sole deciding factor in this regard is the arrangement of the acquisition agreement between the consortium and the issuer respective the animation contract between the consortium banks.⁸⁰

Is the prospectus signed thereupon respectively the acceptance of the accountability for the prospectus announced, the signer and announcer guarantee for the prospectus according to § 44 I 1 1 BörsG. Not decisive is whether the certain member of the consortium was actively involved in the process of the creation of the prospectus, what is regularly not the case.⁸¹

Did credit institutes as sub-underwriters took risk-papers from the group of underwriters and do not sign the prospectus or do not announce the accountability for the prospectus, they will

⁷⁴ Assmann, in Hdb. KapitalanlageR, § 7, rn.202; Mülberr, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.38.

⁷⁵ Mülberr, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.42.

⁷⁶ Mülberr, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.42.

⁷⁷ Groß, Kapitalmarktrecht, 2006, §§ 44, 45. BörsG Rn.33

⁷⁸ Groß, Kapitalmarktrecht, 2006, §§ 44, 45. BörsG Rn.33

⁷⁹ Groß, Kapitalmarktrecht, 2006, §§ 44, 45. BörsG Rn.33

⁸⁰ Muster bei Groß, in BuB, Rn.10/325 Ziff. II, Rn. 326 Art. 4(a); Rn.10/333a Rn. 10/333e Section 1(3)(c).

⁸¹ Ellenberger, 2001, p. 26; Schwark in Schwark, 2004, §§ 44, 45 Rn.10.

not become guarantor of the prospectus in terms of § 44 I 1 1 BörsG, even if they are listed as sub-underwriter on the prospectus.⁸²

(iii) Initiator of the Prospectus

The liability of those people who initiated the prospectus covers the actual originator.⁸³ Only those persons shall who do have a commercial interest on the issue be covered by the liability.⁸⁴ The holding company, the majority shareholder, or the leading supervisory board-members who created the prospectus can, under certain circumstances, develop such a commercial interest.⁸⁵

A managing board director of the issuer is, however, also able to develop this interest, but merely holding the position of managing board director is insufficient to justify a liability of the prospectus benefitting the investor.⁸⁶

(iv) Others

Victualers of false material for the creation of a prospectus, like financial auditors, annual auditors, experts and lawyers, shall not be initiators or originators of the prospectus and are consequently, not to be covered by § 44 I BörsG. This applies as long as they just deliver parts of the prospectus and as long as they do not have their own commercial interest in the issue.⁸⁷

(v) BaFin/ Admission Office

The BaFin does not accept any liability with regard to verifying the prospectus, nor is the BaFin an initiator or originator of the prospectus.

This means that the BaFin is not liable in terms of the §§ 44 ff. BörsG.

The same rule holds for the measures of the Admission Office and the Office itself.

However, unaffected remains the official responsibility for malpractice during the verification process respectively the admission process by the BaFin or the Admission Office.

(b) False or Incomplete Statements

The liability of the prospectus requires, furthermore, that the, for valuation of the risk-papers essential, statements, are false or incomplete.

The separation between false and incomplete prospectus does not exist any longer, because of an assimilation of the grades of negligence by the 3rd Financial Market Development Act.

⁸² Hauptmann, in Vortmann, § 3 Rn. 51; Ehrlicke, in Hopt/ Voigt, p. 187, 227f.

⁸³ Assmann, in Hdb. KapitalanlageR, § 7, rn.204.

⁸⁴ Assmann, in Hdb. KapitalanlageR, § 7, rn.204.

⁸⁵ Assmann, in Hdb. KapitalanlageR, § 7, rn.204; Sittmann, in NZG 1998, 490, 493.

⁸⁶ Spindler/ Christoph, in BB 2004, 2197, 2197.

⁸⁷ Ehrlicke, in Hopt/ Voigt, p. 187, 229.

Whether or not the prospectus was accepted by the BaFin is considered irrelevant in the appraisal of falsehood. The examination of the BaFin shall not take the risk of a liability off the guarantors of the prospectus. Rather it shall establish an additional control in the interest of the protection of the individual and the protection of the function of the capital market.

(i) Facts, Value Judgements, Prognoses, Overall Impression

Facts are all incidents noticeable objectively by external perception or states of the outside world. Because each value judgement requires certain facts and consequently, both factors are closely related to each other, false value judgements and prognoses can affect a liability as well as false facts.⁸⁸ It is only the scale of the fault that is different.

Finally, the overall impression with regard to financial standing, profitability, and liquidity position of the issuer must not be false or incomplete.⁸⁹

(ii) Criterion

Essential to an appraisal of the falsehood or incompleteness of a prospectus is an evaluation of the requirements that are demanded from a person addressed by the prospectus in terms of knowledge and comprehension. The Federal Court of Justice (*BGH*) applies on behalf of the “ordinary” investor, who does not necessarily have to be familiar with the special jargon.⁹⁰

The criteria of the “ordinary investor..., who understands a balance but is not necessarily familiar with the special jargon”, is, in terms of the completion of the prospectus, to be particularly considered. This presents a complicated balance, as the ordinary investor, unlike the layman, does not need an explanation for everything, yet, unlike the expert, will need certain explanations.⁹¹ Finally, will this interpretation of the criteria lead to the creation of a more understandable prospectus with explanations to certain items of the balance sheets.

(iii) Moment of appraisal

The moment of appraisal is generally the date of the creation or of the publication of the prospectus, later earned cognitions are not allowed to be used.

(iv) Falseness

Statements are false if they do not comply with the truth. This depends on the time of the publication of the prospectus.⁹²

Value judgements are false if they are not covered by facts or commercially not refundable.⁹³

⁸⁸ BGH, WM 1982, 862, 865; Assmann, in Assmann/ Lenz/ Ritz § 13 VerkProspG Rn. 18; Ellenberger, 2001, p. 32.

⁸⁹ BGH, WM 1982, 862, 865; Ellenberger, 2001, p. 32.

⁹⁰ BGH, WM 1982, 862, 865; Ehrlicke, in Hopt/ Voigt, p. 187, 220.

⁹¹ Mülbart, Unternehmensfinanzierung am Kapitalmarkt, 2005, § 26 Rn.19.

⁹² OLG Frankfurt, WM 1994, 291, 295.

In terms of the falseness of prognoses also it has to apply to the state of knowledge at the time of publication, and the prognosis has to be covered by facts and be commercial refundable also.

The overall impression of the prospectus is considered incorrect when facts, value judgements and prognoses draw in general an untruthful, incomplete or unrealistic overall picture of the issuer, his financial standing, profitability, and liquidity.⁹⁴

(v) Incompleteness

§ 44 I 1 BörsG demands that, in order for risk papers to be valued, the essential statements must be complete. This means that not all requirements for the investment decision essential statements were included in the prospectus. This consequently, means that an incomplete prospectus can be considered as a form of falsehood.⁹⁵

A prospectus which does not contain all of the statements essential for making an investment decision is not just incomplete, it is also false because of the refrained statements as well.

Generally, a prospectus is complete if it meets the needs of § 38 I Nr.2 BörsG and § 7 WpPG regarding the regulations and amendments of the ordinance of the prospectus.

However, exemptions to this basic, general principle of completion are possible in two ways.

In other words, there are certain circumstances possible in which a prospectus could be complete without meeting all the needs of § 7 WpPG, or vice versa, where the prospectus is incomplete notwithstanding meeting the needs of § 7 WpPG.

Consequently, which statements are necessary for a complete prospectus is dependant on the demands of § 7 WpPG, in connection with the regulations and amendments of the ordinance of the prospectus in general, where, due to certain circumstances of each singular case, fewer statements could be necessary as well as more.

(vi) Statements of a third Person, Rating, Future relating Statements, As-if-closings

Negative statements of third persons like ratings of rating-agencies, reports of commercial magazines or newspapers are facts by themselves but the tenor of the report not necessarily.

Even the circumstance under which such a report might exist is not a factor that creates value.

These statements must not be included in the prospectus in general.

(c) **Updating and Adjustment**

Updating and adjustment describe two different problems. Updating requires dealing with the problem until it is resolved. When this occurs, all changes to the original document must be

⁹³ BGH, WM 1982, 862, 865.

⁹⁴ BGH, WM 1982, 862, 865.

⁹⁵ BT-Drs. 13/8933, S. 54, 76, 80.

displayed, together with actual or legal rates, which are essential for the appraisal of the admission of risk-papers in the prospectus.

Adjustment, on the other hand, requires correcting previously incorrect statements before publication.

(i) Updating

§ 5 I 1 WpPG requires that all the essential actual and legal conditions for an appraisal of the risk-papers have to be completely and truthfully displayed in the prospectus.

These conditions may, however, change during the time of creation and admission of the prospectus because of external or internal circumstances.

For this reason, § 16 I 1 WpPG obliges that each essential circumstance, whether it happened before the contract was sealed, or the admission or implementation was in the market, must be amended to the prospectus.

According to § 516 I 1 WpPG, the time limit for updating stock market admission prospectuses is exactly at the time of admission or implementation of the risk-papers for the public market.

This dictate updating is already valid for the process of creating the prospectus. All the statements have to be correct and complete at the moment of its creation, this also includes new ideas and circumstances.

This could make additional, unaccounted statements about the newest developments in the interim report, interim financial statement, or financial report, necessary. This dictate covers the period after the creation of the prospectus and its submission for admission till the admission is finally given.⁹⁶

Incurred changes up until the point of admission have to be incorporated into the so called application version. This is the version of the prospectus that was handed in for admission. As long as the changes were nonessential, the admission respite will be kept, according to § 13 WpPG, by such an update.

The dictate will apply up until the publication of the prospectus.⁹⁷ Furthermore, § 16 I 1 WpPG requires that all essential changes of circumstances occurring between the time of the admission of the prospectus and the opening of the trade are updated.

(ii) Adjustment

Separate from the updating is the adjustment. Adjustment is the correction of unfounded statements in actual or legal circumstances.

⁹⁶ Stephan, in AG 2003, 3, 7.

⁹⁷ Stephan, in AG 2003, 3, 7.

According to § 16 I 1 WpPG, there exists a duty to amend to the prospectus “each incorrect statement relating to the prospectus containing statements that might affect the evaluation of risk-papers and which occurred or got discovered after the admission of the prospectus but before the final end of the offer to the public or the implementation in the trade”. This duty is, according to § 16 I 2 WpPG, related to the issuer or the person who applied for admission of the prospectus. The duty covers two different situations. Firstly, the adjustment of already originally incorrect circumstances and secondly the adjustment of originally correct but in the meantime changed to incorrect statements.

According to the wording of § 16 I 1 WpPG, this duty of adjustment for stock market admission prospectuses ends with its admission to the market.

(iii) Room for adjustments

According to § 45 II Nr.4 BörsG, the duty of adjustment is to separate from the room for adjustment. There is a chance for liability liberating adjustment for up to six months after implementation of the risk papers.

(d) **Deficiencies with the design of a Prospectus**

Should a prospectus bear all the required statements, it will not become incorrect by merely formal or stylistic deficiencies. A structurally complex prospectus is still correct and complete, as long as the prospectus is not incomprehensible because of the structure.⁹⁸

(e) **Meaning of Incorrectness/ Incompleteness (Essentiality)**

A requirement for the liability of the prospectus is that incorrect or incomplete statements are included in the prospectus and these statements are essential for the evaluation of risk-papers. These statements contribute to the decrease of the stock price, § 45 II Nr.2 BörsG.

Only those statements which generate the worth of a risk-paper, are considered essential. In other words, incorrect statements about pay offices or depositories, wrong statements about insignificant balance sheet items, or general balance sheet items which are insignificant for future profitability of a company are not considered essential submissions.⁹⁹

However, even if the statement was essential, this statement must have contributed to the decrease of the stock market price.¹⁰⁰ The burden of proof of the lacking liability consuming causality (haftungsausfüllende Kausalität) must be borne by the guarantor of the prospectus, according to § 45 II Nr.2 BörsG.

⁹⁸ Assmann, Hdb. KapitalanlageR, § 7, m. 92.

⁹⁹ Assmann, Hdb. KapitalanlageR, § 7, m. 66; BT-Drs. 13/8933, S. 54, 76; Hopt, Verantwortlichkeit, 1991, Rn. 154.

¹⁰⁰ Ellenberger, in FS Schimansky, p. 591, 602; BGH, AG 1994, 32f.

(f) Caused by the prospectus issued risk-papers

The liability is only related to those risk-papers, admitted because of the prospectus.

Risk papers issued prior to the prospectus, or after the prospectus, but without obligation of a prospectus, are consequently not covered by the liability in general.

(g) Issued caused by the publication of the prospectus

A further requirement is that the risk-paper was bought against payment within a period of six months after the first implementation publication of the prospectus.

Buying decisions made before the publication of the prospectus are, consequently, not covered by the statutory liability of the prospectus. Because of the issuing within the demanded six month period, the law assumes that the purchaser issued the risk-papers because of the prospectus respectively a certain investment temper caused by the prospectus. It is irrelevant whether it was a acquisition in first hand or second hand, each person who bought risk-papers after implementation may legitimately demand damage compensation.¹⁰¹ The above system is designed to help the acquirer demand his damage compensation. However, it is possible for the liable person to eliminate the liability by proving the risk-papers were not acquired by the acquirer because of the prospectus, according to § 45 II Nr.1 BörsG.

(h) Domestic Business (in Germany)

In claims because of the liability of the prospectus for risk-papers of issuer with their domicile abroad, a reference to Germany is absolute necessary, when the risk-papers are also listed abroad § 44 III BörsG.

Such a reference does exist, when the risk-papers caused by a deal closed in Germany, or were acquired completely or partly in Germany fulfilled by a risk-paper-service. Only at the domicile of the issuer acquisitions are not covered by the German claims of liability of the prospectus prior. § 44 III BörsG is definitive legal evidence that for the identification of the applicable law the market of placement is the connection criterion for deals with an foreign reference.¹⁰²

(2) Subjective Requirements of the Provision / Guiltiness

According to § 45 I BörsG a person is excluded from the liability, if they can provide evidence that they did not know about the falsehood or incompleteness and that this unawareness was not based on gross negligence.

¹⁰¹ Kort, in AG 1999, 9, 12.

¹⁰² Bischoff, in AG 2002, 489, 490ff.

Gross negligence requires that due diligence was violated to a large degree, that basic considerations did not take place and that observations were neglected.¹⁰³ This definition includes subjective personal circumstances like skill and competence as well as personal knowledge and leads, consequently, to different justifications of the same behaviour of different people.¹⁰⁴

(3) Size of the compensation

The size of the compensation claim is directly determined by § 44 I 1, 2, II BörsG. The claim covers, limited by the offering price, the acquisition price plus additional acquisition side costs, and, in the case of a amortisation, less the amortisation price, plus additional amortisation costs. The limitation on the offering price is based on the thinking that the setprice was offered because of the prospectus. Successive changes of the price does not depend on the prospectus and must not burden a guarantor of the prospectus.¹⁰⁵

(4) Disclaimer

§ 45 BörsG is deals with the circumstances under which a liability of the guarantor of the prospectus itself, § 45 I BörsG respectively in general, § 45 II BörsG can be averted.

(a) Individual Exculpation

Because of the individual exculpation, please look at subject requirements of the provision of guilt.

(b) General Exculpation

Should any of the circumstances in § 45 II BörsG be fulfilled by a claimant, the liability of any guarantor no longer exists.

(1) Exculpation because of proof about lacking liability justifying causation

Please look at Issued caused by the publication.

(ii) Exculpation because of proof about lacking liability expletive causation

According to § 45 II Nr.2 BörsG a liability will only be activated when the incorrect or incomplete statements can be found to have directly caused the decreased stock market price.

¹⁰³ Canaris, Bankvertragsrecht, 2005, Rn.2280; Palandt/ Heinrichs, 2007, § 277 Rn.2.

¹⁰⁴ Assmann, in Assmann/ Lenz/ Ritz, § 13 VerkProspG Rn.58:

¹⁰⁵ BT-Drs. 13/8933, S.54, 78.

(iii) Contributory Negligence

§ 45 II Nr.3 BörsG contains a concluding special rule about contributory negligence. Only positive knowledge of falsehood or incompleteness will activate the liability, gross negligence, on the other hand, will not.¹⁰⁶

(iv) Correction

According to § 45 II Nr.4 BörsG corrections of incorrect statements are excluded in the liability for deals which were closed after publication of the correction.

The object of correction can only be circumstances which, objectively, already existed at the time of implementation of the risk-papers and, consequently, made the prospectus already incorrect or incomplete.¹⁰⁷

The correction must be designed in a clear and understandable manner. It must not explicitly point out that it corrects an incorrect or incomplete statement in the prospectus.¹⁰⁸

There are no standard formalities for the correction. It is not necessary to publish the correction in the same form as the prospectus itself, it is sufficient if the correction is published in connection with the annual report, if the correction is equivalent to the annual report formalities.¹⁰⁹

For the exculpation it is not essential that the acquirer knows about the correction and the proof of it, nor is it essential that the acquirer prove his knowledge of the prospectus.¹¹⁰

(v) Exculpation only for the Summary

§ 45 II Nr.5 BörsG deals with the exclusion of liability, based only on the incorrectness or incompleteness of the summary, or its translation.

A summary that is incomplete may summarize certain statements, and even skip other necessary ones. On the other hand, each prospectus has to have a summary. So it is only logically consistent that a liability of the prospectus based only on the statements in the summary has to be excluded, so long as the summary is not read together with other parts of the prospectus, delusive, incorrect or inconsistent.

(5) *Burden of Proof*

The burden of proof about the incorrectness/ incompleteness of the prospectus, its acquisition via a domestic business, after publication of the prospectus as well as the acquisition price

¹⁰⁶ Kort, in AG, 1999, 9, 14.

¹⁰⁷ Stephan, in AG, 2002, 3, 12.

¹⁰⁸ BT-Drs. 13/8933, 54, 81; Hopt in FS Drobniig p. 525, 531.

¹⁰⁹ BT-Drs. 13/8933, 54, 80; Schwark, in Schwark, 2004, §§ 44, 45 BörsG Rn.58.

¹¹⁰ BT-Drs. 13/8933, 54 81; Hauptmann, in Vortmann § 3 Rn.130.

respectively the margin between acquisition price / offering price and amortisation price, has to rest with the claimant.

The liable person has to prove the missing guiltiness respectively the in § 45 II BörsG mentioned circumstances on the other hand.

(6) Other possible basis for claims

Contractual or pre-contractual claims may exist, as long as the claimant has acquired the risk-papers from a issuing attendant bank, in addition to the claims of the liability of the prospectus.¹¹¹ These claims are not excluded by § 47 II BörsG. Further possible basis for claims relating to the publication of the prospectus are §§ 826, 823 II BGB i.c.w. § 264a StGB, as long as the offence was committed wilfully.

b) § 47 BörsG (No limitation of liability)

§ 47 BörsG (own translation)

(1) An agreement, which excludes or reduces the claim in § 44 in advance is void.

(2) Additional claims, which result from the sections of the Civil Code based on contracts or intended illegal actions are unaffected.

§ 47 I BörsG points out that agreements about a limitation of liability in advance are illegal. Only after the origin of the claim is a limitation of liability legal.

§ 47 II BörsG regulates that contractual and existing claims against a guarantor of the prospectus are not excluded by §§ 44 f. BörsG.

Furthermore, § 47 II BörsG decides the competition between the claims of stock-market-law and the law of torts.¹¹² Only premeditated illegal actions could be asserted by the coverage of the liability of the incorrect stock market prospectus.

Beyond these claims are all other claims, especially those of the normal Civil Law liability of the prospectus in contrast of the coverage of the liability of the incorrect stock market admission prospectus excluded. Insofar the regulations of the §§ 44 ff. BörsG are final.¹¹³

¹¹¹ Kort, in AG 1999, 9, 18.

¹¹² Schwark in Schwark, 2004, §§ 44, 45 BörsG Rn. 74ff.

¹¹³ BT-Drs. 13/8933, 54, 81.

C. The WpPG (Wertpapierprospektgesetz – Risk-Paper Prospectus Act)

The “Law about creation, approval and publication of the prospectus, which is to publish by offers of risk-papers to the public or by including the risk-paper to an official market (Wertpapierprospektgesetz-WpPG)”, became effective from the 1st of July 2006, and used the conversion of the directive DIR 2003/71/EC.

One of the significant modifications introduced by the directive was the deregulation of the separation between sales prospectus on the one hand, and stock market authorisation prospectus on the other.¹¹⁴

Once approved prospectus could be used for offers to the public as well as for the authorisation of risk-papers for the trade on an official market.

This regulation represents a breach to the separation between the prospectus for offers to the public and the authorisation prospectus, which is used in Europe, this also represents a breach in the used separation between a prospectus for the authorisation of an official market and any other market.¹¹⁵

The laws coverage is described in § 1 I WpPG and is the conversion of Art. 1 of the Directive of the Prospectus. § 1 II WpPG regulates the exceptions and § 1 III WpPG opens the possibility for the issuer to create a prospectus offering these risk-papers abroad or on an Official Market.

1. Essential Rules and Regulations:

a) § 3 WpPG (Duty to publish a prospectus and exceptions according to the kind of offer)

§ 3 WpPG (own translation)

(1) For risk-papers, offered in Germany to the public, the issuer must publish a prospectus. This applies not, as far as a prospectus, according to the sections of this law, was published already or if nothing else applies according to subsection (2) or § 4 I.

(2) The Obligation to issue a prospectus does not apply for an offer of risk-papers,

1. if the offer is directed to qualified investors only,
2. if the offer is directed to less than 100 non qualified investors in every country of the European Union,
3. if the offer is directed to investors, who can acquire on each separate offer risk-papers from a minimum amount of 50.000 EURO per investor,
4. if the risk-papers are divided into a minimum of 50.000 EURO, or
5. if the market price for all offered risk-papers is less than 100.000 EURO, in which this limit is to evaluate within a period of 12 months.

¹¹⁴ Kullmann/ Sester, in ZBB- Report 2005, 209, 210; Groß, Kapitalmarktrecht, 2006, Vorbm. WpPG, Rn. 6.

¹¹⁵ Groß, Kapitalmarktrecht, 2006, Vorbm. WpPG, Rn. 6.

Every later resale of risk-papers, which were part of one or more offers mentioned in sentence 1, is considered as separated offer. In the case of a placement of risk-papers by organisations in terms of § 1 Ib KWG or an institute according to § 53 I 1 KWG or 53b I 1 or VII KWG, a prospectus is to issue, if the final placement does not satisfies the requirements of sentence 1 nr.1 to 5.

(3) For risk-papers, which shall get admission for the official market, the issuer of risk-papers must publish a prospectus, as far as § 4 II does not apply.

§ 3 I WpPG explains the general duty of a prospectus for each offer to the German public.

§ 3 II WpPG, on the other hand, exempts certain offers to the public from this duty.

§ 3 III WpPG regulates the permission to an Official Market.

(1) Requirements of the duty of the prospectus § 3 I 1 WpPG

The prospectus is required by law to offer the risk-papers to the public in Germany. With regards to Germany, this requires that potential investors in the coverage of this law are addressed specifically by the offer.¹¹⁶

According to the purpose of the WpPG, this law is applicable if the measure of the issuer affects Germany.¹¹⁷

As a result of the increasing use of and access to the internet, which are technically very difficult to restrict to individual countries, the *BAWe* decided in 1999 when exactly an offer via internet is considered an offer in Germany. The *BAWe* alligned its opinion according to the opinion of the *Bundesaufsichtsamt für das Kreditwesen zum Vertrieb ausländischer Investmentanteile (Federal Banking Supervisory Office)*. Essentially, the ruling seeks to ascertain whether the investors in Germany are addressed by the internet-offer.

Indications of intention can include the use of the German language, the nomination of partners in Germany or explanations of German taxes. If German investors are not directly addressed by the offer, there should be a disclaimer at the beginning of the site. This should explicitly explain, in the German language, that an acquisition in Germany would not be possible.¹¹⁸

(2) Exceptions for certain kinds of offers § 3 II WpPG

(a) Qualified Investors

The Exception in § 3 II 1 1 WpPG maintains that only qualified investors, and consequently that kind of investors are addressed by the offer, who are assumed to have the opportunity to use different sources of information to receive the necessary knowledge as a basis for a deci-

¹¹⁶ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 4.

¹¹⁷ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 4.

¹¹⁸ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 4.

sion to invest in the certain risk-paper.¹¹⁹ The unambiguous formulation shows that as soon as the offer is also addressed to qualified investors and the public, this exception is not applicable and the duty of the prospectus is still in place.

(b) Limited person subgroup

The Exception in § 3 II 1 2 WpPG is also applicable if the offer is to the public, but only to a certain, limited subgroup of people.

(c) Division into shares and Minimum purchase price

In the Exception § 3 II 1 3, 4 WpPG, the law-maker assumes that the investor of such large divisions into shares already has the necessary experience and knowledge about both the issuer and the issue itself to make an additional prospectus unnecessary.¹²⁰

The minimum purchase price option explains that risk-papers can be issued in smaller units, as long as the full amount of the risk-papers is not more worth than € 50.000,- per investor.

(d) Kleinstemission (Mini issue of share)

With a amount of maximum € 100.000,- the issue of shares is a further exception in § 3 II 1 5 WpPG and is therefore exempt from the duty of the prospectus. There is an appreciation of value between the deregulation on the one hand and the protection of the investors on the other.¹²¹ The main reason is that the costs for the creating and publishing of a prospectus would be disproportionate to the issue returns.¹²²

(e) Resale

In § 3 II 2 WpPG regulates that later offers of risk-papers to the public, which already have been offered to the public but for this earlier offer a duty of the prospectus was not applicable, now have to publish a prospectus, providing there is not an exception.

Basically, this regulation wants to make clear that later offers of risk-papers to the public could do underlie the liability of the prospectus, even though the first offer to the public did not.

(3) Legal Consequences of breach of Duty of the Prospectus

(a) In General

The legal consequences of a breach of duty of the prospectus depends, in the first place, on whether the duty is determined by § 3 I WpPG or § 3 III WpPG. In the case of § 3 I WpPG, is

¹¹⁹ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 6.

¹²⁰ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 8.

¹²¹ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 9.

¹²² Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 4; Carl/ Machunsky, 1992, p.39.

legal consequence that an admission because of the missing requirement, a prospectus, §§ 30 III 2, 51 I 3 BörsG, will not be given,

In the cases of a breach of § 3 I WpPG, an offer to the public without a prospectus, the legal consequence presents an administrative offence in the sense of § 30 I 1 WpPG, a possibility of prohibition of the offer to the public by the *BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht – Federal Financial Supervisory Authority)*, § 21 IV WpPG, and the liability of the prospectus in § 13a VerkProspG.

(b) Consequences of closed deals

Contracts, even if they were closed because of an offer to the public that presented a breach of § 3 I WpPG, are valid.¹²³ This follows clearly from the new in the VerkProspG inserted regulation § 13a VerkProspG, because of the *Anlegerschutzverbesserungsgesetz AnSVG (Improvement of Protection of Investors Act)*, liability in the case of a non existing prospectus.¹²⁴ This regulation is not only applicable for a non existing sales prospectus, but also for a non existing risk-paperprospectus.¹²⁵

Legal consequence in the case of breach of duty with regard to the prospectus of the WpPG is judged according to § 13a VerkProspG with a claim of the acquirer against the issuer and the offeror to takeover the risk-papers.

Should the contract be ineffective because of the violation of the duty of the prospectus, the regulation in § 13a VerkProspG would be useless.¹²⁶

b) § 5 WpPG (The Prospectus)

§ 5 WpPG (own translation)

(1) The prospectus must be, irrespective the obligations in § 8 II, in an easily analysable and in an understandable way contain all the necessary and required information about the issuing risk-paper for the admission for listing on the official market, and to inform the public in a truthful and fair manner about the assets and debts, financial situation, the profits and losses, the future prospects of the issuers and every guarantors as well as all information about the rights which are connected with the risk-paper. Especially must the prospectus contain information about the issuer and the risk-paper, which shall offered to the public on the official market. The prospectus must be formulated in a way, that ease its understanding and its analysis.

(2) The prospect must contain a summary. The summary shall mention all material facts and risks in a short and common understandable manner, which applies to the issuer, each guarantor and the risk-paper. The summary must contain warnings, that

1. the summary should be considered as introduction to the prospect,
2. the investor should base each investment decision in the certain risk-paper on the complete prospectus,

¹²³ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 12 m.W.H.

¹²⁴ BGBl. I. 2004, 630.

¹²⁵ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 13.

¹²⁶ Groß, Kapitalmarktrecht, 2006, § 3 WpPG, Rn. 13.

3. in the case, that a claim is asserted in front of a court, because of the statements in a prospectus, the plaintiff in application of the particular sections of the single states of the European Union could bear all translation costs and
4. these persons, who bear the liability of the summary including the translation, or who are responsible for the publication of it, could become liable, if the summary is misleading, false, or controversial, in context with other parts of the prospectus.

Does the prospectus regards the admission for an official market of non-dividend-papers with a minimum denomination of 50.000 EURO, a summary must not rendered.

(3) The prospectus shall contain its date of creation and is to sign by the issuer. Are risk-papers supposed to become traded on an official market, the prospectus is to sign by the applicant as well.

(4) The prospectus has to contain name and functions, at legal persons or entities the name and the domicile, of these persons who take the responsibility of it; it must contain a declaration of these persons or entities, that, from their point of view, all statements are true and no material facts were left out. In case of subsection 3 sentence 2 the credit institute, financial institute, or the company in terms of § 53 I 1 or § 53b I 1 KWG the issuer applied for admission for the risk-paper together with, has to take responsibility for the prospectus and the prospectus must contain this declaration in terms of sentence 1.

The requirements of the prospectus are valid for an offer to the public as well as for application for admission for an Official Market.

(1) Basics

According to § 5 I 1, 2 WpPG, the prospectus must have three information blocks. One should be about the issuer, one about the issued risk-paper itself, and the final should be a summery.

The minimum specifications-are required for each block are regulated in the Ordinance Regulating the Prospectus and its amendments, respectively, in § 5 II WpPG for the summery.¹²⁷

These blocks could be combined together in one prospectus, or be separated in three single documents. In the case of a separation, the three documents are the *Registrierungsformular (Register)*, containing the information about the issuer, the *Wertpapierbeschreibung (Description of the Risk-Paper)* containing all the information about the issuing risk-paper, and the *Zusammenfassung (Summery)*.

(2) Truth of the Prospectus

§ 5 I WpPG does not expressly mention that all the information in the prospectus has to be correct, but such an assumption goes without saying.¹²⁸ Expressly mentioned, on the other hand, is that the prospectus has to be complete as a subset of the principle of the truth of the prospectus. An incomplete prospectus is illegal, because it does not contain all the necessary information.

¹²⁷ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 2.

¹²⁸ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 3.

According to § 5 I 1 WpPG, it is necessary for the issuer of the risk-papers to include all information to evaluate the financial situation (liquidity and obligations) of a company, the financial standing (gains and losses), and its future prospects.¹²⁹ This information is called the *material facts*.¹³⁰

(3) Clarity of the Prospectus

In the first and third sentences of § 5 I WpPG, it is pointed out that the prospectus have to be “easily analysable and in an understandable way formulated”, “to relax its comprehension and its examination”.

This requirement is, however, not able to empower the regulatory authority to set up requirements comparable to those of the “Plain English Rule” of the SEC.¹³¹ This would be unnecessary though, as § 5 I 1, 3 WpPG demands no more or less than that the prospectus in formulation, structure, language, style, etc. have to “relax comprehension and examination”. To meet the needs the jurisprudence demands to gear to an advertent reader, who is able to read and understand a balance sheet, but does not need to have advanced skills in finance.

(4) Summery

The requirement of a summery in the prospectus is new in terms of the law, but not in common practice.¹³² Problematic and not so far addressed, is the fact that even risk-factors have to be summarised. Up until this point, there was merely a chapter risk-factor contained in the prospectus. This was, however, not summarised because this chapter is considered unqualified to summarise.¹³³

Quiet on the contrary, this chapter is generally used to refer to all the other chapters for any detailed information, according to this was the chapter risk-factor already a summery.

Finally, the Summery must not contain more than 2500 words.

¹²⁹ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 3.

¹³⁰ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 3.

¹³¹ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 4; Crüwell, in AG 2003, 243, 246.

¹³² Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 6.

¹³³ Groß, Kapitalmarktrecht, 2006, § 5 WpPG, Rn. 6.

D. The VerkProspG (Verkaufsprospektgesetz - Sales Prospectus Law)

This law is valid for all offers of not in risk-papers certified financial assets to the public, and demands to create and publish a prospectus.

1. Structure of the Law

The VerkProspG is divided into three sections. The first one deals with the factual and regional coverage, as well as with the exceptions regarding the kind of offer, the issuer and certain kinds of risk-papers. Furthermore, this section contains specific guidelines about the contents of a prospectus, the lineup and audition of the annual balance statement and the status report. Also featured are rules regarding the about the depository and their rights, as well as advertising and the obligation of secrecy.

The second section regulates the publication and the liability of the prospectus.

The rates and further provisions for administrative fines and provisions for the transition are regulated in the third section.

2. Applying the law

The VerkProspG is filled with vagueries, particularly calling for an interpretive attitude towards concepts of law.¹³⁴ The *BaFin*, formally known as *BAWe (Bundesaufsichtsamt für den Wertpapierhandel – Federal Securities Supervisory Office)* published a first and a second announcement, the second over-ruled the first one, provision in the way of an administrative regulation for implementing standards for the interpretation of the VerkProspG. To what extent the second provision is still valid, because of the last changes in the coverage of the law, is arguable.¹³⁵ However, the BaFin recently published on its homepage (www.bafin.de) a catalogue dealing with certain material questions about the duty of a prospectus, which can be used as an interpretation guideline of the VerkProspG.¹³⁶

¹³⁴ Groß, Kapitalmarktrecht, 2006, Vorb. VerkProspG Rn. 8.

¹³⁵ Groß, Kapitalmarktrecht, 2006, Vorb. VerkProspG Rn. 8.

¹³⁶ Groß, Kapitalmarktrecht, 2006, Vorb. VerkProspG Rn. 9

3. Essential Rules and Regulations

a) § 13 VerkProspG (Liability of the defect prospectus)

§ 13 VerkProspG (own translation)

If material facts in a prospectus for the rating of risk-papers, which are not accredited on local stock markets, or financial assets in terms of § 8f I VerkProspG are false or incomplete, the Sections §§ 47 – 47 BörsG are applicable accordingly as follows:

1. in application of § 44 I 1 BörsG the time of the first offer to the public in Germany is applicable for the measurement of the period of six months instead of the date issued the risk-paper;
2. § 44 III BörsG is applicable on issuers with domicile overseas, if their risk-papers are offered to the public overseas as well;
3. for statements in sales-prospectuses for financial-assets in terms of § 8f I BörsG, the §§ 44 and 45 BörsG are applicable irrespective Number 1 and 2 as follows:
 - a) the financial-asset takes the place of the risk-paper,
 - b) the first purchasing price takes the place of the limitation of the purchasing price to the issuing price according to § 44 I and II BörsG,
 - c) not applicable are § 44 I 2 and § 45 II Nr.5 BörsG and
 - d) the purchasing price takes the place of the stock market price in § 45 II Nr.2 BörsG.

(1) Coverage

(a) Also Applying on the prospectus after the WpPG

§ 13 and § 13a VerkProspG are the only provisions of this law which in a certain coverage still apply for prospectus, which were created for offers of risk-papers to the public or for the admission to an Official Market, even after the last changes of this law.¹³⁷

(b) Prospectus for already licensed Risk-Papers

§ 13 VerkProspG is consequently valid for prospectus' in the meaning of the WpPG, according to § 13 I VerkProspG. In this regard however, § 13 I VerkProspG contains a restriction; namely that the prospectus in the meaning of the WpPG has to refer to risk-papers which are not licensed to be traded on a German stock-market.

§ 3 WpPG, however, lays out the duty of a prospectus for offers to the public of previously licensed risk-papers.

According to the very explicit wording of § 13 I VerkProspG, would a prospectus for the offer to the public of already licensed risk-papers not be included by § 13 VerkProspG.

The specialised regulation of the liability of the prospectus would not be valid for this kind of prospectus.

This, however, contradicts the unambiguous will of the German legislator.¹³⁸ Although, this will is not explicitly expressed in the justification to the changes for § 13 VerkProspG, the

¹³⁷ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 1.

¹³⁸ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 3.

German Government did expressly mention that: "Provisions of liability of risk-papers...remain in the Börsen- and Verkaufsprospektgestz...An Accordant regulation dealing with risk-paper-prospectus will be guaranteed via a reference in § 13 I VerkProspG." this can be found in the general part of the justification to the *Prospektrichtlinie-Umsetzungsgesetz (Prospectusdirectives-Adoption Act)*.¹³⁹

This statement can be interpreted in only one way; that the German government regards all the suggested regulations, which got transformed in law as satisfactory.

The loophole that a prospectus in terms of the WpPG for offers to the public of already licensed risk-papers is not covered by § 13 VerkProspG apparently got overlooked.¹⁴⁰

However, it can not be that surprising, that this was the case, bearing in mind the background that the duty of a prospectus for offers to the public of previously licensed risk-papers is a entirely new regulation for Germany and Europe, and that no duty of a prospectus exists so far.¹⁴¹

Overall, we can conclude that all prospectuses for risk-papers in terms of the WpPG, even if they are prospectuses for already licensed risk-papers, are covered by the liability regulation of § 13 WpPG.

(2) Regulation of liability

The liability of incorrect prospectuses, i.e. untrue and incomplete prospectuses in terms of the WpPG¹⁴² and the VerkProspG is regulated by § 13 VerkProspG to that effect that § 13 VerkProspG is referring to §§ 44-47 BörsG.

Apart from particular variations is the liability of the prospectus in Germany, whether it is according to the WpPG, the VerkProspG, or the BörsG, in consonance.¹⁴³

(3) Variations in § 13 I Nr.1, 2 and 3 VerkProspG

Variation number 1 and number 2 of § 13 I VerkProspG take into account the particulars of the transfer of liability of the BörsG prospectus to the liability of the WpPG prospectus. This deals with offers of risk-papers and investments to the public matters which are currently regulated by the VerkProspG.¹⁴⁴

¹³⁹ BT-Drs. 15/4999, S.25, 26; BT-Drs. 15/4999, S.25, 41; BT-Drs. 15/5373, S.50.

¹⁴⁰ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 4.

¹⁴¹ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 4.

¹⁴² Kullmann/ Sester, in WM 2005, 1068, 1071; Assmann, in NJW 1991, 528, 531; BT-Drs. 11/6340, S.1, 14

¹⁴³ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 4

¹⁴⁴ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 6

Because of the fact that, unlike the liability of the BörsG, the liability of the prospectus of the VerkProspG cannot apply on the official market listing of a risk-paper, the preclusion period starts with the first offer to the public in Germany, according to § 13 I Nr.1 VerkProspG

Such an offer demands a prior announcement of a prospectus in terms of the WpPG respectively the VerkProspG in Germany. Consequently, an investor is able to recognise the incorrect prospectus, as well as to notice the offer to the public of the risk-paper the first time.

Therefore the respite of six months, during which the acquisition of the risk-papers must have occurred, starts with the first offer of the risk-papers to the public.¹⁴⁵

Decisive is alone, likewise to the BörsG, the point in time of the conclusion of the contract, which have to be sealed within the six-month-respite.

Because of the fact that the first offer to the public is the basis for the liability of the prospectus according the VerkProspG, § 13 I Nr.2 VerkProspG clarifies that the disclaimer according to § 44 III BörsG is not applicable to the listing of foreign risk-papers, but only on the first offer to the public. If this first offer to the public should happened abroad, the claim according to § 44 I BörsG exists only if the risk-papers were purchased by virtue of a closed deal in Germany or by virtue of an investment service which was adduced in Germany completely or partially.

The variation in § 13 I Nr.3 VerkProspG is the sales prospectus of investments in terms of § 8f VerkProspG. These investments are not certified in risk-papers and, consequently, they are not traded on a Stock-Market. Furthermore Nr.3 is simply concerned with the changes which arise from the differences between risk-papers and investments, such as the issuing price to the purchasing price or the stock-market price to the purchasing price.

(4) Temporal Coverage

According to § 18 II 1 VerkProspG, § 13 VerkProspG is applicable to prospectuses which were issued in Germany after 01.04.1998. For all the prospectuses which were issued before that date, the old § 13 VerkProspG in connection with §§ 45 – 48 BörsG is applied.

b) § 13a VerkProspG (Liability in the case of a non existant prospectus)

§ 13a VerkProspG (own translation)

(1) The acquirer of risk-papers, which are not licensed on a German stock market, or of financial-assets in terms of § 8f I VerkProspG is entitled to claim from the issuer and offeror joint and severally for takeover of the risk-paper or financial assets against the paid price, as long as this price does not exceed the first purchase price, and the cost that usually arise with the purchase, if the prospectus which is necessary according to § 3 I 1 WpPG or § 8f I 1 VerkProspG or § 8f VerkProspG was not published, and the acquisition was made prior to the publication of the prospectus and within the six-month-period after the first offer

¹⁴⁵ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 6

to the public in Germany. The acquisition of risk-papers of the same issuer, which can not be distinguished from the risk-papers mentioned in sentence 1 by any criteria, is to treat accordingly sentence 1.

(2) In the case that the acquirer is not holder of the risk-paper or financial-asset in terms of § 8f I VerkProspG any longer, the acquirer is entitled to claim for compensation of the difference between the purchase price and the amortisation price of the risk-papers or the financial-assets, as well as the cost that usually arise with the purchase and the amortisation. Subsection (1) sentence 1 does apply accordingly.

(3) If risk-papers or financial-assets in terms of § 8f I VerkProspG of an issuer with his domicile not in Germany are offered to the public aboard as well, the claim according to Subsection (1) or Subsection (2) only exists if the risk-papers or financial-assets were acquired by virtue of a closed deal in Germany or by virtue of an investment service which was adduced in Germany completely or partially.

(4) The claim according to Subsection (1) to (3) does not exist, if the acquirer did know about the obligation of issuing a prospectus, at the time of the acquisition.

(5) The claim according to Subsection (1) to (3) does prescribe after one year from the time of the acquirers knowledge about the obligation of issuing a prospectus, but not later than 3 years since acquisition.

(6) An agreement, reducing or waiving a claim according to subsection (1) to (3), is invalid. Additional claims, based on the German Civil Code, on contracts, or tort will remain unaffected.

(7) § 32b Civil Process Order applies by decisions about claims according to subsection (1) to (3).

Like § 13 VerkProspG is § 13a VerkProspG applicable for investment-sales prospectuses as well as for prospectuses for the offer of risk-papers to the public.

(1) History

The § 13a VerkProspG was implemented by the *AnSVG* in the VerkProspG. In financing this regulation was the duty of the prospectus, also implemented by the *AnSVG*, even for investments in the "Grey Market" also known as the Regulated Unofficial Market.¹⁴⁶

Creating a sales-prospectus contrary to duty was prosecuted with merely an administrative fine, leading to a prohibition of the offer by the BaFin. These legal consequences seemed to be too mild for the legislator, especially for trade in the Grey Market.¹⁴⁷

Even more relevance, than its literal declaration, as justification of a liability of a prospectus with absent prospectus, attained § 13a VerkProspG because of its clarifying function.¹⁴⁸

This clarity is, in the fact, that a breach of the duty of prospectus does not affect the effectiveness of the executory agreement.

Should it be different, then § 13a VerkProspG would be redundant.

¹⁴⁶ Schäfer, in ZGR 2006, 40, 47.

¹⁴⁷ Groß, Kapitalmarktrecht, 2006, § 13a VerkProspG Rn. 3.

¹⁴⁸ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 6.

According to the WpPG and the VerkProspG, the legal consequence of a breach of the duty of prospectus is a claim to the investors for takeover of the risk-papers for compensation of the paid price against the issuer and the offeror.

Should it be the case, however, that due to a breach of duty of prospectus, the acquisition should become invalid, the legal consequence would be the same as in § 13a VerkProspG. Consequently, § 13a VerkProspG would be redundant.

If, however, the legislator believes the regulation in § 13a VerkProspG is necessary, then the outcome of this is that a breach of duty of the prospectus does not affect the effectiveness of a contract.¹⁴⁹

(2) Requirements of the provision

Requirement to activate the liability is, according to § 13a I 1 VerkProspG, the absence of a demanded published prospectus by § 3 I 1 WpPG or § 8f I 1 VerkProspG.

According to the wording of the regulation in § 13a VerkProspG a default does not matter.

Furthermore, the title only exists if the acquisition was made prior to the publication of the prospectus and within the six-month-respite period.¹⁵⁰

Later publication does not affect the title. Should the acquirer no longer be the owner/ holder of the risk-papers or investments, § 13a II VerkProspG acts the same way as incorrect sales-prospectuses.

According to § 13a III VerkProspG, a corresponding consequence does apply if the issuer is registered in a foreign country,

The statutes of limitations in § 13a V VerkProspG are consistent with the limitations in § 46 BörsG, and the statutes of limitations in § 13 VI VerkProspG are consistent with § 47 BörsG.

E. Claim in Civil-Law

1. The Term Prospectus in Civil-Law

Unlike the specialised Capital Market Law the term 'prospectus' is not referred to even indirectly, by general Civil-Law. If we interpret the term in a broader sense, many reports, such as sales orientated written reports, memorandums of information and interim reports, are included within the definition of the prospectus.¹⁵¹

¹⁴⁹ Groß, Kapitalmarktrecht, 2006, § 13 VerkProspG Rn. 6.

¹⁵⁰ Bohlken/ Lange, in DB 2005, 1259, 1261.

¹⁵¹ Hamann, in Schäfer, 1999, Vor § 1 VerkprospG Rn1; Schäfer, in ZGR 2006, 40, 45.

If the liability of the Civil Law is amalgamated with that of the specialised Capital Market Law many of the specialised laws consciously excluding reports would be justified.

In view of the general – this is accompanied by § 44 IV BörsG and the affiliated equality between certain written reports, and the AnSVG by which a selective extension of the liability of the prospectus to other certain areas is enacted – decision by the Legislator not to expand the specialised liability of the prospectus to include every kind of written report, the Capital Market Law could also be applied to the prospectus.¹⁵²

The liability of the prospectus in Civil Law is only applicable when the law is not held responsible for a prospectus or its substitute.

Important is the question about liability of the prospectus by substitutes, including risk-papers, in the Regulated Market or Regulated Unofficial Market. According to § 56 BörsG, preempted by the 4th Financial Market Development Act 2002, market participants can request that their risk-papers be included in the Regulated Market, without the consent of the issuer, as long as the risk-papers have been accredited at any other domestic Official or Regulated Market or at a corresponding foreign market.

This regulation is used for large number of foreign risk-papers in a big amount.

The issuer information about the inclusion of the risk-paper as well as the creation of information-reports about the issuer by the requesting market participant, are regulated by the respective Stock Exchange Regulations especially.

Additional publication obligations are not accorded to the issuer, as stated by § 56 II 2 2.Hs. BörsG. § 10 WpPG stipulates that the publication of an annual report is only necessary for licensed risk-papers.

Because of the protection of the investor the single Stock-Market regulations require the applicant to create a comprehensive publication. Similarly, this applies to single risk-papers in the Regulated Unofficial Market, as set out by § 57 BörsG i.c.w. the certain Directives of trade.

§§ 45, 46 BörsG and §§ 8f, 13 VerkProspG contain no regulations pertaining to this. This is caused by the coverage of these sections which is not extending to this area, and not that these regulations would be applicable but there is just no duty of a prospectus.¹⁵³

Therefore remains the coverage with the liability of the prospectus in civil law in general, as long as the certain publications match the requirements, the term prospectus is matching and publishing the publication.¹⁵⁴

¹⁵² Assmann, in AG 1996, 508, 512ff.

¹⁵³ Schäfer, in ZGR 2006, 40, 47.

2. § 823 II BGB i.V.m. § 264a StGB

Section 823 BGB Liability in damages

(1) Anyone intentionally or negligently trespassing, contrary to law, on the life, body, health, freedom, property or any other right of another party shall be liable for the damage thus incurred to that other party.

(2) The same duty affects anyone breaching a law aiming to protect another party. If, according to the contents of such law, a breach thereof is also possible without culpability, then liability in damages only occurs in case of culpability.

Section 264a StGB Capital Investment Fraud

(1) Whoever, in connection with:

1. the sale of securities, subscription rights or shares intended to grant participation in the yield of an enterprise; or
2. an offer to increase the capital investment in such shares, makes incorrect favorable statements or keeps unfavorable facts secret in prospectuses or in representations or surveys to a considerable circle of persons about the net assets in relation to circumstances relevant to the decision about acquisition or increase, shall be punished with imprisonment for not more than three years or a fine.

(2) Subsection (1) shall apply accordingly if the act is related to shares in assets which an enterprise administers in its own name, yet for the account of a third party.

(3) Whoever voluntarily prevents that the benefit contingent upon the acquisition or the increase is produced on the basis of the act shall not be punished pursuant to subsections (1) and (2). If the benefit is not produced due in no part to the contribution of the perpetrator, then he will be exempt from punishment if he voluntarily and earnestly makes efforts to prevent the production of the benefit.

§ 823 BGB is the main section in the law of delict. Subsection II of § 823 BGB deals with the restitution of damages due to a violation of any protective law.

a) Elements of § 823 II BGB i.V.m. § 264a StGB

(1) Violation of a Protective Law

In this regard it is essential that the violated law is a protective one. Protective laws are all legal norms which besides aim to the protection of the others, want to protect a certain person or a certain person subgroup against the violation of their rights.¹⁵⁵ § 264a StGB (*Criminal Code*) is such a protective law.¹⁵⁶

§ 264a StGB does not only protect the estate of the investor, it also protects the interest of the public in a functional capital market.¹⁵⁷

¹⁵⁴ Schäfer, in ZGR 2006, 40, 47; Schwark in Schwark, 2004, § 45 BörsG Rn.16.

¹⁵⁵ Palandt/ Thomas, 2007, § 823 Rn. 141.

¹⁵⁶ BGH 116, 7.

¹⁵⁷ Lackner/ Kühl, 2007, § 264a Rn.1; Cramer, in Schönke/ Schröder/ Cramer § 264 Rn.1.

Only risk papers and subscription rights can be the object of violation in this section.¹⁵⁸ Risk papers are defined as instrument that certifies right in a manner, which can not be executed without the instrument.¹⁵⁹

Anybody can be an offender in this section, as long as the violation is connected to the distribution of risk papers.¹⁶⁰ 'Distribution' here is defined as any activity conducted with the aim of selling multiple shares on the market.¹⁶¹ This is often linked to fraudulent activities. Offers made to a particular person are not covered. For the required connection an areal and temporal relation to the distribution is necessary.¹⁶² The extension of coverage to persons besides the issuers cover criminal practices of suspect distribution companies or other dubious persons who violate the individual investment advisory, or who do not cover general memorandums or opinions like information activities usual in business-journalism.¹⁶³

The violation is limited by information in prospectus or in interpretations or schemata about the described asset.¹⁶⁴

Prospectus is defined in this regard as every advertising or informative paper, in which, all the essential facts necessary for an investment decision are included.¹⁶⁵ All the prospectus of all corporate laws which deal with the liability of the prospectus are covered by this definition.¹⁶⁶ A further element of § 264a StGB is that offer has to be an offer to the public.¹⁶⁷

Violation here refers to any action which counteract the benefits as laid out in the prospectus, and this prevent sound investment decisions from being made.¹⁶⁸

To a lesser degree violations can also be committed due to the omission of less attractive facts. All the facts are required to be presented to the investor so as to allow him/ her to make an informed decision.¹⁶⁹

Only statements which are material for the investment decision are covered by § 264a StGB.¹⁷⁰ A statement is material if a reasonable, average careful investor would decide that this fact affect worth, chances, and risks of the investment.¹⁷¹ That is usually the case by

¹⁵⁸ see § 264a StGB.

¹⁵⁹ Lackner/ Kühl § 264a Rn.3.

¹⁶⁰ Lackner/ Kühl § 264a Rn.6.

¹⁶¹ BT-Dr 10/318 S 24.

¹⁶² BT-Dr 10/318 S 24.

¹⁶³ BT-Dr 10/318 S 24.

¹⁶⁴ Lackner/ Kühl § 264a Rn.10.

¹⁶⁵ BGHSt 40, 385, 388.

¹⁶⁶ Lackner/ Kühl § 264a Rn.10.

¹⁶⁷ BT-Dr 10/318 S 23.

¹⁶⁸ Lackner/ Kühl § 264a Rn.12., BT-Dr 10/318 S 24..

¹⁶⁹ BT-Dr 10/318 S 23.

¹⁷⁰ BT-Dr 10/318 S 24.

¹⁷¹ BT-Dr 10/5058 S 31.

violation by active doing, by a passive behaviour it depends on the circumstances of the certain case.

Intention in second degree is sufficient, what means the offender considers the violation possible and accepts the violation assenting.¹⁷²

(2) Unlawful

Behaviour is deemed unlawful if the offender violates a protective law which is established by the legal system.¹⁷³ This means that, in terms of § 823 II StGB every violation of § 264a StGB is also regarded as unlawful behaviour.

(3) Intention

According to § 823 II BGB an offender must be seen to have acted with intent regarding the violation of a protective law. However, the intention demanded by the protective law is authoritative for the needed intention of this section, because of the legal certainty.¹⁷⁴

(4) Causation

Causation occurs if compliance of the protective law would have provided better security against loss or damage.

(5) Damage/Loss

Actual damage must exist. Damage is defined here as any actual loss of assets, or the absence of any increase in the value of assets.

b) Legal Consequences

The legal consequence of § 823 II BGB is to render the offender responsible for any loss caused by his/ her violation, and compel him/ her to financially compensate for this loss.¹⁷⁵

The positive interest has to be compensated only, if the unlawful action, which caused the damage, is as well a necessary requirement for a contractual claim.¹⁷⁶

Besides the civil liability of § 823 II BGB i.V.m. § 264a StGB the offender is awarded penalty. This penalty could be a prison sentence of up to 3 years or a fine.¹⁷⁷ Unlike that of civil

¹⁷² BGHSt 36, 1, 9.

¹⁷³ BGH NJW 93, 1580; Palandt/ Thomas, 2007, § 823 Rn.33.

¹⁷⁴ BGH 46, 21.

¹⁷⁵ BGH WM 00, 1596/ 1599.

¹⁷⁶ BGH NJW 98, 983.

¹⁷⁷ see § 264a I Nr.2 StGB.

liability no evidence of actual damage or loss is needed in order to lay a charge of criminal liability.¹⁷⁸

The Federal Court of Justice (BGH) has established parameters so as to avoid an excessive amount of claims. If sufficient evidence is provided the Federal Court of Justice does allow the possibility that a particular representation may not be the cause of the plaintiff's loss. Without such parameters civil damage compensation would be abused.¹⁷⁹

3. § 826 BGB

Section 826 BGB Intentional damaging in breach of public policy

Anyone intentionally inflicting damage on another person in a manner contra bonos mores is liable to the other party for damages

In German legislation, § 826 BGB is one section of the law of delict and acts to rectify any loopholes in the law of delict.

a) Elements of § 826 BGB

(1) Violation of Good Faith / Act Contra Bonus Mores

A violation of good faith is possible if the chosen behaviour or instrument in relation to the proposed aim fails to consider all the aspects of a certain case.¹⁸⁰

That behaviour merely appears to be unfair is not sufficient, and an action carried out for the benefit of the actor is not contra bonus mores in general, if a violation of others is connected to the action.¹⁸¹

The violation is deduced from the aim and motivation of the behaviour in each particular case. It is an objective test because of the subjectivity of motivation.¹⁸² It is also possible to violate passively by omitting certain key information.¹⁸³

In order to act contra bonus mores it is not necessary to be aware of the risk of liability, the person who pleads ignorant is considered to have acted contra bonus mores as well.¹⁸⁴

(2) Intention

To act contra bonus mores dolus eventualis is sufficient, which means in terms of a prospectus that it is sufficient if the representer foresees the possibility that the representation may be

¹⁷⁸ Cramer in S/S, § 264a Rn.1.

¹⁷⁹ MüKoBGB/ Wagner, § 823 BGB Rn.348.

¹⁸⁰ Palandt/ Thomas, 2007, § 826 Rn.2.

¹⁸¹ Palandt/ Thomas, 2007, § 826 Rn.2.

¹⁸² Palandt/ Thomas, 2007, § 826 Rn.3.

¹⁸³ Palandt/ Thomas, 2007, § 826 Rn.7.

¹⁸⁴ BGH NJW 1994, 2289.

false and could cause damage, but nevertheless decides to do it.¹⁸⁵ A general idea of possible damages is not sufficient.¹⁸⁶

It is not necessary to be aware of the consequences, it is sufficient if the person merely knows about the circumstances.¹⁸⁷

Negligence is not sufficient.¹⁸⁸

b) Legal Consequences

According to § 249ff. BGB the entire loss is to be compensated, by the party who violated § 826 BGB.¹⁸⁹

¹⁸⁵ BGH NJW 2000, 2896.

¹⁸⁶ BGH WM 2001, 1454/1457.

¹⁸⁷ BGH WM 1962, 579.

¹⁸⁸ BGH NJW 1962, 1766.

¹⁸⁹ Palandt/ Thomas, 2007, § 826 Rn.14.

VII. Liability of the prospectus at issue of risk-papers in South Africa

A. Claim in Corporate Law

The liability of the prospectus is part of the Offers to the Public which is regulated in the Companies Act section 143 – section 169.

1. The Term: Prospectus

“Prospectus means any prospectus, notice, circular, advertisement or other invitation, irrespective of whether it is done in non-electronic or any electronic manner, offering any shares of a company to the public”.

As defined in section 1 (1) of the company Act, this is any notice, circular, advertisement or other invitation offering any shares of a company to the public. This definition indicates that although that the prospectus is the actual offer, it is submitted that the prospectus should rather be considered the document that accompanies the offer. Furthermore, the meaning of prospectus is extended by the presumption in section 157(1). According to this section, the definition includes every newspaper or other advertisement that offers, or calls attention to an offer or intended offer of shares in a company to the public that is deemed to be a prospectus issued by the person responsible for the publication or dissemination of that advertisement. Therefore, all the provisions of the Company Act are applicable to any such advertisement.¹⁹⁰ Excluded from the provisions of the Companies Act, thus of no consequence, are these statements that an advert in is not a prospectus, according to section 157(2). An advertisement is not deemed to be a prospectus if it contains no more information than the listed in section 157(1)(a-g).

2. Liability for Falsification in Prospectuses

There are two possible main consequences, for providing false statements¹⁹¹ in a prospectus a civil and a criminal proceeding. These apply whether they are related to matters required by the Act to be disclosed or not.¹⁹² The same consequence, are applied for any report or memorandum appearing on the prospectus issued with it, or incorporated therein.¹⁹³

Both the civil and the criminal liabilities can arise in terms of the Act as well as the common law. Civil liability, in terms of the Act, is governed by section 160 and section 161, while the criminal liability is governed by section 162 and section 163.

¹⁹⁰ Blackman, § 157 6-30; Cilliers&Benade, 2005, p. 17.07.

¹⁹¹ See the definition in s 142

¹⁹² Blackman, § 160 6-33.

¹⁹³ Blackman, § 160 6-34.

3. Statutory Civil Liability

The statutory civil liability was originally designed to protect aggrieved subscribers or share-purchasers recover damages resulting from the submission of untrue statements from any person responsible for the content of the prospectus.¹⁹⁴

Unlike the common law, the statutory liability enables the subscriber or purchaser to recover damages merely by proving that the shares were acquired on the faith of the prospectus alone and that the loss or damages sustained were directly due to the untrue statement contained therein. It is, therefore, unnecessary to establish fault.¹⁹⁵

4. Essential Rules and Regulations

a) Section 144 Offers not being offers to the public

144. Offers not being offers to the public. – An offer of shares in relation to an offer for subscription for or sale of any shares, shall not be construed as an offer to the public –

- (a) if the offer is made to –
 - (i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act No. 94 of 1990); or
 - (ii) a mutual bank registered or provisionally registered in terms of the Mutual Banks Act, 1993 (Act no. 124 of 1993); or
 - (iii) an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943),
which is acting as principal, and also to a wholly owned subsidiary of such bank, mutual bank or insurer when it acts as agent in the capacity of authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956) or for a unit trust scheme managed by the said wholly owned subsidiary which is registered as a management company in terms of the United Trust Control Act, 1981 (Act No. 54 of 1981);
- (b) if the offer for subscription is of such a nature that the total acquisition cost of the shares for a single addressee acting as principal is at least R 100.000 or such higher amount as the Minister may, by notice in the Gazette, determine in order to counter the effect of inflation;
- (c) if it is a single once-off offer for subscription and the offer is accepted by a maximum of fifty persons acting as principals: Provided that –
 - (i) the aggregate subscription price (including any premium) of the shares so issued does not exceed R 100.000 or such higher amount as the Minister may, by notice in the Gazette, determine in order to counter the effect of inflation;
 - (ii) the issue of the shares shall be finalised within six month from the date the offer was first made;
 - (iii) the offer shall be in writing;
 - (iv) particulars of the offer shall be lodged in the prescribed manner with the Registrar for registration prior to the offer being made; and
 - (v) the offer shall not be accompanied by or made by means of an advertisement and no selling expenses shall be incurred in connection with the offer;

¹⁹⁴ Cilliers&Benade, 2005, p. 17.24.

¹⁹⁵ Cilliers&Benade, 2005, p. 17.24.

- (d) if it is a non-renounceable offer for subscription of shares and the offer is made only to existing shareholders or debenture holders of that company;
- (e) if it is a rights offer; or
- (f) if the offer is made to any director or officer of the company, or any close relative of such director or officer: Provided that the original offer shall for the purposes of this Chapter be an offer to the public if the offer is renounceable in favour of a person who is not a director or officer of the company or close relative of such a director or officer;
- (g) if it is an employee share scheme as contemplated in section 144A.

This section provides for the included instances in which an offer will not be construed as an offer of them to the public.

The section encompasses offers both for the subscription for, and the sale of shares. If an offer is envisaged by this section, it will not constitute an offer to the public and must not accompany by a prospectus.

Objective Requirements of the Provision - The single exemptions

(1) Paragraph a

This subsection specifies subgroups of persons and is therefore would offers to those not ordinarily regarded as offers to the public.

(2) Paragraph b

This subsection deals with a single addressee. Therefore is it highly presumably that it is not regarded as an offer to the public.¹⁹⁶ Furthermore is the prospectus intended to be a protection of investors, this paragraph, however, stipulates a minimum acquisition of shares of R 100.000. This could lead to the conclusion that the lawmaker does not believe that a sophisticated investor does not need this kind of protection by a prospectus.¹⁹⁷ However, debatable is what is precisely intended to be conveyed by the words "single addressee".¹⁹⁸

(3) Paragraph c

This category contemplates a "single, once-off" offer which may be accepted by a maximum of 50 persons acting as principals.¹⁹⁹ This section is designed to raise a relatively small amount of capital from a limited number of persons.²⁰⁰

¹⁹⁶ Blackmann, § 144 6-12

¹⁹⁷ Blackmann, § 144 6-12

¹⁹⁸ Henochsberg

¹⁹⁹ Henochsberg

²⁰⁰ Blackman

(4) Paragraph d

This paragraph excludes an offer for subscription of shares to existing shareholders or debenture holders of a company, where the offerees are not entitled to renounce their rights to subscribe for the shares in favour of other persons.²⁰¹

(5) Paragraph e

See section 142 Companies Act No. 61 of 1973.

(6) Paragraph f

Paragraph f is self-explanatory, only the requirement of a close relative is debatable.²⁰²

(7) Paragraph g

Paragraph g excludes employee share schemes as contemplated in s. 144A of the Companies Act No. 61 of 1973.

b) Section 160 Liability for Untrue Statements in the Prospectus

160. Liability for untrue statements in prospectus. – (1) Where shares are offered to the public for subscription in pursuance of a prospectus, every person-

- (a) who is, at the time of the issue of the prospectus, a director of the company;
- (b) who becomes a director at any time between the issue of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed;
- (c) who with his authority is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;
- (d) who is a promoter of the company; or
- (e) who has authorized the issue of the prospectus,

shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(2) Where shares are offered to the public for sale in pursuance of a prospectus, every person –

- (a) who has made the said offer;
- (b) who under section 154 (3) is deemed to have authorized the issue of such prospectus; or
- (c) who is in relation to the company the shares of which are so offered, a person referred to in subsection (1) (a), (b), (c), (d) or (e),

shall be liable to pay compensation to all persons who have acquired any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement therein, or in any report or memorandum appearing on the face thereof or issued therewith, or by reference incorporated therein.

(3) The liability provided for in subsection (1) or (2) shall not attach to any person if it is proved-

²⁰¹ Blackman

²⁰² Henochsberg

- (a) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believe that the statement was true; and
- (b) with respect to every such untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from the report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation and that the defendant had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person making the statement was competent to make it, and that the said person had given the consent required by this Act to the issue of the prospectus or the making of the offer and had not withdrawn that consent before lodgement of a copy of the prospectus for registration or, to the defendant's knowledge, before allotment thereunder or before the acceptance of the offer; and
- (c) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document;

or if it is proved-

- (i) that having consented to become a director of the company, he withdrew his consent before the issue of the prospectus and that it was issued without his authority or consent; or
- (ii) that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
- (iii) that after the issue of the prospectus and before allotment or acceptance thereunder he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal and of the reason therefore.

(4) Where the prospectus contains the name of a person as a director of the company, or as having agreed to become a director thereof, and he has not consented to become a director, or has withdrawn his consent before the issue of the prospectus and has not authorized or consented to the issue thereof, the director of the company (except any without whose knowledge or consent the prospectus was issued) and any other person who issued it or authorized the issue thereof, shall be liable to indemnify the person named as aforesaid, against all damages, costs and expenses for which he may be liable by reason of his name having been so stated in the prospectus or in defending himself against any action or legal proceedings brought against him in respect thereof.

(5) Every person who by reason of his being a director or having been named as a director, or having agreed to become a director, or of his having authorized the issue of the prospectus or of his having become a director between the issue of the prospectus and the holding of the first liability to make payment under this section, may recover a contribution, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

(1) Objective Requirements of the Provision

The civil liability for statements in a prospectus issued in pursuance of an offer of shares to the public for subscription is regulated in section 160(1).

First of all, the section names all possible liable persons. It is not uncommon, however, that the same person matches more than one of the listed categories.

Most important, section 142 dictates that an attorney who is involved in the preparation of the prospectus should be excluded from the definition of promoter.

The "time of issue" of a prospectus referred to in section 160(1)(a) is the date of the prospectus registration in the Companies Registration Office, unless a different time is proved, according to section 154(5).

To receive this claim, the plaintiff must have relied on the false statement or misleading omission²⁰³, in other words, the plaintiff must have been on the faith of the prospectus.²⁰⁴ This statement must have been made by a person who has signed the prospectus as offeror in terms of section 154(1) if it is an offer for subscription or section 154(2) if it is an offer for sale.

Furthermore the statements must be on the face of the prospectus and the statements must be fairly represented finally.²⁰⁵ Fair representation means that all material must be stated with "scrupulous accuracy" and nothing must be knowingly omitted which "might in any degree affect the nature, or extent or quality of the privileges or advantages which the prospectus holds out as inducements to take shares"²⁰⁶

The burden of proof for the loss rests with the claimant. The extent to which the claimant is entitled to be compensated will be determined by his/ her ability to supply sufficient evidence as to the influence of the prospectus in the acquirement of certain shares.²⁰⁷

Whether the claimant acquired the shares directly in response to the offer to the public or later on the stock exchange, is irrelevant.²⁰⁸

The latter way of acquiring shares could, however, cause difficulties when attempting to prove the role the prospectus played in the loss suffered, because of the gap between the time of issue of the prospectus and that of the acquisition.²⁰⁹

Section 160(2) differs slightly from section 160(1). The main difference is that (2) deals with the liability of false statements in a prospectus issued in pursuance of an offer of shares for

²⁰³ See s. 142.

²⁰⁴ *Baty v Keswick* (1901) 85 LT 18 (Ch) 19.

²⁰⁵ *Henochsberg*, s 160, P.289.

²⁰⁶ *The New Brunswick & Canada Railway & Land Co v Muggeridge* (1860) 1 Drew & Sm 363 (Ch) 381-382

²⁰⁷ *Blackman*, § 160 6-35; *Shepard v Broome* [1904] AC 342 (HL); *Macleay v Tait* [1906] AC 24 (HL)

²⁰⁸ *Blackman*, § 160 6-35

²⁰⁹ *Blackman*, § 160 6-35

sale to the public as opposed to an offer for subscription. Furthermore the list of liable persons in (2) is more comprehensive than that in (1).

(2) Disclaimer

Reasons that exclude the liability are set out in Section 160(3). These reasons can be separated into three different categories, depending on the false statement.

A false statement in the first category is one which purports to be an extract from a report or valuation made by an expert²¹⁰

The liability is discounted if the false statement accurately represents the view of the expert, or is deemed to be an authentic extract from a report or valuation and the defendant had reasonable grounds to believe, and did so up to the time of the issue of the prospectus, that the expert was competent enough to make the statement, and the expert had given the consent required under the Act to issue the prospectus and had not withdrawn that consent before the lodging of a copy of the prospectus for registration or, to best of the defendant's knowledge, before allotment under it or acceptance of the offer, the statements are deemed permissible.²¹¹

A false statement purporting to be made by an official person or contained in an extract from a public official statement is the second category.²¹²

If the defendant can prove that the false statement was a true and correct reflection of the statement or extract he is not held liable.²¹³

What constitutes an "official person" or "public official statement" is open to debate.²¹⁴ It is argued that an "official person" is someone who holds a governmental position either nationally or locally, and a "public official statement" is one emanating from such a person in the course of his official duties.²¹⁵

The last category covers all other false statements which are not covered by the preceding two categories.²¹⁶

If the defendant can prove that he had reasonable grounds to believe and did, up to the time of the allotment of the shares or the acceptance of the offer, believe that the statement was true, he is exonerated.²¹⁷

²¹⁰ See s 160(3)(b)

²¹¹ See s 160(3)(b)

²¹² See s 160(3)(c).

²¹³ See s 160(3)(c).

²¹⁴ Blackman, § 160 6-36.

²¹⁵ Blackman, § 160 6-36.

²¹⁶ See s 160(3)(a).

²¹⁷ See s 160(3)(a); *Greenwood v Leather Shod Wheel Co* [1900 1 Ch 421 (CA)]; *Akerheim v Me Mare* [1959] 3 All ER 485 (PC).

In those circumstances when the false statement takes on the form of an omission and the defendant knows that the information has been omitted but believes that it does not have to be disclosed, the defendant cannot use this as grounds on which to base his defence as the belief is not reasonable.²¹⁸

The following three situations apply to all categories of false statements, and all constitute grounds for the retraction of a liability..

Firstly, if the defendant withdraws his consent to become a director of a company before the issue of the prospectus and it was issued without his authority or consent.²¹⁹

Secondly, if the prospectus was issued without the defendant's knowledge or consent and, when becoming aware of its issue, he forthwith gives reasonable public notice that it was issued in such a manner.²²⁰

Finally, liability is excluded if, after the issue of the prospectus and before allotment or acceptance under it, the defendant, on becoming aware of the untrue statement, withdrew his consent and gave reasonable public notice of the withdrawal and the reason for it.²²¹

The burden of proof is on the defendant for the general exclusions as well as for the special exclusions.²²²

The definition of "reasonable public notice" depends on each individual case's circumstance but notice in a newspaper would be sufficient.²²³

In the case of a notice that was posted to all recipients of the prospectus, it may be considered adequate for those recipients, but would not suffice for those who acquired the shares on the faith of the prospectus but were not immediately party to the issue.²²⁴

Furthermore, according to section 160(5), any person whose name is wrongly included in the prospectus as a director or prospective director, and who was not instrumental in the issue must be indemnified against all damages and costs for which he may, in consequence, be liable by the directors and other people who authorised the issue of a prospectus.²²⁵

According to section 160(5) every person who discharged his statutory liability for an untrue statement in the prospectus, can recover a pro rata contribution from the other liable parties.²²⁶

²¹⁸ *Shepherd v Broome* [1904] AC 342 (HL).

²¹⁹ *Drincqbier v Wood* [1899] 1 Ch 393; *Watts v Bucknall* [1902] 2 Ch 628, [1903] 1 Ch 766 (CA).

²²⁰ *Blackman*, § 160 6-37; *Drincqbier v Wood* [1899] 1 Ch 393.

²²¹ *Blackman*, § 160 6-37.

²²² *Blackman*, § 160 6-37.

²²³ *Blackman*, § 160 6-37.

²²⁴ *Drincqbier v Wood* [1899] 1 Ch 393.

²²⁵ *Cilliers&Benade*, 2005, p. 17.28.

²²⁶ *Cilliers&Benade*, 2005, p. 17.28.

(3) Legal Consequence

The legal consequence of section 160(1) is to pay compensation to the investor. In general, the defendant is liable for the whole of the loss or damage of the claimant. This is not to be understood as a penalty or a punishment.²²⁷ The investor does not get the right to sell the shares to the issuer, nor does the investor get the right of rescission, to return the shares to the company, by this section.²²⁸ The compensation payable by the defendant is for the loss sustained by the claimant. The loss is calculated, by reference to what the investor position would have been if the untrue statement had not been made that is the negative interest.²²⁹

The compensation is not intended to be a penalty imposed by statute to punish without reference to the injury sustained.²³⁰

c) Section 161 Liability of Experts and Others

161. Liability of experts and others. - (1) Where the consent of any person is required under section 151 and he has given that consent-

- (a) he shall not, by reason of his having given it, be liable as a person who has authorized the issue of the prospectus either
 - (i) under section 160(1) or (2) to compensate persons subscribing or purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by him as an expert; or
 - (ii) under section 160(4) to indemnify any person against liability under the said section 160(1) or (2); but
 - (b) he shall, in respect of any untrue statement purporting to be made by him as an expert, be liable under the said section 160(1) or (2), unless one of the following things (which shall in his case be in lieu of the grounds of defence available to others by virtue of section 160(3)), is proved, namely -
 - (i) that having given his consent as aforesaid he withdrew it in writing before lodgement of a copy of the prospectus for registration; or
 - (ii) that after lodgement of a copy of the prospectus for registration and before allotment thereunder to, or before acceptance thereunder by, the person complaining, he, on becoming aware of the untrue statement, withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefore; or
 - (iii) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment of the shares or the acceptance of the offer, as the case may be, believe that the statement was true.
- (2) Where under section 151 the consent of any person is required to the issue of a prospectus, and he either has not given that consent or has withdrawn it before the issue of the prospectus, he shall be entitled to indemnity under section 160 as if he had without his consent been named in the prospectus as a director of the company.

²²⁷ Henochsberg, s 160, P.288.

²²⁸ Blackman, § 160 6-34.

²²⁹ Blackman, § 160 6-35; Clark v Urquhart [1930] AC 28 (HL) 56-57; Broome v Speak [1903] 1 Ch 586 (CA) 605-606.

²³⁰ Thomson v Lord Clanmorris [1900] Ch 718 (CA); Mackay v Tait [1906] AC 24 (HL).

(1) Objective Requirements of the Provision

An expert is a geologist, engineer, architect, quantity surveyor, valuer, accountant, auditor, or any other person who professes to have extensive knowledge of or experience in a particular field.²³¹

Statutory liability occurs when an expert makes a false statement. It is important to note that not every false statement generates liability, only those which concern an expert's field of speciality.

The reason for this special liability is to protect experts by making sure that any claims against them are justified. A person who is required to give consent in terms of section 151, cannot incur a liability for the indemnity in section 160(4) be imposed on him by reason only of his having given consent. This is instituted as a way to protect experts from liability, as long as they did not actually authorise the issue of the prospectus.²³²

The expert shall not be protected, however if he has made a false statement in his capacity as an expert.

(2) Exemptions

The expert is exempt from liability on one of the grounds set out under section 161(1)(b) (i)-(iii). Joint liability cannot arise.²³³ The expert has to prove the defences.

d) Section 162 Offences in respect of false statements in prospectus

162. Offences in respect of untrue statements in prospectus. – (1) Where a prospectus contains a statement which is untrue, every person referred to in section 160(1) or (2) shall, subject to the provisions of subsections (3) and (4) of this section, be guilty of an offence.

(2) Where there is published with or as part of a prospectus a report of any expert or an extract from such report and such report or extract contains a statement which is untrue, the expert shall, provided he has given his consent to the inclusion of such statement in the prospectus in the form and context in which it appears, and subject to the provisions of subsections (3) and (4), be guilty of an offence.

(3) In any prosecution under this section it shall be a defence if it is proved either that the untrue statement was immaterial or –

- (a) with respect to every such untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that the person charged had, after reasonable investigation, reasonable ground to believe and did up to the time of the allotment of the shares or acceptance of the offer (as the case may be) believe that the statement was true, and that there was no omission to state any material fact necessary to make the statement as set out not misleading; and

²³¹ S 161(1)(b); in terms of s 142.

²³² Blackman, § 161 6-39.

²³³ Blackman, § 161 6-39.

- (b) with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, that the person charged had reasonable ground to believe and did believe that the person making the report or valuation was competent to make it; and
 - (c) with respect to every such untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document.
- (4) In any prosecution under this section of any person it shall be a defence if it is proved –
- (a) that having consented to become a director of the company he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
 - (b) that the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue he forthwith gave reasonable public notice that it was issued without his knowledge or consent; or
 - (c) that after the issue of the prospectus and before allotment or acceptance thereunder, he, on becoming aware of any untrue statement therein, withdrew his consent thereto and gave reasonable public notice of the withdrawal, and of the reason therefore.

Section 162 accords criminal liability to a person on whom civil liability has been previously imposed. It is possible for common law fraud to co-exist with criminal liability which has been imposed by section 162 because of section 163.

(1) Objective Requirements of the Provision

The objective requirements of section 162 are quite similar to sections 160(1) and (2). Subsection (1) accords criminal liability in respect of a false statement made by any person other than an expert, and subsection (2) accords criminal liability when the false statement made by an expert is contained in a report or in an extract published with or as part of the prospectus. However, the liability is only valid when the expert has given permission for the statement to be included in the prospectus.²³⁴

(2) Exemptions

In section 162(3) there are certain grounds on which the liability is excluded. These grounds are very similar to the defences in section 160(3) but not the same.

The defence of immateriality is a special defence for criminal liability and does not apply to civil liability.²³⁵

²³⁴ Henochsberg, s 162, P.294.

²³⁵ Blackman, § 162 6-41.

A statement is immaterial if it does not induce a reasonable person to act upon it.²³⁶ To test if a statement is material or not one must ask: “If the facts had been revealed, or even clearly indicated, would any man of sense have put his money into it?”²³⁷

A statement is considered material, however, “when it has the natural and probable effect of influencing the mind of the person to whom it is made”.²³⁸

However, the materiality of a false statement can also be removed, if the statement was false at the time of the issue, but made true before allotment.²³⁹ Concealment of vital facts can also give rise to criminal liability.²⁴⁰

Mere honest belief on the basis of legal advice that the statement was immaterial is not considered a defence.²⁴¹

The onus is on the accused to prove a particular defence, and seems to be more onerous to prove than the civil counterpart because of the addition of the words “after reasonable investigation” in section 162(3)(a).²⁴² Only to prove that he had reasonable grounds to believe is insufficient, the accused has to prove that he made a full and objective investigation into the truth of the statement. This is in the situation where he does not rely on expert testimony or the fact that its source was a public official document.²⁴³

B. Common Law Civil and Criminal Liability

According to section 163, the liability a person may incur under any other law or common law is not limited or diminished by the provisions of the Act.

Common law criminal liability is based on the principles of fraud and is punishable as such.²⁴⁴

The base of the common law civil liability is depending on the circumstances, the principles of the law of delict and of contract, in relation to misrepresentation and the remedies deriving from this.²⁴⁵

1. Criminal Liability

Fraud is defined as unlawful and intentional misrepresentation which causes actual prejudice or which is potentially prejudicial to another.²⁴⁶

²³⁶ R v Milne & Erleigh (2) 1950 (4) SA 596 (W) 597-8; Broome v Speak [1903] 1 Ch 586 (CA); Shephard v Broome [1904] AC 342 (HL).

²³⁷ R v Bishirgian [1936] 1 All ER 586 (CA) 594.

²³⁸ Pretorius v Natal South Sea Investment Trust Ltd 1965 (3) SA 410 (W) 415-416; Wessels, The Law of Contract in South Africa, para 1097.

²³⁹ R v Milne & Erleigh (2) 1950 (4) SA 596 (W).

²⁴⁰ S v Judin 1969 (4) SA 425 (A).

²⁴¹ Broom v Speak [1903] 1 Ch 586 (CA); Henochsberg, s 162, P.295.

²⁴² S v Shaban 1965 (4) SA 646 (W); Blackman, § 162 6-41; Henochsberg, s 162, P.295.

²⁴³ Henochsberg, s 162, P.295.

²⁴⁴ Cilliers&Benade, 2005, p. 17.23.

²⁴⁵ Cilliers&Benade, 2005, p. 17.23.

Fraud is not only a crime against property, it can also be regarded as a crime against the interests of the community in general.²⁴⁷

Because of the possibility of prejudice inherent in the misrepresentation, fraud is punished mainly²⁴⁸, the violation of property is a minor factor. The actual harm it causes is less harmful than the longterm damage or harm it could cause.

The elements of fraud are, therefore, misrepresentation, unlawfulness, prejudice and intention.²⁴⁹

a) Misrepresentation

Misrepresentation is the first requirement for fraud. In general, this means that the accused must have represented to the complainant that a material fact, or set of material facts, existed which, in truth, did not exist.²⁵⁰

Misrepresentation can be committed actively or passively by means of an omission, where the accused fails to disclose material facts.²⁵¹

However, a misrepresentation by means of non-disclosure will only amount to a misrepresentation if there was a legal duty to disclose.²⁵²

This means not that a non-disclosure which is a civil fraud is automatically a fraud in criminal terms; the civil fraud is not equivalent to criminal fraud.²⁵³

b) Prejudice

It is considered sufficient if the misrepresentation may cause harm or prejudice. Actual prejudice is not required to constitute fraud.²⁵⁴

It is not only probable, direct or reasonably certain risks of prejudice that constitute fraud, it is also considered sufficient if there is a reasonable possibility for prejudice in general.²⁵⁵ On the other hand, the possible risk must not be too remote.²⁵⁶

²⁴⁶ LAWSA 6 par 322.

²⁴⁷ LAWSA 6 par 323.

²⁴⁸ R v Moshesh 1948 1 SA 681 (O); R v Deetlefs 1953 1 SA 418 (A) 421H.

²⁴⁹ LAWSA 6 par 323.

²⁵⁰ LAWSA 6 par 324.

²⁵¹ LAWSA 6 par 325.

²⁵² S v Rosenthal 1980 1 SA 65 (A) 85.

²⁵³ S v Burstein 1978 4 SA 602 (T) 604.

²⁵⁴ Moolchund v R (1902) 23 NLR 76 78-81; R v Jolosa 1903 TS 694 698; S v Kruger 1961 4 SA 816 (A) 827-828.

²⁵⁵ R v Smith 1951 2 PH H105 (O); R v Seabe 1927 AD 28 32-34; R v Bester 1961 2 SA 52 (FC) 54; S v Chetty 1972 4 SA 324 (N) 328.

²⁵⁶ R v Seabe 1927 AD 28 32 34; R v Smith 1951 2 PH H105 (O); S v Kruger 1961 4 SA 816 (A) 832; S v Tshoba 1989 3 SA 393 (A).

The test is whether the misrepresentation is such that a reasonable person might, in the ordinary course of events, be deceived.²⁵⁷ There is no room for prejudice if it is obvious that the reasonable man would never believe the misrepresentation.²⁵⁸

Whether the representee is aware of the fact that the representation is false or whether he has special knowledge which ordinary reasonable men do not have, is irrelevant. Also, it does not matter if the representee has not actually acted upon the misrepresentation, or that the representor's fraudulent design has not succeeded.²⁵⁹

Whether the defrauded party is finally in a better position as a result of the misrepresentation than before is also immaterial, because whether or not there is prejudice must be determined from the time when the misrepresentation was made.²⁶⁰

c) Causation

A final objective requirement for fraud is a casual link between the misrepresentation and the prejudice, or the potential prejudice.²⁶¹ For the liability of the prospectus this means that it is sufficient if damage or loss could have caused by the misrepresentation in the prospectus. To avoid abuse of criminal liability, on the other hand, it is necessary that the risk of prejudice is not too remote.²⁶²

d) Intention

As a subjective element of fraud, the accused must have had an intention to defraud in order to be found.²⁶³ This implies that the accused must be aware of the fact that the representation is false.²⁶⁴ The burden of proof is borne by the accused; he has to prove that he did not know that the representation was false.²⁶⁵

The awareness can be declared as false not only if the accused knows that it is false, but also if he has no honest belief in its truth, or if he acts recklessly, and does not care whether it is true or false.²⁶⁶ The same counts if the accused intentionally abstains from checking on

²⁵⁷ R v Seabe 1927 AD 28 32-34; S v Kruger 1961 4 SA 816 (A) 828-829; S v Francis 1981 1 SA 230 (ZA).

²⁵⁸ LAWSA 6 par 328.

²⁵⁹ R v Dayonta 1935 AD 52 55-57; R v Mohale 1950 1 SA 390 (G) 391-392; R v Kritzinger 1971 2 SA 57 (A); S v Kruger 1961 4 SA 816 (A) 828 832-833.

²⁶⁰ S v Kruger 1961 4 SA 816 (A) 828 832.

²⁶¹ R v Youngsleson (1) 1948 1 SA 819 (W); R v Smith 1951 2 PH H105 (O) 229; S v Rautenbach 1990 2 SACR 195 (N).

²⁶² R v Seabe 1927 AD 28 32-34; S v Kruger 1961 4 SA 816 (A) 828-829.

²⁶³ LAWSA 6 par 331.

²⁶⁴ R v Freedman (1905) 19 EDC 139; S v Loewenthal 1983 3 SA 430 (T).

²⁶⁵ R v Oliver (2) 1959 4 SA 145 (D); 145-146; S v Harper 1981 2 SA 638 (D) 649.

²⁶⁶ R v Mohr 1944 TPD 105 108-109; S v Jordaan 1962 1 PH H87 (O).

sources of information with the express purpose of avoiding any doubts about the facts which form the subject matter of the representation.²⁶⁷

The grade of intention is 'dolus eventualis', which means that it is sufficient if the representer foresees the possibility that the representation may be false, but nevertheless decides to make it.²⁶⁸ Any kind of negligence regarding the truth of a statement can not be equated with intention.²⁶⁹

Furthermore it is important to establish a conviction of fraud, that the accused has an intention to induce somebody to embark on a flamed course of action.²⁷⁰ Regarding to the liability of the prospectus means that the representation induced one to subscribe for or to purchase the shares, no matter whether the claimant finally act on the misrepresentation or not. The representation must be false about a material fact.²⁷¹

e) Legal Consequences

Legal consequence is a recourse that may be taken for the recovery of damages for such patrimonial loss as the claimant may have suffered.²⁷² This action exists irrespective of whether the damaged party uses their civil claims or not.²⁷³

2. Civil Liability

For the civil liability in common law, it is important to distinguish between the kinds of liabilities.²⁷⁴ On the one-hand, there is the liability to suffer rescission of the contract to subscribe for, or purchase, the shares on the ground of a misrepresentation contained in the prospectus. On the other hand, there is the liability for damages for fraudulent misrepresentation, or liability for restitutional damages in form of a reduction of the purchase price where the misrepresentation was innocent, in the case of a sale of the shares.²⁷⁵

a) Fraudulent Misrepresentation

Fraudulent misrepresentation can be defined as a false precontractual statement of fact intentionally made by one party in a contract, which induces the other party to enter into the con-

²⁶⁷ R v Oliver (2) 1959 4 SA 145 (D) 146; R v Meyers 1948 (1) SA 375 (A) 382-384.

²⁶⁸ R v Bougarde 1954 2 SA 5 (C) 9.

²⁶⁹ R v Meyers 1948 (1) SA 375 (A) 384; R v Bougarde 1954 2 SA 5 (C) 8.

²⁷⁰ S v Isaacs 1968 2 SA 187 (D) 191.

²⁷¹ R v Meyers 1948 (1) SA 375 (A) 382.

²⁷² Vlotman v Landsberg (1890) 7 SC 301; Symons and Moses v Davies 1911 NPD 69.

²⁷³ De Jager v Grunder 1964 1 SA 446 (A); Ranger v Wykerd 1977 2 SA 976 (A).

²⁷⁴ Henochsberg, s 162, P.296.

²⁷⁵ Henochsberg, s 162, P.296; Benjamin v Minter (1896) 8 HCG 37 53-54.

tract or to agree to terms to which the other party would not have agreed had the truth been known.²⁷⁶

To commit a fraudulent misrepresentation, a party has to fulfil certain criteria.

(1) Precontractual false statement of fact

The representor has to make a false statement of fact. This can even consist of the expression of an opinion which is not honestly held.²⁷⁷ The false statement can be made through conduct, as well as omission.²⁷⁸

(2) Wrongful / Unlawful misrepresentation

Misrepresentation, by word or other positive conduct, is taken as wrongful if the misrepresentation induced the contract or induced a party to agree to terms to which they would not otherwise have agreed.²⁷⁹ As well as at the criminal law, the fact has to be material.²⁸⁰

(3) Causation

There must be a clear causal link between the act of the fraudulent misrepresentation and the conclusion of the contract.²⁸¹

(4) Other Party

The last objective requirement is that the fraud must be made either by the other party, or by a third party acting in collusion with, or as the agent of, the other party.²⁸²

There will be no effect however, if the third party is an independent third person.²⁸³

(5) Intention

Finally, the false representation must be made intentionally. In other words, the intention of the party must be to induce the other party to act on it.

(6) Legal Consequences

The party injured by a fraudulent misrepresentation has the choice either to abide by the contract or to rescind the contract and claim *restitutio in integrum*.²⁸⁴

²⁷⁶ *Novick v Comair Holdings Ltd* 1979 2 SA 116 (W).

²⁷⁷ *Feinstein v Niggli* 1981 2 SA 684 (A) 695C – 696H; *Van Heerden v Smith* 1956 3 SA 273 (O).

²⁷⁸ *Standard Bank of SA Ltd v Coestee* 1981 1 SA 1131 (A) 1135D – G.

²⁷⁹ *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W) 415-416; *Karoo and Eastern Board of Executors and Trust Co v Farr* 1921 AD 413 415

²⁸⁰ *Pretorius v Natal South Sea Investment Trust Ltd* 1965 (3) SA 410 (W) 415-416; *Karoo and Eastern Board of Executors and Trust Co v Farr* 1921 AD 413 415

²⁸¹ *Stellenbosch Municipality v Lindenburg* (1860) 3 SA 345; *Khan v Naidoo* 1989 3 SA 724 (N).

²⁸² *Karabus Mootors Ltd v Van Eck* 1962 1 SA 451 (C) 453.

²⁸³ *Karabus Mootors Ltd v Van Eck* 1962 1 SA 451 (C) 453.

²⁸⁴ LAWSA 5 par 148.

This choice undoubtedly exists where the party would not have entered into the contract at all, but for the misrepresentation.²⁸⁵ The legal consequences of the other instance - where the party simply agreed to certain terms of the contract, caused by the misrepresentation - are controversial.²⁸⁶

b) Negligent Misstatement

Furthermore, there is the possibility in South Africa to claim damages for negligent misstatement causing pure economic loss, including the case where the negligent misstatement induces the conclusion of a contract.²⁸⁷

The elements of this action are quite similar to the elements of the fraudulent misstatement, an unlawful misstatement made by negligence that caused an economic loss.²⁸⁸ Finally, the defendant has a duty to not make a false statement.²⁸⁹

Due to their similarity, only the intention and the duty will be mentioned here.

(1) Negligence

In this regard, negligence means the honest but mistaken belief, that a statement is true.²⁹⁰

That is not, however, the general definition of negligence. As such, negligence is rather interpreted on a case by case basis.²⁹¹

(2) Duty

Finally, there is a duty on the defendant not to make a false statement.²⁹² This duty is generally applicable to the one issuing a prospectus.²⁹³ This duty applies to each person whom one reasonably foresees will rely on the contents of the prospectus, whether for the purpose of subscribing for, or purchasing, the shares.²⁹⁴

²⁸⁵ Gous v de Kock, Combrinck v De Kock (1887) 5 SC 405; Frost v Leslie 1923 AD 276.

²⁸⁶ Favouring a right of rescission in every case would seem to be Beukes v Bekker 1924 EDL 4; Karoo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413; in favour of a right of rescission in cases of casual fraud only Gous v de Kock, Combrinck v De Kock (1887) 5 SC 405.

²⁸⁷ Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) 832-833; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) 904, 911-914; Kern Trust Bpk v Hurter 1981 (3) SA 607 (C) 616; Bayer South Africa (Pty) v Frost 1991 (4) SA 559 (A) 567-570; Cape Empowerment Trust Ltd v Fisher Hoffman Sithole [2005] 1 All SA 654 (C) 680; Axiam Holdings Ltd v deloitte & Touche [2005] 4 All SA 157 (SCA) 160.

²⁸⁸ Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) 912.

²⁸⁹ Bayer South Africa (Pty) v Frost 1991 (4) SA 559 (A) 567-570; Axiam Holdings Ltd v deloitte & Touche [2005] 4 All SA 157 (SCA) 160.

²⁹⁰ Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) 912.

²⁹¹ Natal v Trust Bank van Afrika Bpk 1979 (3) SA 824 (A) 832-833; Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) 912.

²⁹² Bayer South Africa (Pty) v Frost 1991 (4) SA 559 (A) 560; Axiam Holdings Ltd v deloitte & Touche [2005] 4 All SA 157 (SCA) 163.

²⁹³ Henochsberg s 163 p 296.

²⁹⁴ Henochsberg s 163 p 296.

It is, however, important to determine whom the prospectus is addressed to, in order to receive cover from this duty. A general prospectus may cover the subscriber as well as purchaser, in other words, the primary market as well as the secondary. However, a prospectus addressed to the shareholders of the company, with the particular purpose of inviting a subscription for further shares, the primary market, owe no duty to a shareholder who relied on the certain prospectus for the purpose of buying shares on the secondary market.²⁹⁵

(3) Legal Consequences

The legal consequence of a negligent and false statement is that the person liable has to compensate the other person in respect of the loss suffered by the subscription or purchase of the shares.

²⁹⁵ *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321 (Ch).

VIII. Varieties

As demonstrated above there are two different systems with a multiplicity of ways to secure the protection of the investor. Both systems have their advantages and disadvantages, and, although there is a lot of diversity. I will now focus on the more remarkable examples.

A. *Burden of Proof*

One main difference is that there is a different burden of proof in comparable situations. They are similar, in that both systems require the claimant to prove the false statement and the loss. However, differences can be found, especially in the area of causation.

In Germany, the basic rule for the onus of proof is that: "Each party has to prove its advantage".

This rule has some exemptions, reversal of the burden of proof, especially if it is almost impossible or impossible for one party to prove a fact. This occurs, for example, with the intention of the other party, or certain behaviour like business-decisions or knowledge, but also if it seems to be an unfair discrimination.

A good example, regarding to the liability of the prospectus is the assumption of the court that an investor acquired shares because of the prospectus. Not only does the investor not have to prove this, but they do not even need to know about the prospectus. From the moment the prospectus is published, it is assumed that an investor acquired shares because of the prospectus, as long as the acquisition happened within a six month period, after publication. An investor cannot prove his intention by evidence, it is an absolute subjective action. On the other hand, it might also be difficult for the liable person to provide evidence that there were aspects other than the prospectus that influenced the acquirer, but it becomes a question of fair risk distribution. The person who brings a prospectus to the market with the intention to encourage investors cannot pretend that he did not believe that people acted because of the prospectus. Subsequently, he has to bear the risk that people trust in the prospectus and invest, in other words, he has to bear the risk to prove the opposite.

This is also one of the biggest differences in South African law, where the claimant has to prove the faith in the prospectus as reason for acquiring the shares and the untruth of the statement as cause for the loss.²⁹⁶

This burden becomes more and more difficult to prove later, especially if the shares were acquired on the secondary market.²⁹⁷ It is a strict interpretation of the basic maxim of the burden of proof, but it seems to be unfair in certain circumstances.

²⁹⁶ Blackman, § 160 6-35; *Shepard v Broome* [1904] AC 342 (HL); *Macleay v Tait* [1906] AC 24 (HL).

B. Liability of Experts

Liability of the experts was a big issue in Germany. Unlike South Africa, no special section about the liability of experts, comparable to section 161 Companies Act No. 61 of 1973, exists in Germany. So far there is just a partial liability, caused by the jurisdiction of so-called experts covering only the part of the prospectus they were responsible for, and for which they provided confidence to the public.²⁹⁸ These quasi experts were mostly financial auditors, annual auditors, experts and lawyers, because of their specialised knowledge through their profession, certain special position in the economy, or simply because of their advantageous skills in this particular area.²⁹⁹

Because of the lack of a special liability of experts, the Federal Court of Justice established that only maxims which provide a limited liability regarding the certain area of work would be considered in litigation.³⁰⁰ The problem with this maxim is that it contradicts the maxim of the BörsG of joint liability.³⁰¹ This means that a person who is just liable for a part of the prospectus is not liable in terms of § 44 BörsG. This result's from the "ranking" of these maxims in the German law system, the maxim in the BörsG, embedded by the legislator, outweigh the maxim established by the Federal Court of Justice. Subsequently, it means that the liability of experts is impossible without an intervention by the lawmaker.³⁰²

For this reason the lawmaker was planning a § 44a BörsG which should deal with the liability of third parties in other words, the liability of others.³⁰³ This law provided the liability of persons who are responsible for just a part of the prospectus, as long as the role they played, in the process of creating the prospectus, is clearly explained in the document. This is similar to the maxim established by the Federal Court of Justice, only this time it would be on a legal basis.

This law was, however, recently revoked by the Federal Government.

One could argue that the liability of the expert in section 161 Companies Act No. 61 of 1973 and the guarantor in § 8g II VerkProspG are not as different as they initially seem. § 8g II VerkProspG regulates the content of the prospectus. One of the compulsory details which has to be on a prospectus is a section establishing whether a person is generally responsible, or is liable only for sections of the prospectus. This means that only those persons listed

²⁹⁷ Blackman, § 160 6-35.

²⁹⁸ BGHZ 77, 172, 178/179; Meyer, WM.2003, 1301, 1308/1309; Kiethe, in ZIP 2005, 216, 222.

²⁹⁹ BGH NJW 2004, 3420.

³⁰⁰ BGH NJW 1984, 865.

³⁰¹ Fleischer, in BKR 2004, 339, 344.

³⁰² Fleischer, in BKR 2004, 339, 344.

³⁰³ Diskussionsentwurf für ein Gesetz zur Verbesserung der Haftung für falsche Kapitalmarktinformationen (Draft for a law to improve the liability for false capital market statements); NZG 2004, 1042, 1044.

on the prospectus are liable. These could be similar to guarantors or experts, but need not necessarily be.

However, to establish a liability, the profession is no longer important. Only the actual listing on the prospectus establishes a liability of the prospectus.

In General German legislation does not include a section which deals with the liability of the expert.

C. Exemptions

Slight differences occur as well in the field of what offers are excluded from the obligation to be accompanied by a prospectus. In respect of details the South African section is more extensive than the German one, but with a closer look the coverage of both sections, the German and the South African, is quite similar.

While section 144(a) lists all the particular offerees, like a registered bank, the German § 3 II WpPG in its number 1 only excludes qualified investors. The term Qualified investors in terms of the WpPG, on the other hand, is defined in § 2 WpPG and includes registered banks and credit institutes for example. In both systems you find an exemption for mini issue of shares as well as an exemption for persons who decide to invest a certain high amount of money. In the German system is this § 3 II nr. 3-5 WpPG, in South Africa section 144(b), and (c)(i). The reasons are similar as well. § 3 II nr. 3,4 WpPG presumes that a person who invests that high amount of money does not need this kind of protection, because he already knows about the risks and is therefore "almost qualified". The reason for § 3 II nr.5 WpPG is that the costs of the prospectus are disproportioned to the sales revenue. You find the same reasons in the South African commentaries.

The other exemptions are not that similar, even though the German § 3 II nr.2 WpPG does stipulate that an offer to a limited person subgroup, not more than 100 persons per Member State of the EU, is excluded from the obligation of a prospectus, is this the only requirement.

The South African "counterpart", section 144(c) is much more detailed in its requirements.

The biggest difference in both systems seems to be the exemption in section 144(g), the employee share scheme, and in section 144(f), an offer to a relative person. It appears that there are no similar regulations in the § 3 WpPG, but § 4 I nr.5 WpPG is regulates that a company is empowered to offer shares to its actual employees as well as former employees, as long as this offer is accompanied by a document which informs about the amount and kind of risk-papers and reasons and details about the offer. However, the reasoning is different. While the German lawmaker presumes that employees are provided with enough in-house information

that a prospectus seems to be unnecessary, in South Africa the main arguments are the disproportion between the costs of a prospectus and the expected revenue, as well as the time it would cost to create a full prospectus.³⁰⁴ In respect of the offer to a relative person it could be argued that this kind of offer could be interpreted in § 3 II nr.2 WpPG, offer to a limited subgroup.

Finally it is to summarize that the similarities and varieties are in balance. The main difference is, once again, the formulation. For every paragraph in section 144 a comparable § in the WpPG does exist.³⁰⁵ The particular § 3 WpPG is formulated more general while the South African sections are very detailed. This has pros and cons. A general rule gives room for interpretation and judicial discretion on the one hand, but could also open the gates for misuse on the other hand. A detailed section can ease the understanding and serve as strict guideline for judges. Here again is to conclude that this is a result of the differences in the legal system in general. The South African system is used to this kind of detailed sections, while the legislator in Germany often leaves room for judicial discretion. However, in this special case it is to admit, that the general § 3 WpPG is supported by § 4 WpPG.

D. Material Facts

Differences also occur in how false information is defined. This factor is less a characteristic of German law than it is of South African law.

While in both, German and South African law, tangible proof is demanded, in Germany this proof is related to the facts, whereas in South Africa it is open to debate.³⁰⁶

This difference could, in part, be a product of the Pretorius case³⁰⁷ wherein it was stated that, "it is material when it has the natural and probable effect of influencing the mind of the person to whom it is made". It is debatable whether material proof relates to wrongdoing or to the causal link between the misrepresentation and the misrepresentee's act of entering into the contract.³⁰⁸

³⁰⁴ Blackman s 144 6-11

³⁰⁵ Including § 4 WpPG. This section stipulates a lot of details and requirements, which have to be fulfilled till a exemption could be made. However, all the stipulated exemptions have in common, that a document is provided which informs the potential investors, comparable to the prospectus. This shall ease and fasten the process of issuing risk-papers, after a merger (§ 4 I nr.3, II nr.4 WpPG) or an acquisition (§ 4 I nr.2, II nr.3 WpPG) for example, without the long and expensive process of issuing a prospectus. It is supposed by the legislator that only persons like qualified or "almost" qualified investors are involved in this kind of transactions. Therefore do those persons do not need a protection by a prospectus.

³⁰⁶ Karoo and Eastern Board of Executors and Trust Co v Farr 1921 AD 413 415; Pretorius v Natal South Sea Investment Trust Ltd 1965 3 SA 410 (W).

³⁰⁷ Pretorius v Natal South Sea Investment Trust Ltd 1965 3 SA 410 (W).

³⁰⁸ LAWSA 5, par 147, FN 8.

This difference is one of subjectivity and objectivity. If material proof relates to causation rather than to the wrongdoing itself it would mean that every claim of misrepresentation could be justified. It would become quite difficult, however, for the court to prove which statements in the prospectus could be considered material in terms of causation. Especially if it is related to the person to whom the statement is made. Each individual person can become influenced by different statements in a prospectus. This would result in a multiplicity of reasons to justify a decision. Certainly, rules or guidelines could be established, but at the end of the day it is a problem of evidence. Each claimant would insist that the statement in question was the reason, and therefore the cause, for his decision, to invest in the certain shares and the issuer would not have a chance to prove that this was not the case, because the motivation would be completely subjective. Proof in relation to facts is, however, more objective. A simple definition of what constitutes a material fact would make it easier to determine whether a fact is essential or not.

Proof of a causal link should only be allowed if it can be verified in a test and if it could be determined whether a reasonable investor could rely on this information when making an investment decision. Only in such a way could it be permissible in court. The South African system would no longer be different because the tests could be applied to any situation. It would not make a difference whether you claimed that the false statement stemmed from an essential fact or that the investment was caused by the misrepresentation.

E. Knowledge of Misrepresentation

Differences also occur between South Africa and Germany in regards the defence of the issuer or liable person.

The main difference is that in South Africa it is possible to demand compensation for a negligent false statement, while in Germany only wilful misrepresentation or, according to § 45 I BörsG, gross negligence, can justify a liability. A person must know about the falseness or must not know gross negligently about the falseness of the statement.

The South African system provides the investor with greater protection in this regard. It is understandable, with regard to the protection of investors, that a fair risk distribution could also be used as an argument for this kind of liability. A person who wants to encourage investors has to therefore make sure that he knows what he is talking about, and what he is publishing.

Even so, the responsibilities of the issuer are enormous, and the possibility of acting negligently is thus high. It is arguable that the accuracy of the prospectus falls within the ambit of the issuer and that he has to therefore make sure that no false statements be included therein.

Overprotection of the investor could act as a deterrent to the issuer, and prevent him from issuing shares in South Africa. On the other hand it is arguable that a kind of "Delaware-Effect", a race to the top, could occur, with a subsequent boom of investments due to the ample protection of the investor. This is a matter for the economist, however, and is not a legal issue.

F. In Criminal Law

Furthermore, there are a few differences between the South African and German criminal law. The South African system stipulates that a prejudice, but an abstract prejudice, is sufficient to warrant a criminal case, while in the German system the crime is committed at the moment the prospectus with the false statement included is issued.³⁰⁹

While in South Africa only if it is determined a reasonable man could be influenced by a false statement can a case be made in Germany it is not even necessary that someone read the statement merely that it be made in the first place. In Germany such a delict is called "abstraktes Gefährdungsdelikt" (abstract hazardous delict).

The main difference between these systems is that in South Africa the possibility of a bad investment due to misrepresentation cannot be too remote³¹⁰, while in Germany any misrepresentation in an offer to the public is enough to warrant a criminal case.³¹¹

However, these differences are mere formalities, and in most cases should not lead to different conclusions. An offer to the public always carries with it the risk of prejudice if the misrepresentation concerns a tangible fact. It is difficult to imagine a case relating to the misrepresentation of facts without a possible risk of prejudice, besides those that deal with obvious misrepresentation.

G. Distinction of acquirer

Another interesting difference between South Africa and Germany is the distinction made between investors in South African law.

³⁰⁹ BGH 30, 291.

³¹⁰ R v Seabe 1927 AD 28 32 34; R v Smith 1951 2 PH H105 (O); S v Kruger 1961 4 SA 816 (A) 832; S v Tshoba 1989 3 SA 393 (A).

³¹¹ BT-Drs. 10/318.

In *Al-Nakib Investments (Jersey) Ltd v Longcroft*³¹² it was decided that the directors did not need to compensate persons who were not directly addressed by the prospectus or any person who acquired shares other than in the intended way.

German law does not make a distinction in this regard. Any person who suffers damages has the right to claim for compensation. It is difficult to relate this way of distinction.

A prospectus is not a contract, that opens the argument, only the parties are empowered to claim damages nor is it a directive to acquire shares. According to the definition in Section 1 of the Companies Act the prospectus has to honestly inform, the potential investor.

This distinction abets malpractice. The issuers can limit their liability by choosing who is entitled to read the prospectus and who is not.

If the issuers publish a prospectus they have to be aware the risk that many people will read the prospectus and act accordingly. They are therefore compelled to compensate for the loss incurred by any false statements. To limit the liability because issuers did not want to endanger a particular group of investors, does not alter the falseness of the statement.

A distinction between the intended ways of acquiring shares because of differences in cash-flow should be made, as this could affect the market in an unintended way. In this case the motivation of the issuer is different.

It is not uncommon for investors, influenced by the prospectus, to invest in certain shares.

A prospectus contains several facts, opinions, and expectations and these statements are not related to a certain subgroup or manner of acquiring shares.

By limiting the liability due to the issue of who the prospectus addresses, the Court established a further possibility of exculpation that the legislator did not foresee. In Section 160(3) of the Company Code all possible reasons for exculpation are listed. If the legislator did not wish a certain cause for exculpation to be utilized it would have been explicitly stated. Indeed, Section 160 deals with offers to the public and so Section 160(3) concerns exculpation for this claim only. The title of Section 160 is for offers to the public only, and the title of Common Law is limited by the addressed subgroup. That would, subsequently, lead to the conclusion that an investor who would act against the recommended way of the prospectus, but still in the generally intended way of it, to acquire shares, is in a inferior situation than a person who is directly addressed who acquired shares. This conclusion seems unfair, because of the fact that both persons are in the same situation because of the same misrepresentation in the prospectus. Both investors trusted the statement and both investors lost their money to treat them differently only because of the address on the prospectus seems unjust.

³¹² *Al-Nakib Investments (Jersey) Ltd v Longcroft* [1990] 3 All ER 321 (Ch).

As mentioned before, it is not unforeseeable that persons other than those expected acquire shares, or persons acquire shares in a different way than was suggested.

These investors are without protection and this cannot be in the interest of the legislator. If the issuer wants to limit his liability, a limitation by addressing the prospectus, or even a note on the prospectus, does not seem enough. For that purpose, the issuer has to make sure that only the addressed persons know about the prospectus and have access to it. The statements must be expressly related to the certain shares and the certain way of acquiring them. Alternately, according to the interpretation of the term prospectus as an offer, the issuer must make sure that none of the acceptances of investors will be accepted or vice versa, that no offer for shares by the investors will be accepted by the market or the company. If the court allows the issuer to limit the "offer" to a particular subgroup, the issuer has to turn away all investors who do not fall within this group.

All these ways are almost impossible to realize by the issuer. However, why should an investor, who is not explicitly addressed by the prospectus, not be allowed to trust the information included therein? It would possibly be easier if a new title for investors who are not addressed by these prospectuses, similar to that of the German § 823 II BGB in connection with § 264a StGB, was created or the decision made in *Al-Nakib Investments (Jersey) Ltd v Longcroft* was overruled.

This distinction, however, would only be necessary if the damage results from differing ways of acquiring shares. If the investor would not suffer damages if acquiring shares in the recommended way, the distinction serves a purpose. However, as long the damages result from misrepresentation all the investors have to be treated equally.

The issuer, who reaps the benefits of investments by all investors has to be accountable to all acquirers and compensate for their loss in the same way. Investments made by people other than there addressed in the prospectus should not be treated differently by the company or the market, merely because the issuer did not wish certain people to invest.

In my opinion there is irrevocable evidence for why this kind of limitation should be possible.

IX. Conclusion

The liability of the prospectus has many facets, whether it is a civil liability or a criminal. In the comparison between South Africa and Germany, we can conclude that the thoughts behind the concept of liability are very similar.

In both systems, we find the need for a misrepresentation or false statement in the prospectus. Furthermore this has to consist of a material fact and a causation is essential as well.

As shown before, the main differences arise from the diversity of the law systems in the two countries and deal appropriately according to the particular system.

To figure which law or which system protects in a better way and is, in the same moment, not overregulated in order to give the issuers enough room to publish prospectuses without fear, is impossible to say. On the one hand, the South African law gives the claimant a possibility to the hand against negligent misrepresentation, but, on the other hand, in Germany the claimant does not need to prove that he had access to the prospectus at all.

In general, the pros and cons are balanced. In both systems, the investor is provided with plenty of possibilities to claim back his loss. In both systems, the issuer is obliged to secure that the statements he is publishing do not cause any damage or even cause possible damage. The transparency is granted and the investor is actually in the position to claim back his loss.

With the new laws in Germany, the legislator closed loopholes and granted the investors the possibility to claim damages. On the other hand, it seems quite harsh for an investor to lose his claim after six months. Unfortunately, it is as well that the legislator did not expressly take the chance to regulate the liability of experts. This could have been important for the practice, where the investor often is in the situation that the issuer of the prospectus, his debtor, is insolvent. In the case that no expert is listed on the prospectus the investor has no chance to claim back his money. The number of liable persons is limited, however, because of the demanded listing on the prospectus to justify a liability, and subsequently more clear.

Furthermore, the assimilation of the liability of the prospectus to the BörsG makes the liability generally much more focussed on corporate law than before. The separation between consumer protection and the liability of the prospectus becomes clearer.

It seems to me that the transparency of the "Grey Market" and the stability of the trade law are in the foreground of the new regulations, rather than the protection of the single investor.

Problematically seems that the most legal consequences were transfused from the BörsG, which is company law, to close corporation law. That is not a problem in general but could cause problems if the special maxims of the certain law does not were considered.

The legal consequence "Restitution of the acquiring price for takeover of the risk-papers and financial assets" is interpreted as modified right of withdrawal, for example.

It will be interesting to figure how the Federal Court of Justice will interpret the new sections of liability and will handle the legal consequences in the certain situation.

Bibliography

Books/ Commentaries

- Assmann, Heinz
Handbuch des Kapitalanlagerechts (Capital Investment Law), 3. Edition, 2007;
Cit.: Assman, Hdb. KapitalanlageR, § , rn.
Assmann, Heinz
Prospekthaftung (Liability of the Prospectus), 1985;
Cit.: Assmann, Prospekthaftung, 1985, p.
Assmann, Heinz
Kommentar zum Verkaufsprospektgesetz (Commentary for Verkaufsprospektgesetz), 2001;
Cit.: Assmann in Assmann/ Lenz/ Ritz, § VerkProspG Rn.
Assmann, Heinz
Europäisches Wirtschafts- und Steuerrecht (European Corporate and Tax Law), 1990;
Cit.: Assmann, Europäisches Wirtschafts- und Steuerrecht, 1990, p.
Blackman, Michael S./ Jooste, Richard Dennis/ Everingham, Geoff
Commentary on the Companies Act, 2002;
Cit.: Blackman, § ..., p....
Brechmann, Arnd
Wertpapiere in Theorie und Praxis (Risk-Papers in Theory and Praxis), 6. Edition, 2006;
Cit.: Brechmann, Wertpapiere in Theorie und Praxis, 2006, p. 58
Bruns, Georg/ Rodrian, Heinrich/ Stoeck, Wolfgang
Wertpapier und Börse (Risk-paper and Stock Market), 1990;
Cit.: Bruns/ Rodrian/ Stoeck, 1990, §...
Canaris, Claus W.
BörsG, Anm....
Handelsgesetzbuch – Bankvertragsrecht (Tradelaw – Contracts of Banks), 4 Edition, 2005;
Cit.: Canaris, Bankvertragsrecht, 2005, Rn....
Carl, Dieter/ Machunsky, Jürgen
Wertpapier-Verkaufsprospekt : Gesetz, Kommentar, Anhang (Sales Prospectus: Law, Commentary, Appendix), 1992;
Cit.: Carl/ Machunsky, 1992, p....
Cilliers, H./ Benade, M.
Corporate Law, 3rd Edition, 2005;
Cit.: Cilliers&Benade, 2005, p...
Clausen, Carsten Peter
Bank- und Börsenrecht (Bank- and Stock market law), 3. Edition, 2003,
Cit.: Clausen, Bank- und Börsenrecht, 2003, §... Rn...
Ellenberger, Jürgen
in Festschrift für Herbert Schimansky, Bankrecht – Schwerpunkt und Perspektiven (Bankinglaw – Core and Perspective), 1999;
Cit.: Ellenberger in FS Schimansky, p...

- Ellenberger,, Jürgen
 Groß, Wolfgang
 Henochsberg, Edgar S. / Meskin, Philip M.
 Hopt, Klaus
 Hopt, Klaus
 Hopt, Klaus
 Hopt, Klaus
 Hopt, Klaus/ Voigt, Hans- Cristoph
 Joubert, Willem, Adolf
 Kropff, Bruno / Semler, Johannes
 Kümpel, Siegfried
 Kümpel, Siegfried
 Lackner, Karl/ Kühl, Kristian
 Mülbert, Peter
- Prospekthaftung im Wertpapierhandel (Liability of the Prospectus), 2001;
 Cit.: Ellenberger, 2001, p....
 Kapitalmarktrecht (Capital Market Law), 3. Edition, 2006;
 Cit.: Groß, Kapitalmarktrecht, 2006, §... Rn...
 Henochsberg on the Close Corporation Act, 1997;
 Cit.: Henochsberg, s ..., P...
 Die Verantwortlichkeit der Banken bei Emissionen (Banks liability at emission), 1991;
 Cit.: Hopt, verantwortlichkeit, 1991, Rn....
 Kommentar zum Handelsgesetzbuch (Trade Law Commentary), 32. Edition, 2006;
 Cit.: Hopt, HGB, 2006, §..., Rn...
 Gutachten G für den 51. DJT, 1976;
 Cit.: Hopt, Gutachten G, 1976, p....
 Festschrift für Ulrich Drobnig zum siebenzigsten Geburtstag, 1998;
 Cit.: Hopt in FS Drobnig, p...
 Prospekt- und Kapitalmarktinformationshaftung (Liability of the Prospectus and the Capitalmarket), 2005;
 Cit.: Editor in Hopt/ Voigt p...
 The Law of South Africa, 2. Edition, 2003;
 Cit.: LAWSA ..., par ...
 Münchener Kommentar zum BGB, Band 5 (Munich Commentary about the Civil Code, Volume 5), 5. Edition, 2006;
 Cit.: MüKoBGB/ Editor., § ... Rn...
 Kapitalmarktrecht (Capital Market Law), 3. Edition, 2004;
 Cit.: Kümpel, Kapitalmarktrecht, 2004, p....
 Bank – und Kapitalmarktrecht (Banking – and Capital market law), 3. Edition, 2004;
 Cit.: Kümpel, Bank – Kapitalmarktrecht, 2004, Rn...
 Strafgesetzbuch : Kommentar (Criminal Law : Commentary), 26. Edition, 2007;
 Cit.: Editor in Lackner/ Kühl, 2007, §..., Rn...
 Unternehmensfinanzierung am Kapitalmarkt (Corporate financing at Capital market), 2005;
 Cit.: Mülbert, Unternehmensfinanzierung am Kapitalmarkt, 2005, §..., Rn...

- Onderka, Günther
in Hading/ Schneider, Beiträge zum Börsenrecht (Contributions about Stock Market Law) - Die Umsetzung der EG- Börsenrichtlinien in das deutsche Börsenrecht (Transposition of the EC- Stock Market Directive in the German Stock Market Law), 1987;
Cit.: Editor, in Hading/ Schneider, Beiträge zum Börsenrecht, 1987, p...
- Palandt, Otto
Bürgerliches Gesetzbuch : Kommentar (Civil Code : Commentary), 66. Edition, 2007;
Cit.: Palandt/ Editor, 2007, §..., Rn...
- Redmond, Paul
Companies and Securities Law, Commentary and Materials; 4th Edition 2005;
Cit.: Redmond, 2005, p...
- Schäfer, Frank / Geibel, Stephan,
Schäfer, Kommentar zum WpHG/BörsG/VerkProspG (Comentary WpHG/BörsG/VerkProspG), 2. Edition, 1999;
Cit.: Editor in Schäfer, 1999, §..., Rn....
- Schimansky, Herbert/ Bunte, Hermann/
Lwowski, Hans
Bankrechts- Handbuch (Handbook for Banking Law), 3. Edition, 2006.;
Cit.: Editor, in Bankrechts- Handbuch, 2006, §..., Rn...
- Schönke, Adolf/ Schröder, Horst/ Cramer, Peter
Strafgesetzbuch : Kommentar (Criminal Law : Commentary), 27. Edition, 2006;
Cit.: Editor in Schönke/ Schröder/ Cramer, §..., Rn....
- Schwark, Eberhard
Kapitalmarktrechts-Kommentar (Capital Market - Commentary), 3. Edition, 2004;
Cit.: Schwark in Schwark, 2004, §..., Rn...
- Seidel, Martin
Festschrift für Rudolf Lukes – zum 65. Geburtstag (Festschrift Lukes), 1989;
Cit.: Seidel, in FS Lukes, 1989, p. 57
- Vortmann, Jürgen
Aufklärungs- und Beratungspflichten der Banken (Duty of Disclosure and Advice), 8. Edition, 2006;
Ciz.:Editor in Vortmann, 2006, §...Rn...
- Wessels, John Wilhelmus
The Law of Contract in South Africa, 2nd Edition vol 1, 1937;
Cit.: Wessels, The Law of Contract in South Afric, para...
- Wiedmann, Herbert
Gesellschaftsrecht Band I (Company Law Volume I), 1980;
Cit.: Wiedmann, Gesellschaftsrecht, 1980, p...

Cases

ABl. Nr. L 124 v. 5 Mai 1989, S. 8
Abl. Nr. L 48 v 20 Februar 1982, S. 26
Akerheim v Me Mare [1959] 3 All ER 485
(PC)
Al-Nakib Investments (Jersey) Ltd v Long-
croft [1990] 3 All ER 321 (Ch)
Axiam Holdings Ltd v deloitte & Touche
[2005] 4 All SA 157 (SCA) 160
Baty v Keswick (1901) 85 LT 18 (Ch) 19
Bayer South Africa (Pty) v Frost 1991 (4) SA
559 (A)
Benjamin v Minter (1896) 8 HCG 37 53-54
Beukes v Bekker 1924 EDL 4
BGH NJW 1962, 1766
BGH NJW 1982, 2827
BGH NJW 1982, 2827
BGH NJW 1984, 865
BGH NJW 1993, 1580
BGH NJW 1994, 2289
BGH NJW 1998, 983
BGH NJW 2000, 2896
BGH NJW 2004, 3420
BGH WM 1962, 579
BGH WM 2000, 1596
BGH WM 2001, 1454
BGH, AG 1994, 32
BGH, WM 1982, 862
BGHSt 36, 1
BGHSt 40, 385
BGHZ 116, 7
BGHZ 30, 291
BGHZ 46, 21
BGHZ 77, 172
BGHZ 92, 317
Broome v Speak [1903] 1 Ch 586 (CA)
BT-Dr 10/318 S 24
BT-Dr. 10/4992 (Official Statement in Bun-
destag Drucksachen)
BT-Drs. 13/8933, S. 54
BT-Drs. 15/4999, S.25
BT-Drs. 15/5373, S.50
BT-Drs. 11/6340, S.1
Cape Empowerment Trust Ltd v Fisher
Hoffman Sithole [2005] 1 All SA 654 (C)
Clark v Urquhart [1930] AC 28 (HL)
De Jager v Grunder 1964 1 SA 446 (A)
Directive 87/345/EEC, ABl. Nr. L 185 4.
July 1987, P. 81

Directive 89/592/EEC
Directive 93/22 EEC, Abl. EC 1993, L
141/27
Directive 93/6 EEC, Abl EC 1993 L 141/1
Directive 97/9 EC of the European Parlia-
ment and of the Council of 3 March 1997;
Directive 88/627 EEC, ABI. EC 1988, L
248/62
Drincqbier v Wood [1899] 1 Ch 393
Feinstein v Niggli 1981 2 SA 684 (A) 695C
- 696H
Frost v Leslie 1923 AD 276
Gous v de Kock, Combrinck v De Kock
(1887) 5 SC 405
Greenwood v Leather Shod Wheel Co [1900
1 Ch 421 (CA)]
Karabus Mootors Ltd v Van Eck 1962 1 SA
451 (C) 453
Karoo and Eastern Board of Executors and
Trust Co v Farr 1921 AD
Karoo and Eastern Board of Executors and
Trust Co v Farr 1921 AD 413
Kern Trust Bpk v Hurter 1981 (3) SA 607
(C)
Khan v Naidoo 1989 3 SA 724 (N)
Mackay v Tait [1906] AC 24 (HL)
Moolchund v R (1902) 23 NLR 76 78-81
Natal v Trust Bank van Afrika Bpk 1979 (3)
SA 824 (A)
Novick v Comair Holdings Ltd 1979 2 SA
116 (W)
OLG Frankfurt, WM 1994, 291, 295.
Pretorius v Natal South Sea Investment Trust
Ltd 1965 (3) SA 410 (W)
Pretorius v Natal South Sea Investment Trust
Ltd 1965 (3) SA 410 (W)
R v Bester 1961 2 SA 52 (FC)
R v Bishirgian [1936] 1 All ER 586 (CA)
R v Bougarde 1954 2 SA 5 (C) 9
R v Dayonta 1935 AD 52 55-57
R v Deetlefs 1953 1 SA 418 (A) 421H
R v Freedman (1905) 19 EDC 139
R v Jolosa 1903 TS 694 698
R v Kritzinger 1971 2 SA 57 (A)
R v Meyers 1948 (1) SA 375 (A)
R v Milne & Erleigh (2) 1950 (4) SA 596
(W)
R v Milne & Erleigh (2) 1950 (4) SA 596
(W) 597-8
R v Mohale 1950 1 SA 390 (G) 391-392
R v Mohr 1944 TPD 105 108-109

R v Moshesh 1948 1 SA 681 (O)
R v Oliver (2) 1959 4 SA 145 (D)
R v Seabe 1927 AD 28 32-34
R v Smith 1951 2 PH H105 (O)
R v Youngsleson (1) 1948 1 SA 819 (W)
Ranger v Wykerd 1977 2 SA 976 (A)
S v Burstein 1978 4 SA 602 (T)
S v Chetty 1972 4 SA 324 (N)
S v Francis 1981 1 SA 230 (ZA)
S v Harper 1981 2 SA 638 (D)
S v Isaacs 1968 2 SA 187 (D) 191
S v Jordaan 1962 1 PH H87 (O)
S v Judin 1969 (4) SA 425 (A)
S v Kruger 1961 4 SA 816 (A)
S v Loewenthal 1983 3 SA 430 (T)
S v Rautenbach 1990 2 SACR 195 (N)
S v Rosenthal 1980 1 SA 65 (A)
S v Shaban 1965 (4) SA 646 (W)
S v Tshoba 1989 3 SA 393 (A)
Shepherd v Broome [1904] AC 342 (HL)
Siman & Co (Pty) Ltd v Barclays National
Bank Ltd 1984 (2) SA 888 (A)
Standard Bank of SA Ltd v Coestee 1981 1
SA 1131 (A) 1135D - G
Stellenbosch Municipality v Lindenburg
(1860) 3 SA 345
Symons and Moses v Davies 1911 NPD 69
The New Brunswick & Canada Railway &
Land Co v Muggeridge (1860) 1 Drew & Sm
363 (Ch) 381-382
Thomson v Lord Clanmorris [1900] Ch 718
(CA)
Van Heerden v Smith 1956 3 SA 273 (O)
Vlotman v Landsberg (1890) 7 SC 301
Watts v Bucknall [1902] 2 Ch 628, [1903] 1
Ch 766 (CA)

Articles/ Journals

- Assmann, Heinz- Dieter
Die Befreiung von der Pflicht zur Veröffentlichung eines Börsenzulassungsprospekts nach § 45 Nr.1 BörsenZulVO und die Prospekthaftung: Eine Lücke im Anlegerschutz? In AG 1996, 508 – 515
Cit.: Assmann, in AG 1996, 508, p....
- Assmann, Heinz- Dieter
Neues Recht für den Wertpapiervertrieb, die Förderung der Vermögensbildung durch Wertpapieranlage und die Geschäftstätigkeit von Hypothekenbanken; in NJW 1991, 528 - 534
Cit.: Assmann, in NJW 1991, 528, p....
- Bischoff, Kai
Internationale Börsenprospekthaftung; in AG 2002, 489 - 497
Cit.: Bischoff, in AG 2002, 489, p....
- Bohlken, Lars/ Lange, Meik
Die Prospekthaftung im Bereich geschlossener Fonds nach §§ 13 I Nr.3, 13a Verkaufsprospektgesetz; in DB 2005, 1259 - 1263
Cit.: Bohlken/ Lange, in DB 2005, 1259, p....
- Bundschuh, Karl Dietrich
Die Rechtsprechung des Bundesgerichtshofes zum Börsenterminhandel, in WM 1986, 725 - 733
Cit.: Bundschuh, in WM 1986, 725, p....
- Crüwell, Christoph
Die europäische Prospekttrichtlinie; in AG 2003, 243 - 253
Cit.: Crüwell, in AG 2003, 243, p....
- Diskussionsentwurf für ein Gesetz zur Verbesserung der Haftung für falsche Kapitalmarktinformationen (Draft for a law to improve the liability for false capital market statements);
In NZG 2004, 1042 – 1051
Cit.: NZG 2004, 1042, p....
- Fleischer, Heinrich
Prospektpflicht und Prospekthaftung für Vermögensanlagen des Grauen Kapitalmarkts nach dem Anlegerschutzverbesserungsgesetz; in BKR, 2004, 339 - 346
Cit.: Fleischer, in BKR 2004, 339, p...
- Hansen, Herber
Der Finanzplatz Deutschland im Wandel, in AG- Report 2002, R75 – R76
Cit.: Hansen, in AG-Report 2002; p....
- Hopt, Klaus
Vom Aktien- und Börsenrecht zum Kapitalmarktrecht?
Teil 2: Die deutsche Entwicklung im internationalen Vergleich; in ZHR 141 (1977), 389-441
Cit.: Hopt, in ZHR 141 (1977), S.429, p...

- Hopt, Klaus
Inwieweit empfiehlt sich eine allgemeine gesetzliche Regelung des Anlegerschutzes? Gutachten G für den 51. Deutschen Juristentag; Gutachten G für den 51. DJT, 1976, S. G 130 - 155
Cit.: Hopt, Gutachten G, 1976, S. G ...
- Horn, Norbert
Aktien- und Konzernrechtlicher Vermögensschutz der Aktiengesellschaft und der Gang an die Börse; in ZIP 1987, 1225 - 1234
Cit.: Horn, in ZIP 1987, 1225, p....
- Kiethe, Kurt
Haftungs- und Ausfallrisiken bei der Patronatserklärung; in ZIP 2005, 646 - 654
Cit.: Kiethe, in ZIP 2005, 646, p....
- Kohl, Helmut/ Kübler, Friedrich/ Walz, Rainer/ Wüstrich, Wolfgang
Abschreibungsgesellschaften, Kapitalmarkteffizienz und Publizitätszwang; in ZHR 138 (1974), 1 - 49:
Cit.: Kohl/ Kübler/ Walz/ Wüstrich, in ZHR 138 (1974), p...
- Kort, Michael
Börsenprospekthaftung und Unternehmensberichterstattung; in AG 1999, 9 - 21
Cit.: Kort, in AG 1999, 9, p....
- Kullmann, Walburga/ Sester, Peter
Das Wertpapierprospektgesetz. (WpPG) – Zentrale Punkte des neuen Regimes für Wertpapieremissionen in ZBB- Report, 2005, 209 - 215
Cit.: Kullmann/ Sester, in ZBB- Report 2005, 209, p...
- Kullmann, Walburga/ Sester, Peter
Das Wertpapierprospektgesetz, in WM 2005, 1068 - 1076
Cit.: Kullmann/ Sester, in WM 2005, 1068, p....
- Meyer, Andreas
Aspekte einer Reform der Prospekthaftung – Teil I in WM 2003, 1301 - 1312
Cit.: Meyer, in WM 2003, 1301, p....
- Pöttsch, Thorsten
Das Dritte Finanzmarktförderungsgesetz; in WM 1998, 949 - 966
Cit.: Pöttsch, in WM 1998, 949, p....
- Schäfer, Frank
Stand und Entwicklungstendenzen der spezialgesetzlichen Prospekthaftung; in ZGR, 2006, 40 - 78
Cit.: Schäfer, in ZGR 2006, 40, p....
- Schwark, Eberhard
Das neue Kapitalmarktrecht; in NJW 1987, 2041 - 2048
Cit.: Schwark, in NJW 1987, 2041, p....
- Sittmann, Jörg
Die Prospekthaftung nach dem dritten Finanzmarktförderungsgesetz; in NZG 1998, 490 - 496
Cit.: Sittmann, in NZG 1998, 490, p....

Spindler, Gerald/ Christoph, Fabian

Die Entwicklung des Kapitalmarktrechts in
den Jahren 2003/ 2004; in BB 2004, 2197 -
2205

Cit.: Spindler/ Christoph, in BB 2004, 2197,
p....

Stephan, Klaus Dieter

Angebotsaktualisierung; in AG 2003, 551 -
561

Cit.: Stephan, in AG 2003, 551, p....