



Legal high Committee for  
Financial markets of Paris

***REPORT ON INVESTORS'  
COMPENSATION FOR FALSE  
INFORMATION  
ON FINANCIAL MARKETS***

*by the Legal High Committee for  
Financial Markets of Paris*

***1<sup>st</sup> October 2025***



## METHODOLOGY AND SUMMARY

Investors' compensation for false information disclosed to the public by listed companies is of crucial importance. Together with administrative enforcement, it is an essential element in the attractiveness of capital markets. In order to attract more people to the stock market, it is necessary to have adequate sanctions in place, including administrative sanctions and an effective investor compensation scheme.

France was one of the first countries in Europe to recognize stock-market-related-losses, with a compensation system that nevertheless took time to develop and was intellectually contested because the loss is based on "*loss of opportunity*". However, while France appeared to be ahead of the curve in recognizing stock-market-related-losses, this has become widespread in Europe over the last twenty years. Nevertheless, the regimes applicable in neighboring countries are not well known. That is why, at the request of the AMF, the HCJP decided to set up a working group to review a selection of foreign laws.

The report presents the stock market compensation regimes in several jurisdictions. The countries included in this comparative law analysis were chosen because of their importance. These are Germany, Italy, Spain, the Netherlands, and the United Kingdom. The review focuses on the liability regimes applicable to false information disseminated on the primary and secondary markets. The report was written by Enrico Sartori, PhD student at the University of Luxembourg and the University of Frankfurt. To facilitate comparison with French law, a comprehensive presentation of the latter in relation to compensation for stock-market-related-losses is included as Appendix II. A third Appendix includes an overview of the conditions of civil liability insurance for executive directors and the insurability of administrative penalties for false information to the public in France. These two appendices were written by Professor Johan Prorok.

The working group's objective is not to indicate whether one jurisdiction has a better system than another, but simply to gain a better understanding of these legal systems and also to determine whether these are jurisdictions with a high level of litigation in the area of civil liability for false information. In particular, the aim is to understand whether the studied jurisdictions are generally favorable or hostile, or even reserved, towards compensation for stock-market-related-losses.

To understand the applicable regimes in the selected jurisdictions, a series of hearings was conducted with foreign academics and experts. These interviews with foreign experts were generally conducted with two categories of participants: academics and practitioners.



Spain (10 July 2024): Professor Isabel Fernández Torres (Complutense University of Madrid); Francisco Leon and Fernando Bedoya, Attorneys at Pérez-Llorca (Madrid).

Italy (12 September 2024): Professors Matteo Gargantini and Michele Siri (University of Genoa); Emanuele Grippo and Daniele Vecchi, Attorneys at Gianni & Origoni.

Germany (10 October 2024): Professor Rüdiger Veil (University of Munich); Michael Brellocks and Henner Schlaefke, Attorneys at Noerr.

Austria (7 November 2024): Professor Walter Doralt (University of Graz).<sup>1</sup>

Netherlands (5 December 2024): Professor Danny Busch (University of Nijmegen).

United Kingdom (23 January 2025): Professor (emeritus) Paul Davies (University of Oxford, Harris Manchester College); Matt McCahearty (Solicitor at Macfarlanes) and Gregory Denton Cox (Barrister).

Due to its relevance in both French law and comparative law, a hearing was also held on the issue of civil liability insurance conditions for executive directors for false information to the public in France: Ms. Françoise Mari (26 June 2024), Director of Financial Risks (Liberty). Similarly, a hearing was held on the methods used by French courts to determine damages: Mr. Olivier Péronnet (10 July 2024), Chartered Accountant, Auditor, Expert at the Paris Court of Appeal and certified by the Court of cassation, Founding Partner at Finexsi.

The members of the working group would like to express their gratitude to colleagues and experts who agreed to present the state of the law in their jurisdictions.

The summary of our work is as follows:

## France

In France, investors' compensation for false information is based on case law. This took time to develop but has been stabilized since the 2010 *Gaudriot* ruling by the Commercial Chamber of the Court of cassation.<sup>2</sup> The fault consists both in the dissemination of false (or misleading) information and in an omission. The fault may be attributed to the issuer, company officers, and auditors. In addition, liability is accepted for mere negligence. Case law has given preference to compensation for loss caused by an altered investment decision. It considers the loss of opportunity to make another, more profitable investment to be a prejudice. Although the loss must be individualized, in practice, case law grants a form of lump-sum compensation (without expressly stating so) and often rules on the basis of equity. The French regime can be considered protective for investors, with a presumption of causation of the transaction and a presumption of causation of the impact of false information on the stock market price. From this point of view, the French regime is therefore favorable to investors' compensation. However, there are procedural obstacles to the protection of these rights, and the amount of compensation is limited.

## Similarities and differences

---

<sup>1</sup> Austria also recognizes stock market damage but was not included in the report.

<sup>2</sup> Cass. com, 9 March 2010, No. 08-21.547 (No. 924 FS-PB).



The situation in the five jurisdictions studied corresponds to a mosaic of regimes, with similarities and numerous differences from a legal perspective. This finding is hardly surprising. Nevertheless, certain similarities do exist. First, all of the jurisdictions studied acknowledge the reality of stock market loss. Second, the legal basis for compensation, with some exceptions, is tort law, possibly under special legislation (prospectus). Finally, the measure of compensation for losses (loss of opportunity or full compensation) has been left to the courts (with the exception of the German prospectus liability regime). In all cases, however, the standard adopted in these jurisdictions is full compensation for the loss, insofar as compensation consists of the difference in price compared to the price unaffected by the defective information (or lack of information), or the outright rescission of the transaction or an equivalent measure (compensation for transaction-related losses). This is a significant difference from France.

There are, however, significant differences between these foreign jurisdictions. While all jurisdictions have specific legislative provisions governing prospectus liability, the situation is more fragmented when it comes to secondary market liability. For example, only Spain and the United Kingdom have introduced specific legislation governing defective financial reports. In contrast, in other jurisdictions, the civil liability regime applicable to defective financial reports has been developed through case law. On the other end of the spectrum, no jurisdiction has established a special tort regime to address information-based market manipulation.

Regarding the fault of the author of the false statement, courts are divided between those that allow liability for simple negligence (Italy, Spain, and the Netherlands) and those that normally limit liability to gross negligence (Germany) or even exclude liability for negligence in certain cases (United Kingdom).

Thus, all jurisdictions are in favor of compensation, but the United Kingdom has a restrictive regime. In contrast to the United Kingdom, the Netherlands has legislation and dedicated collective procedures aimed at facilitating actions for compensation for stock-market-related-losses. German civil liability law, derived from the Civil Code (BGB) and case law, is particularly complex and detailed compared to other jurisdictions.



The picture that emerges from this assessment is that there is no excess in terms of liability proceedings for false information to the public. The situation in these jurisdictions shows that the risk of an Americanization of stock market litigation is groundless. Litigation remains difficult for plaintiffs, even in countries where legislation or case law is favorable to investors' compensation.

### **Liability for false or misleading prospectuses**

With regard to liability for false or misleading prospectuses, all five jurisdictions have a specific liability regime codified in law. These regimes are mainly based on tort liability. They apply only to prospectuses, except in the Netherlands, where the regime is based on consumer law and differs depending on the nature of the claimant – whether they are a “*consumer*” or a professional investor.

Even where there is a specific liability regime, general tort law can sometimes still be invoked, which can be useful, for example, in pursuing persons who are not covered by the special regime (Germany, Italy). In addition, in some jurisdictions, contractual remedies can play an important role in practice (Spain, Italy, Germany, and the Netherlands).

### **Liability for false information on the secondary market**

With respect to civil liability for periodic information (annual report and half-yearly report), Spain and the United Kingdom have established a special legislative regime. In other jurisdictions, general tort law applies. In almost all the jurisdictions studied, directors may be held liable.

Regarding ongoing information under the 2014 Market Abuse Regulation, there are two obligations, one arising from Article 17 (ongoing disclosure) and the other from Article 15 (market manipulation). Under Article 17, Germany and the United Kingdom have established a specific civil liability regime. In the United Kingdom, the regime is identical to that established for periodic disclosure. Under Article 15, none of the jurisdictions studied has established a specific legislative regime. Compensation is therefore governed by general tort law.

### **Causal link with the transaction**

The legislative regimes governing prospectuses in Germany and the United Kingdom include a presumption of causation between the false information and the decision to acquire the securities. The courts in the other jurisdictions have established simple presumptions.

With regard to periodic and ongoing information, courts also generally uphold a presumption of causation without accepting the fraud on the market theory.

Furthermore, there are exceptions where proof of causation is required without resorting to presumption. This is the case, for example, in Germany for ongoing information when the investor claims that, in the absence of defective information, he would not have entered into the transaction in question. Similarly, UK courts require proof of a direct causation regarding periodic and ongoing information.

### **Intentional misconduct or negligence**



The studied jurisdictions fall into two groups. The first group generally accepts liability for false information on the basis of simple negligence (Italy, Spain, and the Netherlands). The second group rejects negligence in most cases and requires gross negligence (Germany) or fault or even intentional fault (United Kingdom in relation to ongoing information). Presumptions of negligence are accepted in all jurisdictions in relation to prospectuses.

### **Compensation for losses**

The studied jurisdictions do not limit compensation to loss of opportunity, as in French law. They all provide for full compensation for losses. Generally, the applicable measure of losses depends on the factual basis alleged by the plaintiff.

On the one hand, the investor may claim that, in the absence of the defective information, he would not have entered into the transaction in question. In this case, the investor must therefore receive either a full refund or payment of the difference between the stock market price after taking into account the false information and the purchase or sale price of the shares. This form of compensation shifts the market risk to the issuer, even when the change in the price of the securities is due to reasons other than the defective information. This form of compensation is imposed in Germany in all cases of defective prospectuses.

On the other hand, the investor may claim that, in the absence of defective information, he would have made the investment but under different conditions. The investor must therefore receive the difference between the price actually paid (or received) and the price that he would have paid (or received) in the absence of the defective information.

### **Use of experts in cases of compensation based on a price difference**

The use of experts to calculate the amount of compensation is common in the jurisdictions studied. However, the methods used vary from one jurisdiction to another.

### **Competent courts**

The courts with jurisdiction over claims for compensation for false information are either ordinary courts or specialized courts. However, in the case of ordinary courts, there are often specialized chambers (optional in the Netherlands, mandatory in the United Kingdom for the most important cases). The concentration of corporate headquarters in certain cities also means that certain courts (for example, Milan or Rome in Italy, Amsterdam in the Netherlands) develop specific expertise in this type of litigation.

### **Class actions**

Class actions are possible in all the jurisdictions studied. These class actions are limited in Spain, Italy, and the United Kingdom. They are rarely used except in the Netherlands. Finally, in the Netherlands and Germany, there is a tendency to conclude proceedings with a settlement between investors and issuers.



## Conclusion

This comparative law study reveals a contrasting landscape, but one that is marked, even in the presence of legislation, by the importance of the role of the judge. Compensation for stock-market-related-losses and their assessment are largely a matter of case law. It is also a case law that is, to a certain extent, still under development. Nevertheless, full compensation for losses is the principle in the jurisdictions studied. In France, as indicated, the use of the concept of loss of opportunity leads in practice to case law awarding lump-sum compensation (without expressly stating so) and, in reality, often ruling on the basis of equity.

The question of whether the regime and the level of compensation for stock-market loss can influence the attractiveness of financial centers cannot be answered unequivocally. On the one hand, the United Kingdom has legislation and case law that is hostile to compensation for stock market loss, except in cases of fraud, and is one of the largest financial centers in Europe. On the other hand, in the United States, the intensity of enforcement by the Securities and Exchange Commission (SEC) and the importance of stock market compensation litigation are considered to be a factor in attracting investors. It is clear to the members of the working group that a lack of protection or weak protection on a stock market cannot constitute a favorable environment for investors. It is therefore one factor among others in the attractiveness of a financial center. The role of the stock market supervisor is at least as important. The report also shows that civil proceedings are frequently based on administrative sanctions.

It is therefore impossible to designate any foreign legislation as being more effective, as each has its own specific features influenced by its national legal culture. Nevertheless, certain foreign legal approaches and techniques could potentially inspire legislators, case law, and doctrinal debate in France. This is the ambition of this report.



# TABLE OF CONTENTS

<b>I. Introduction</b> .....	<b>9</b>
<b>II. Substantive legal aspects</b> .....	<b>11</b>
2.1 – The legal bases for civil liability .....	11
2.1.1 - Civil liability on the primary market .....	12
2.1.2 - Civil liability on the secondary market .....	18
2.2 – The causation requirement .....	27
2.2.1 - Causation of the transaction .....	28
2.2.2 - The presumption of transaction causation.....	34
2.3 - The fault requirement .....	38
2.3.1 - The relevance of intent or negligence .....	38
2.3.2 - The presumption of negligence .....	43
<b>III. Quantification of losses suffered by investors</b> .....	<b>45</b>
3.1 - Alternative measures of losses .....	45
3.1.1 - Compensation for transaction-related losses.....	49
3.1.2 - Compensation for price difference .....	54
3.2 - The use of expert reports .....	58
<b>IV. Procedural law aspects</b> .....	<b>60</b>
4.1 - The designated court.....	60
4.2 - The existence of class actions and compensation systems.....	62
4.3 - Attorney's fees and recovery of litigation costs.....	71
<b>Composition of the working group</b> .....	<b>75</b>
<b>List of persons interviewed</b> .....	<b>78</b>
<b>Appendix 1.</b> Investors’s compensation for false information in France.....	Appendices
<b>Appendix 2.</b> Elements of insurance law .....	Appendices



# INVESTORS' COMPENSATION FOR FINANCIAL INFORMATION IN EUROPE: A COMPARATIVE STUDY

## I. Introduction

It is well known that the efficiency of capital markets is closely linked to the quality of information available on the securities traded on those markets<sup>3</sup>. Furthermore, investor confidence and willingness to invest depend on maintaining a high level of accuracy in that information. It can be argued that this confidence also depends on investors being able to obtain compensation if they are harmed by false or misleading information disseminated in the market. For example, because, relying on defective information, they decided to buy financial instruments at an excessively high price or to sell them at too low a price.

The European Union (EU) and national legislators have long pursued a strategy of regulating issuers' disclosure obligations in order to ensure the transparency and integrity of capital markets. These can indeed be easily compromised by the dissemination of false or misleading information. In particular, defective information refers to that contained in prospectuses, financial reports, and *ad hoc* information.

Today, most of the information requirements imposed on issuers are governed by European legislation, in particular the Prospectus Regulation<sup>4</sup>, the Transparency Directive<sup>5</sup>, and the Market Abuse Regulation<sup>6</sup>. While the legislator has sometimes taken tentative steps to ensure that a civil liability regime applies to defective public information, national legislators have generally retained considerable leeway in implementing civil liability.

Under the influence of European legislation and in order to ensure compensation for aggrieved investors, some Member States have designed new liability regimes *ex novo*, others have adapted existing and proven provisions, while still others have simply relied on general civil liability provisions. Sometimes, the same Member States have adopted different approaches depending on the type of defective information involved—in particular, information disseminated on the primary and secondary markets is often treated differently. As a result, European countries implement a wide range of liability regimes for investors in relation to defective information.

To illustrate the civil liability regimes currently applicable in Europe with regard to defective information, this chapter will focus on five countries in particular. Four of these are current members of the EU, namely Germany, Italy, Spain, and the Netherlands. They have been chosen because of their importance in the context of EU capital markets and/or the interest of their legal

---

<sup>3</sup> BONNEAU Th., *Régulation bancaire et financière européenne et internationale*, 6th edition, Bruylant, 2022, p. 676 et seq.

<sup>4</sup> Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, (OJ L 168, 30.6.2017, p. 12 et seq.), hereinafter referred to as “Prospectus Regulation”.

<sup>5</sup> Directive (EU) 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (OJ L 390, 31.12.2004, p. 38 et seq.), hereinafter referred to as the “Transparency Directive”.

<sup>6</sup> Regulation (EU) 596/2014 on market abuse (OJ L 173, 12.6.2014, p. 1 et seq.), hereinafter referred to as “Market Abuse Regulation”.



systems for comparison purposes. The fifth country – the United Kingdom – is included because it is home to Europe's largest capital market. Furthermore, as its legal regime is still partly based on EU legislation in this area, the comparison will not be overly confusing. The examination of these states will provide an overview of the applicable regimes and highlight the differences and similarities between the various legal systems in their treatment of similar issues.

To this end, we will begin by considering, in Section II, the substantive law aspects, including the grounds for liability, causation, and fault.

Section III will cover, specifically, the methodologies for calculating compensable amounts, evaluating the two alternative measures of losses: compensation for transaction-related losses and compensation for price difference. The section will also detail the extent to which losses are calculated using expert reports.

Finally, Section IV will address procedural law issues, including the competent courts, the various forms of class action, and, finally, the rules governing the recovery of legal costs.



## II. Substantive legal aspects

To better understand how civil liability regimes for defective public information are shaped, it is necessary to examine the three fundamental elements that enable an investor to establish a defendant's civil liability. These are the legal bases on which liability can be established (2.1), the requirement of causation (2.2), and the relevance of intent or negligence (2.3).

### 2.1 – The legal bases for civil liability

As European law provides for a regime of information obligations for issuers, in particular under the Prospectus Regulation, the Transparency Directive, and the Market Abuse Regulation, we will organize our analysis of the civil liability regimes applicable in the event of defective information based on these three regulations.

While the level of detail in the information requirements imposed on issuers is sometimes remarkable, EU intervention in the area of civil liability for breaches of these same provisions has traditionally been very limited<sup>7</sup>. The European legislator has laid down only a few rules on civil liability regimes in the Prospectus Regulation and the Transparency Directive. However, it has not taken a position on the civil liability consequences of infringements of the Market Abuse Regulation.

More specifically, Article 11 of the Prospectus Regulation and Article 7 of the Transparency Directive address the issue of civil liability in relation to information published in prospectuses and financial reports. Under these two articles, Member States are required to ensure that national civil liability regimes apply to infringements of the relevant provisions. This obligation does not require Member States to establish a specific regime, provided that the general rules on civil liability already apply to the infringements in question. On the other hand, regarding market abuse, Member States are entirely free to design their own model, in principle even excluding the possibility that an infringement of the Market Abuse Regulation could give rise to civil liability.

These rare provisions of European law relating to civil liability had to be transposed and integrated into national legal systems. As the various states did not act uniformly when they decided to adapt their national systems to the requirements of European law, the result was a highly complex landscape, starting with the legal bases that investors harmed by defective information can invoke.

Some Member States have chosen to develop special liability regimes to establish civil liability rules tailored to the specific characteristics of financial markets, while others have considered that the general regimes already in place are sufficient and adequate, and that no new measures need to be introduced. Very often, however, both general and special regimes may apply to the same harmful act.

The type of legal basis available can make a big difference for the aggrieved investor and the potentially liable company. This is because each legal basis entails the application of different rules on fundamental aspects of substantive and procedural law. For example, regarding the requirements for proving liability, who has standing to sue, and who can be held liable.

---

<sup>7</sup> For more on the limited attempts by European legislators to tackle civil liability issues – traditionally considered to be firmly rooted in national law – see CHEREDNYCHENKO O.O. and ANDENAS, M. (eds.), *Financial Regulation and Civil Liability in European Law*, Edward Elgar Publishing, 2020. The European legislator has, however, made a few isolated attempts at comprehensive harmonization of civil liability rules, such as Article 35a of Regulation (EC) No. 1060/2009 on credit rating agencies. Nevertheless, these attempts do not fall within the scope of this report.



It is convenient to divide the analysis according to the context in which the defective information was presented, i.e., on the primary or secondary market. We will therefore first analyze the regimes applicable to defective information on the primary market through a prospectus (2.1.1). Next, we will examine the regimes applicable in the context of the secondary market to defective information contained in false or misleading financial reports, and *ad hoc* information (2.1.2).

### 2.1.1 - Civil liability on the primary market

In the reference countries, the civil liability regime applicable to the primary market—and therefore more specifically to defective prospectuses—is based on two distinct sets of rules. It is mainly governed by specialized regimes, which are shaped by the requirements of the Prospectus Regulation (2.1.1.1). However, general civil liability regimes may still apply, albeit on a more residual basis (2.1.1.2).

#### 2.1.1.1 - Civil liability under the Prospectus Regulation

The first information obligation that an issuer may be subject to is the publication of a prospectus, pursuant to Article 3 of the Prospectus Regulation. With regard to the information that must be included in this document, Article 6 of the Prospectus Regulation states that it must be "*necessary information which is material to an investor for making an informed assessment*" of the main characteristics of the issuer, the offer, and the financial instruments. However, the Prospectus Regulation – along with a large number of delegated and implementing acts – sets out detailed rules on the content and format of the information to be included in a prospectus.

In several countries, civil liability regimes for information published in a prospectus have a long tradition, dating back well before the relevant European rules. In particular, the codification of liability applicable to prospectuses in UK law<sup>8</sup> and German law<sup>9</sup> dates back to the last decade of the 19<sup>th</sup> century, while the Netherlands introduced this liability into its legislation in 1928<sup>10</sup>. To date, however, the starting point for analyzing liability regimes applicable to prospectuses in the EU is Article 11 of the Prospectus Regulation, which largely reproduces an earlier provision of the Prospectus Directive<sup>11</sup>.

Article 11 of the Prospectus Regulation – which of course also applied to the United Kingdom prior to the withdrawal agreement – requires Member States to ensure that a liability regime is in place regarding the information contained in prospectuses and supplements to those prospectuses. In addition, it lists the persons responsible for the information contained in the prospectus<sup>12</sup>. It is generally considered that Article 11 of the Prospectus Regulation – as was the case with its predecessor in the Prospectus Directive – should be interpreted as a minimum requirement. Within this minimum framework, Member States are free to determine the applicable regime<sup>13</sup>. They may

<sup>8</sup> MCMEEL G., United Kingdom, in BUSCH D., FERRARINI G., and FRANX J.P. (eds.), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020, p. 578.

<sup>9</sup> MOCK S., Germany, in BUSCH D. et al., op. cit., note 6, p. 468.

<sup>10</sup> FRANX J.P., The Netherlands, in BUSCH D. et al., op. cit., note 6, p. 537.

<sup>11</sup> Article 11 of the Prospectus Regulation is considered to be the provision succeeding Article 6 of Directive 2003/71/EC on prospectuses (hereinafter referred to as the "Prospectus Directive"). The content of the two provisions is considered to be substantially similar, see LUCANTONI P., Comment to Article 11 of the Prospectus Regulation, in LEHMANN M. and KUMPMAN C. (eds.), *European Financial Services Law, Nomos/Hart/Beck*, 2019, p.987.

<sup>12</sup> BUSCH D., The influence of the EU prospectus rules on private law, *Capital Markets Law Journal*, 2021, Vol. 16, No. 1, p.5

<sup>13</sup> BUSCH D., LEHMANN M., Uniform Prospectus Liability Rules for Europe, *Journal of European Tort Law*, 2023, Vol. 14, No. 2, pp. 114–115. See also the ESMA report, *Comparison of liability regimes in Member States in relation to the Prospectus*



even refrain from any legislative intervention, as long as a civil liability regime applies.

However, in response to the former Article 6 of the Prospectus Directive, all Member States have in practice adopted a special regime specific to prospectuses, with the exception of the Netherlands. It is interesting to note that even in the case of the Netherlands, the applicable regime is not the general civil liability regime, but still one that does not apply solely to prospectuses. Nevertheless, in addition to the special regimes, common civil liability may still apply on a residual basis.

In other words, all jurisdictions have found that their general civil liability rules were not suitable for dealing with defective prospectuses – at least as a single applicable regime – and have therefore developed special liability rules. In principle, all these special civil liability regimes are considered to be of an extracontractual nature.

The essential features of the special rules on liability for prospectuses in each system will be briefly described in the following presentation. For the sake of completeness, it is also worth mentioning briefly the general national provisions, which will be discussed in more detail below.

In **Germany**, liability for prospectuses is governed by Sections 8 to 12 of the German securities prospectus act (*Wertpapierprospektgesetz* or *WpPG*)<sup>14</sup>. In particular, Section 9 of the *WpPG* allows the purchaser of a security on the basis of a false or misleading prospectus to claim damages from two categories of defendants who are jointly and severally liable: on the one hand, the persons who assumed responsibility for the prospectus<sup>15</sup> and, on the other hand, the persons who initiated the issuance of the prospectus<sup>16</sup>. The same Section 9 of the *WpPG* provides two alternative methods of compensation for losses, depending on whether or not the purchaser of the affected securities still holds them. Section 12 of the *WpPG* sets out the defenses available to the defendant, who may prove that he was not aware of the defective nature of the information and that this ignorance was not due to gross negligence. In addition, this provision specifies the cases in which liability does not arise, for example when the defective information did not contribute to the fall in the price of the securities.

However, in addition to this special regime, the ordinary provisions of the German Civil Code on civil liability may still apply. In particular, the aggrieved investor may invoke Section 826 of the German Civil Code, which imposes liability for intentional conduct contrary to public policy, or Section 823(2) of the German Civil Code, which applies in cases of intentional violation of a provision, provided that the provision is considered to protect the interests of the aggrieved party<sup>17</sup>, such as investment fraud under Section 264 of the German Criminal Code. On the other hand, negligent violation of Section 6 of the Prospectus Regulation does not give rise to tortious liability within the meaning of Section 823(2) of the German Civil Code.

---

Directive, ESMA/2013/619, 30 May 2013, p. 12.

<sup>14</sup> *Wertpapierprospektgesetz* (hereinafter "*WpPG*") of 22 June 2005 (BGBl. I S. 1698). It should be noted that this liability with regard to the prospectus also covers financial reports published in connection with (or in) the prospectus. See POELZIG D., KANZLER M., *Kapitalmarktinformationshaftung bei fehlerhaften Unternehmensabschlüssen*, in HACHMEISTER D., KAHLE H., MOCK S. (eds.), *Rechtsfragen der Kommunikation fehlerhafter Unternehmensabschlüsse*, Otto Schmidt, 2023, p. 195.

<sup>15</sup> These are persons who have publicly assumed responsibility for the prospectus, such as those who have signed it. See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M., MÜLBERT P., SCHLITT M. (eds.), *Handbuch der Kapitalmarktinformation*, Beck 3rd ed., 2020, p. 888.

<sup>16</sup> These are persons who, even without publicly assuming responsibility for the prospectus, have an economic interest in it and have influenced its preparation. See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 889. It should be noted that members of the board of directors and professionals are generally not considered to have such a personal economic interest in the issue. See D. A. VERSE, Germany, in CONAC P.-H., GELTER M. (eds.), *Global Securities Litigation and Enforcement*, Cambridge University Press, 2019, p. 376.

<sup>17</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, 900 - 901.



In **Italy**, liability for prospectuses is governed by Article 94(5)-(9) of the consolidated law of finance (*Testo Unico della Finanza* or *TUF*)<sup>18</sup>. Under this provision, an investor who has reasonably relied on the accuracy and completeness of the information contained in the prospectus may bring an action for damages against the issuer or offeror, the guarantor, and those who have assumed responsibility for certain parts of the prospectus. However, the defendant may escape liability if they can demonstrate that they exercised due diligence.

In addition to this special regime, a series of general liability provisions apply, in particular to extend liability beyond the defendants referred to in Article 94 of the *TUF*. First, the general provision on non-contractual liability set out in Article 2043 of the Italian Civil Code applies due to its very broad wording<sup>19</sup>. In addition, the injured party may rely on other provisions drawn from company law to seek liability from directors (Article 2395 of the Italian Civil Code), statutory auditors (Article 2407 of the Italian Civil Code) or auditors (Article 15 of Legislative Decree 39/2010), again on a non-contractual basis<sup>20</sup>.

In **Spain**, the special liability regime for prospectuses is divided between Article 38 of Law 6/2023 of 17 March 2023<sup>21</sup> – which sets out the general framework – and Articles 69 to 74 of Royal Decree 814/2023 of 8 November 2020<sup>22</sup>, which specify the applicable regime in greater detail. In particular, Article 38(2) of Law 6/2023, read in conjunction with Article 73 of Royal Decree 814/2023, provides that holders (*titulares*) of securities purchased in good faith as a result of false or omitted information in a prospectus may claim compensation for any losses suffered. A list of liable persons is included in Article 38(1) of Law 6/2023, and the conditions for their liability are set out in Articles 69 to 72 of Royal Decree 814/2023. In addition, Article 74 of Royal Decree 814/2023 provides for a defense of due diligence for the potentially liable person.

This legal framework must be supplemented by case law, which has defined a special liability regime closely aligned with the general civil liability regime provided for in Article 1902 of the Spanish Civil Code<sup>23</sup>.

The **Netherlands** is the only country among our reference countries where the special liability regime applicable to prospectuses has not been introduced or at least revised following the Prospectus Directive. The applicable regime is that of consumer law, resulting from the transposition of the Misleading Advertising Directive<sup>24</sup> and the Unfair Commercial Practices Directive<sup>25</sup>.

---

<sup>18</sup> Legislative Decree No. 58 of 24 February 1998, *Testo unico delle disposizioni in materia di intermediazione finanziaria* (hereinafter, “*TUF*”).

<sup>19</sup> Although the legal nature of prospectus liability in Italy is now generally considered to be tortious, there has been debate in the past as to whether this liability could also be interpreted as being contractual in nature (see GIUDICI P., Italy, in BUSCH D. et al., op. cit., note 6, pp. 506–508). The non-contractual nature prevailed, among other things, in view of the absence of negotiation between potential investors and the issuer (see the landmark ruling *Tessival v. Intesa Sanpaolo*, Italian Court of Cassation, ruling of 11 June 2010, No. 14056).

<sup>20</sup> FERRARINI G. and GIUDICI P., Italy, in CONAC P.-H. et al., op. cit., note 14, p. 458.

<sup>21</sup> Law 6/2023 of 17 March Securities Markets and Investment Services.

<sup>22</sup> Royal Decree 814/2023, of 8 November on financial instruments, admission to trading, registration of negotiable securities, and market infrastructures.

<sup>23</sup> See REDONET SANCHEZ DEL CAMPO J., Spain, in BUSCH D. et al., op. cit., note 6, pp. 521–522, providing information on the past doctrinal debate regarding the contractual or tortious nature of liability in relation to prospectuses.

<sup>24</sup> Directive 84/450/EEC on misleading advertising (OJ L 250, 19.09.1984, p. 17). The implementation of this directive led to the abolition of the special Dutch regime of liability for prospectuses introduced in 1928; in particular, given that the purpose of a prospectus is to sell securities, it was considered a form of advertising. See FRANX J.P., The Netherlands, in BUSCH D. et al., op. cit., note 6, p. 539.

<sup>25</sup> Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (OJ L 149, 11.6.2005, p. 22).



Consequently, it is the classification of the investor as a consumer or a professional that governs the application of one or other of these alternative regimes.

In particular, investors classified as consumers can invoke the unfair commercial practices regime under Articles 6:193a to 6:193j of the Dutch Civil Code, while professional investors will rely on the misleading advertising regime governed by Articles 6:194 to 6:196 of the Dutch Civil Code<sup>26</sup>.

Thus, these regimes apply if the conduct of the defendants can be characterized as either an unfair trade practice (if the plaintiff is a consumer) or a misleading public advertisement (if the plaintiff is a professional) in the exercise of a profession or activity. These conditions do not seem to pose any particular problems. In fact, the activities of the issuer, the lead managers and co-managers or members of the placement syndicate, the selling shareholder, and the issuer's auditor are normally recognized as activities falling within the scope of the provisions in question<sup>27</sup>. In addition, the listing agent that companies seeking a listing on Euronext Amsterdam must employ is also considered a potential defendant<sup>28</sup>. However, the difference between the two regimes creates the possibility that, in the same case, the outcome for the two types of plaintiffs may differ<sup>29</sup>.

More generally, it is accepted that investors who do not fall within the scope of the special regimes can still rely on the general civil liability regime under Article 6:162 of the Dutch Civil Code.

In the **United Kingdom**, where liability for prospectuses has been provided for by law since 1890<sup>30</sup>, the current regime is contained in Section 90 of the Financial Services and Markets Act (FSMA)<sup>31</sup>. This provision stipulates that the person responsible for a prospectus is civilly liable to purchasers of securities who have suffered a loss as a result of a false or misleading statement included in the prospectus<sup>32</sup>. In addition, Schedule 10 of the FSMA details the applicable regime, for example by specifying that the defendant may escape liability by arguing that they exercised reasonable care<sup>33</sup>.

Article 5.3 of the Prospectus Regulation Rule contains additional details, notably establishing a list of persons responsible for the prospectus, who are generally considered to be civilly liable<sup>34</sup>. These persons may vary depending on whether the prospectus relates to equity securities or other types of securities. In both cases, the persons responsible are the issuer and the persons who have accepted responsibility for the prospectus or authorized its content. If the offeror or the person requesting the admission of securities to trading on a regulated market is different from the issuer, that person is also responsible.

The same applies to the directors of the offeror or the person requesting the admission of securities to trading if they are different from the issuer.

### ***2.1.1.2 - The residual role of general national civil liability provisions***

<sup>26</sup> See FRANX J.P., The Netherlands, in BUSCH D. et al., op. cit., note 6, 539.

<sup>27</sup> *Ibid.*, 543–547.

<sup>28</sup> See FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., LIEVERSE K. and VAN DER VELDEN J.W. (eds.), *Leerboek Financieel Recht, Ars Aequi Libri*, 2021, paragraph 11.

<sup>29</sup> *Ibid.*, paragraph 4.

<sup>30</sup> In particular, the Directors Liability Act (53 & 54 Vict. Cap. 64) of 18 August 1890.

<sup>31</sup> Financial Services and Markets Act 2000 of 14 June 2000 (hereinafter “FSMA”).

<sup>32</sup> It should be noted that the liability provided for in Section 90 of the FSMA also applies to omissions of information required to be included in the prospectus.

<sup>33</sup> Schedule 10 FSMA.

<sup>34</sup> See MCMEEL G., United Kingdom, in BUSCH D. et al., op. cit., note 6, p. 588, who considers it unlikely that the courts would impose liability on persons other than those listed in the rule of the Prospectus Regulation.



As we have seen, regarding liability on the primary market, all countries have introduced or relied on special regimes to deal with the specific features of liability in relation to the prospectus. Nevertheless, liability in the primary market may still be based on general national civil liability provisions, which have a broader scope. An investor who has suffered loss as a result of a false statement in a prospectus may therefore decide to invoke either the specific prospectus regime or the more general civil liability provision under national law.

We will therefore provide an overview of the general provisions applicable in different countries in relation to non-contractual matters, specifying the conditions for their residual application to prospectuses – their application to the secondary market will be discussed later.

We will first present the countries whose general civil liability regimes are intended to apply very broadly, namely Italy and Spain. Next, we will provide an overview of German and Dutch law, whose general civil liability rules are limited either by the degree of intent required or by the protective scope of the violated provision. Finally, we will discuss the United Kingdom, whose common law does not provide for a general tort clause, but is based on specific cases of unlawful conduct (torts).

In **Italy** and **Spain**, civil liability is based on very broad provisions. The requirements set out in both Article 2043 of the Italian Civil Code<sup>35</sup> and Article 1902 of the Spanish Civil Code<sup>36</sup> are similar and overlap with those of Articles 1240 and 1241 of the French Civil Code. In particular, these provisions require that those who cause loss through their actions or omissions are liable to repair it. Given their very broad wording, it is clear that these provisions are intended to apply to virtually any harmful act – in particular, any action or omission, whether intentional or negligent – provided that certain conditions are met.

Regarding **Italy** in particular, legal doctrine and case law have concluded that, in addition to the general provision on torts in Article 2043 of the Italian Civil Code, a number of other liability regimes typical of company law are applicable. These generally aim to target specific categories of defendants. These include the provision on the personal liability of directors under Article 2395 of the Italian Civil Code and the liability of promoters for false statements under Article 2339 of the Italian Civil Code (the latter being rarely applied in practice). In addition, a series of provisions relating to liability for financial reporting may play a role: in particular, Article 2407 of the Italian Civil Code relating to the liability of auditors (*sindaci*)<sup>37</sup>, Article 15 of Legislative Decree 39/2010 relating to auditors, and Article 154-bis *TUF* relating to the manager responsible for preparing the financial reports of listed issuers.

Regarding **Germany**, it should first be noted that national law does not provide for a general civil liability clause but is governed in principle by the theory of Aquilian relativity, which subjects the application of civil liability rules to further requirements. Two provisions are particularly relevant.

On the one hand, there is Section 826 of the German Civil Code<sup>38</sup>. This provision – which imposes liability on anyone who causes harm to another person – is quite strict in its requirements. In order for Section 826 to apply, the harmful behavior must be intentional and contrary to public policy

---

<sup>35</sup> On civil liability in Italian law, see in general TRIMARCHI P., *La responsabilità civile: atti illeciti, rischio, danno*, Giuffrè, 3rd edition, 2021.

<sup>36</sup> On civil liability in Spanish law, see REGLERO CAMPOS J. and BUSTO LAGO J. (eds.), *Tratado de Responsabilidad Civil, Tomo I*, Aranzadi, 2014, p. 71 et seq.

<sup>37</sup> See FERRARINI G. and GIUDICI P., Italy, in CONAC P.-H. et al., op. cit., note 14, p. 454.

<sup>38</sup> With regard to civil liability for intentional damage under Section 826 of the German Civil Code, see MARKESINIS B., BELL J. and JANSSEN A. (eds.), *Markesinis's German Law of Torts*, Hart, 2019, 5th ed., p. 78 et seq.



(*sittenwidrig*), meaning that liability for negligence is not admissible and the harmful behavior must reach a certain threshold of immorality. These requirements make it considerably more difficult to bring a successful action under this provision. However, this general regime has an interesting advantage over the special regime for prospectuses, in that it extends liability to the directors and officers of the issuer<sup>39</sup>.

The second relevant provision is Section 823(2) of the German Civil Code, which governs liability for intentional or negligent breaches of legal provisions<sup>40</sup>. However, its applicability is limited, since it only allows compensation if the violated provision was intended to protect the individual interests of the person who suffered the loss, so that the violation of a provision intended merely to protect a general interest cannot give rise to liability. It should be noted, however, that the Federal Court of Justice has ruled in most cases that capital market law provisions do not constitute protective laws within the meaning of Section 823(2) of the German Civil Code. Furthermore, negligent violation is only permitted to the extent that the violated provision provides for it. While these two requirements constitute significant limitations, it should be noted that Section 823 of the German Civil Code still offers the advantage of allowing liability for negligence, whereas Section 826 of the German Civil Code is only applicable in cases of intentional conduct.

**Dutch** law appears to combine a general civil liability clause with a limitation based – as in Section 823(2) of the German Civil Code – on the protective scope of the violated provisions. Indeed, Article 6:162 of the Dutch Civil Code imposes liability on a person who has caused loss to another person if that loss was caused intentionally or through negligence. However, the right to compensation only exists if the "*condition of relativity*" provided for in Article 6:163 of the Dutch Civil Code is satisfied, i.e., if the violated standard was intended to protect against the specific type of loss that occurred in the case in question.

In the field of capital markets, however, the limitation due to the requirement of relativity does not seem to pose any problem for plaintiffs. In fact, provisions such as those contained in the Prospectus Regulation, the Transparency Directive, and the Market Abuse Regulation are generally interpreted as having, among other things, the objective of protecting investors. While the continental jurisdictions examined above all have, with a few differences, general provisions on civil liability, **United Kingdom** common law is based on a different principle. English common law does not provide for general civil liability, but relies on typical torts, specific civil offenses<sup>41</sup>: a given harmful behavior can only give rise to compensation if it can be linked to a tort. The tort of deceit and the tort of negligence are particularly important in the area of defective financial information.

The **tort of deceit** applies when the defendant has made a false statement about an existing fact<sup>42</sup>. However, it is necessary that the defendant knew that the statement was false and made it with the intention that the plaintiff would act on the basis of the defective information. Here, intent also includes recklessness, i.e., not caring whether a statement is true or false. Thus, mere carelessness (or negligence) is not sufficient to establish a civil tort. Consequently, if the defendant sincerely believed that the statement was true, they will not be liable<sup>43</sup>. It is also necessary that the plaintiff

---

<sup>39</sup> See POELZIG D., Germany, in BUSCH D., LEHMANN M. (eds.), *Prospectus Liability Rules in Europe and Beyond*, Oxford University Press, 2025, p. 43.

<sup>40</sup> On civil liability for breach of a protective standard under Section 823(2) of the German Civil Code, see MARKESINIS B. et al., *op. cit.*, note 36, p. 72 et seq.

<sup>41</sup> See TETTENBORN A. and JONES M. (eds.), *Clerk and Lindsell on Torts*, Sweet and Maxwell, 2023, 24th edition, p. 15.

<sup>42</sup> The configuration of the tort of deceit was clarified in the landmark case *Derry v. Peek*, 1889 WL 10221 (H. L. 1889).

<sup>43</sup> See DAVIES P., *Davies Review of Issuer Liability: Final Report by Professor Paul Davies QC*, June 2007 (hereinafter, "Davies Final Report"), p. 10, paragraph 8.



relied on the false statement to their own detriment (reliance)<sup>44</sup>. Furthermore, an omission would not be sufficient to trigger the application of such a tort. The restrictive nature of these conditions was already apparent to the British legislature in 1890, which led to the introduction of a prospectus liability regime allowing for negligence claims.

Negligence may, however, be sufficient under the aptly named **tort of negligence**, which applies when the loss has been caused by a breach of a duty of care – in other words, by the defendant's failure to comply with a provision applicable to the case in question<sup>45</sup>. However, for this liability to arise, the defendant must have had a duty of care towards the plaintiff. Given the existence of a special regime for defective prospectuses, the tort of negligence has been used particularly in relation to information provided on the secondary market. In this regard, however, case law has interpreted the duty of care restrictively in the *Caparo* landmark ruling<sup>46</sup>: in this case, the House of Lords ruled that auditors had a duty of care only to shareholders (and even then, not in general), and not to third parties. The House of Lords thus dismissed the action brought by an acquiring company that had based its assessment of the offer price on financial reports validated by the auditors. However, auditors will be held liable if they have expressly assumed responsibility towards a specific person and transaction. It is therefore quite difficult for aggrieved investors to claim tort of negligence.

### 2.1.2 - Civil liability on the secondary market

Regarding liability in the secondary market, general provisions continue to prevail. Indeed, they often remain the only regime that can be invoked in relation to defective public information, since most states have not established specific regimes for liability in the secondary market. This contrasts sharply with liability in relation to prospectuses.

The fact that general civil liability rules are the only possible recourse has important implications. General civil liability clauses may be ill-suited to the specific characteristics of financial markets. Three requirements generally pose difficulties: the burden of proof, the need to prove that one relied on the defective information, and the nature of the fault (intent or negligence). In a context marked by information asymmetry issues, such as that of capital markets, the need to meet these requirements according to their traditional conception may render illusory the protection theoretically offered by general civil liability law to aggrieved investors.

In our reference countries, the civil liability regimes applicable in the secondary market must be distinguished according to whether the misleading information was published in financial reports required under the Transparency Directive (2.1.2.1) or whether it was disseminated in the market as a result of a violation of the Market Abuse Regulation (2.1.2.2). In the latter case, the misleading information may be contained in *ad hoc* information or result from market manipulation.

#### 2.1.2.1 - Civil liability with regard to financial reports required under the Transparency Directive

---

<sup>44</sup> See DEAKING S. and ADAMS Z., *Markesinis and Deakin's Tort Law*, Oxford University Press 2019, 8th edition, p. 453 et seq.

<sup>45</sup> See TETTENBORN A. et al., op. cit., note 39, p. 381. For a discussion of the applicability of the tort of negligence in the context of capital markets, see BENGZEN M., *EU and UK investment disclosure liability: at cross purposes?*, *Capital Markets Law Journal*, Vol. 11, No. 3, 2016, p. 430 et seq.

<sup>46</sup> See *Caparo* [1990] 1 All E R 568, HL.



Throughout the period during which securities are traded, it is important to provide the market with up-to-date information on the issuer's financial situation. To this end, the Transparency Directive imposes on listed companies a continuous disclosure obligation for financial data, which includes annual and half-yearly financial reports<sup>47</sup>. The disclosure obligation is also enforced by a provision relating to civil liability for information disclosed in financial reports. In particular, as is the case for prospectuses, Article 7 of the Transparency Directive lists the persons responsible for the information to be published in accordance with the Directive and requires Member States to ensure that their civil liability regime applies to financial reports. Member States therefore have considerable leeway in implementing these summary guidelines from the European legislator<sup>48</sup>. They are not obliged to create a specific regime to deal with defective financial reports, as long as a civil liability regime within their national legal system can be applied<sup>49</sup>.

The jurisdictions studied did not feel the same need to adopt a specific civil liability regime for defective financial reports, unlike what happened with prospectuses. Three out of five countries considered that their general civil liability provisions could ensure compliance with their obligations under Article 7 of the Transparency Directive.

In fact, only Spain and the United Kingdom have introduced special legislation focusing on defective financial reports. Germany, Italy, and the Netherlands, on the other hand, rely entirely on the rules normally applicable to civil liability, which we examined in the previous chapter. The following analysis will therefore focus first on the legal regimes in Spain and the United Kingdom, before assessing how the general rules of liability are applied specifically to defective financial reporting in Germany, Italy, and the Netherlands.

In **Spain**, civil liability in financial reporting matters is governed by Article 104 of Law 6/2023 of 17 Marzo de los Mercados de Valores y de los Servicios de Inversión. In particular, Article 104(2) of the aforementioned law establishes the basic rule, providing that the issuer and its directors are liable for any loss caused by the information contained in the annual or half-yearly report. The provision adds a materiality criterion for this information, since liability may arise if the relevant information does not reflect a "true and fair view" (*imagen fiel*) of the issuer's situation. Regarding claimants, it is specified that the provision may be invoked by security holders (*titulares*).

Based on these summary indications, a regulation will have to set out the details of the regime, as was done for the prospectus liability regime<sup>50</sup>.

In the **United Kingdom**, the regime applicable to defective information contained in financial reports is set out in Section 90A of the FSMA. This summary provision was introduced specifically to ensure that the UK legal system complies with Article 7 of the Transparency Directive, which requires Member States to establish liability regimes for periodic information disclosed to the market<sup>51</sup>. Section 90A of the FSMA imposes liability on the issuer for losses caused by defective

---

<sup>47</sup> The Transparency Directive provides for the disclosure of financial data under Article 4 for annual reports and under Article 5 for half-yearly financial reports.

<sup>48</sup> See RINGE W.-G., Comment to Article 7 of the Transparency Directive, in LEHMANN M. et al., op. cit., note 9, p. 1136.

<sup>49</sup> See RINGE W.-G., Comment to Article 7 of the Transparency Directive, in LEHMANN M. et al., op. cit., note 9, p. 1136. It should be noted that ESMA conducted a mapping exercise to verify how the provisions of the Transparency Directive have been implemented. See ESMA, Mapping of the Transparency Directive - Options, Discretions and "Gold-plating", ESMA/2011/194, 7 July 2011.

<sup>50</sup> Article 104(1)-(2) of Ley 6/2023 de 17 de Marzo de los Mercados de Valores y de los Servicios de Inversión.

<sup>51</sup> See DAVIES P., Liability for misstatements to the market, Capital Markets Law Journal, Vol. 5, No. 4, 2010, p. 444.



information contained in financial reports<sup>52</sup>. In addition, this provision also applies to dishonest omissions and dishonest delays in the publication of required information. This regime allows only the issuer to be held liable and is the only one applicable to defective financial information, since any other potentially available liability regime is expressly excluded<sup>53</sup>. However, directors may be held civilly liable by the issuer<sup>54</sup>.

This summary provision is expanded upon in Schedule 10A of the FSMA, which details the framework. In particular, it specifies that those eligible to claim damages include investors who purchased, continued to hold, or sold securities based on the defective information<sup>55</sup>. However, investors must demonstrate that this reliance was reasonable in light of the circumstances surrounding their investment decisions. For the issuer to be held liable, a different test applies depending on the type of conduct engaged in by the issuer: intent or recklessness is required for positive misstatements, while dishonesty is required in cases of omissions or delays<sup>56</sup>. In particular, these elements are assessed in relation to persons exercising managerial responsibilities within the issuer<sup>57</sup>. In addition, to clarify the scope of application, the provision specifies that it applies to any information made available by recognized means.

Long considered difficult to apply in practice, Section 90A of the FSMA has only recently been implemented. Indeed, the first dispute in which it was invoked concerned Hewlett Packard's acquisition of the software company Autonomy. In this case, the acquirer had determined the acquisition price offered for the target company's shares on the basis of the latter's financial reports, which subsequently proved to be flawed<sup>58</sup>. This case will serve as the basis for examining the provision in question in this report.

As previously stated, not all other jurisdictions have opted to develop a specific legal regime, but have relied on more general rules, the specifications of which are set out in the following paragraphs.

In **Germany**, the legislator decided not to transpose the requirements of the Transparency Directive into specific legal provisions. Given that the legislator had several opportunities to intervene in this area and refrained from doing so, the legislative gap must be considered intentional<sup>59</sup>. Consequently, other special regimes – such as that applicable to *ad hoc* information – cannot be used by analogy<sup>60</sup>.

The provisions of the German Civil Code therefore apply instead. Section 826 – which allows compensation in cases of intentional harm and contrary to public morals – and Section 823(2) – which also applies in cases of intentional harm or negligence where the provision violated has a

---

<sup>52</sup> As we shall see below, the same provision also applies to defective *ad hoc* information.

<sup>53</sup> See DAVIES P., *op. cit.*, note 49, p. 449.

<sup>54</sup> *Ibid.*

<sup>55</sup> The extension of the special regime to holders of financial instruments has been hotly debated. Nevertheless, given that the requirement of causation applies, the only persons who will be able to benefit from the regime will be “active holders”, i.e., those who can prove that they held the financial instruments on the basis of the defective information. See PROROK J., *La responsabilité civile sur les marchés financiers*, LGDJ, coll. Bibl. dr. pr., vol. 581, 2019, pp. 261-262.

<sup>56</sup> Proving dishonesty is very difficult, since the criterion of dishonesty adopted under Schedule 90A of the FSMA follows that applicable in criminal law. See DAVIES P., *op. cit.*, note 49, p. 449.

<sup>57</sup> Schedule 90A (3)(2)-(3) FSMA.

<sup>58</sup> UK High Court of Justice - Business and Property Courts of England and Wales - Business List, ACL Netherlands B.V. (as successor to Autonomy Corporation Limited) et al. v. Michael Richard Lynch et al., [2022] EWHC 1178 (Ch).

<sup>59</sup> The voluntary nature of the legislative gap was emphasized by the German Federal Court of Justice in the IKB case, which concerned a press release. See BGH v. 13.12.2011 - XI ZR 51/10 - IKB, BGHZ 192, 90, 96 f. = AG 2012, 209.

<sup>60</sup> See POELZIG D., KANZLER M., *Kapitalmarktinformationshaftung*, in HACHMEISTER D. et al., *op. cit.*, note 12, pp. 198-199.



protective purpose vis-à-vis the aggrieved party – are applicable. More specifically, they can be used to hold directors and the issuer liable, given that the actions of directors engage the liability of the company under Section 31 of the German Civil Code<sup>61</sup>.

For Section 826 to be invoked, the director's intention to cause harm to the defendants must be proven, as must the fact that such harmful behavior is contrary to public morals. Regarding the latter point, a simple violation of the law is not sufficient, the behavior of the potentially liable person must be characterized more precisely; legal doctrine indicates, for example, that immorality may exist when the publication of defective financial reports was intended to influence the price of securities<sup>62</sup>.

Section 823(2) has the considerable advantage that it can be invoked even in cases of negligence. However, this provision also requires that the loss be due to a breach of a provision that has a protective effect in relation to a specific person. The question is therefore whether financial reporting rules can be interpreted as having the objective of protecting specific persons, such as investors<sup>63</sup>. The answer is controversial, and there is no definitive case law on this point<sup>64</sup>. In general, however, they are considered to be established exclusively in the public interest. To overcome this limitation, some authors propose to take advantage of the principle of effectiveness of EU law to infer an implied cause of action from the Transparency Directive<sup>65</sup>.

Finally, in the context of financial reporting, it should be noted that the issue of auditor liability is particularly relevant. Recently, the *Wirecard* case has intensified the debate in Germany. In general, it is considered that Section 826 of the German Civil Code – applicable in cases of intentional harm contrary to public morals – allows auditors to be held liable<sup>66</sup>. However, the possibility of liability under Section 823(2) of the German Civil Code must be assessed on a case-by-case basis for each provision governing the disclosure of accounting information. The issue must be examined taking into account the protection that the corresponding obligation to provide accounting information affords to investors' individual interests. The courts have not yet ruled on this issue. However, the *Wirecard* case is likely to lead to a decision by the BGH.

In **Italy**, liability for defective financial reporting has been classified as tortious, at least since a landmark ruling by the Court of cassation in 1984<sup>67</sup>. It is considered to be based on the general provision on torts in Article 2043 of the Italian Civil Code and on the clarification provided by Article 2049 of the Italian Civil Code. The latter provision extends liability to principals for harmful acts committed by their agents, so that the issuer may be held liable for the auditor's activities.

In addition, several other provisions may contribute to targeting additional defendants more specifically. In particular, the directors of the issuer may be held liable under Article 2395 of the Italian Civil Code, while auditors fall within the scope of Article 2407 of the Italian Civil Code<sup>68</sup>. As

---

<sup>61</sup> *Ibid.*, p. 200, also emphasizing that the issuer will have recourse against the directors.

<sup>62</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 981.

<sup>63</sup> For a summary of the standards that can be described as protective, see SCHMOLKE K.U., *Civil Liability of the Company and its Directors for False Financial Statements under German Law*, 2017, available on SSRN, pp. 19-20. The author also acknowledges a certain reluctance on the part of case law to classify these standards as protective, as this would open the door to negligence claims.

<sup>64</sup> In favor of classifying financial reporting rules as protective standards, see SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 971 et seq.

<sup>65</sup> See POELZIG D., KANZLER M., *Kapitalmarktinformationshaftung*, in HACHMEISTER D. et al., op. cit., p. 199.

<sup>66</sup> See POELZIG D., KANZLER M., *Kapitalmarktinformationshaftung*, in HACHMEISTER D. et al., op. cit., p. 201.

<sup>67</sup> Italian Court of cassation, judgment of 3 December 1984, No. 6300.

<sup>68</sup> FERRARINI G. and GIUDICI P., Italy, in CONAC P.-H. et al., op. cit., note 14, p. 458.



regards auditors, their liability is now confirmed by Article 15 of Legislative Decree 39/2010.

Finally, the director's liability regime also applies to the executive responsible for preparing the financial reports of listed issuers, as provided for in Article 154-bis (6) of the *TUF*<sup>69</sup>. It is interesting to note that the same rule applies to the executive responsible for preparing the sustainability reports required by the Corporate Sustainability Reporting Directive<sup>70</sup>. It therefore appears that ESG information will be subject to the same liability regime as financial reports.

In **the Netherlands**, investors who have suffered losses as a result of defective financial reports can sue the issuer under the general tort liability clause in Article 6:162 of the Dutch Civil Code. This is possible because accounting rules can be interpreted as protecting investors, thereby satisfying the requirement of Article 6:163 of the Dutch Civil Code. In addition, the members of the board of directors are liable under Article 2:139 of the Dutch Civil Code, which allows third parties to claim compensation for loss caused by misleading financial reports<sup>71</sup>. Finally, it is considered that auditors who have audited the defective financial reports could also be subject to tort liability under the general tort liability clause of Article 6:162 of the Dutch Civil Code<sup>72</sup>.

### ***2.1.2.2 - Civil liability for violations of market abuse regulations***

To ensure the integrity of capital markets against market abuse, the European legislator has adopted the Market Abuse Regulation. Regarding civil liability, this regulation takes a different approach from that expressed in the Prospectus Regulation and the Transparency Directive.

Indeed, in addition to a detailed set of prescriptive rules imposing obligations on issuers, these two latter laws also mandated Member States to establish a civil liability regime in the event of a breach of these obligations. This is not the case with the Market Abuse Regulation.

Notably, the Market Abuse Regulation harmonizes obligations and prohibitions and, to a certain extent, administrative sanctions. We are particularly interested in two provisions of the Market Abuse Regulation. On the one hand, the obligation to disclose inside information by means of *ad hoc* announcements, as provided for in Article 17 of the aforementioned regulation. Secondly, the prohibition of market manipulation based on information, as provided for in Article 15 of the same regulation. When these provisions are breached, it is likely that defective information will result, with the risk of harming investors.

Yet, the Market Abuse Regulation contains no provisions addressing the civil liability consequences of violating these provisions. Attempts have sometimes been made to fill this apparent gap by arguing that the principle of effectiveness of EU law requires a cause of action to be inferred from the Market Abuse Regulation, even though this act is silent on the issue. However, this interpretative debate has not produced any conclusive results and legal opinion remains divided<sup>73</sup>. Member States had therefore complete freedom to design – where appropriate – the civil

<sup>69</sup> Arguing that the liability of these executives should be limited to breaches of their procedural obligations in providing the required certifications and could not be extended to issues relating to the content of financial reports, see NEGRI-CLEMENTI A., Articolo 154-bis, in FRATINI M. and GASPARRI G., *Il Testo Unico della Finanza*, Vol. 2, UTET, 2012, p. 2128.

<sup>70</sup> Directive (EU) 2022/2464 on the disclosure of sustainability information by companies (OJ L 322, 16.12.2022, pp.15-80), (hereinafter “*CSRD*”).

<sup>71</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, pp. 493–494.

<sup>72</sup> *Ibid.*, p. 494.

<sup>73</sup> With regard to market abuse, see VEIL R., Private Enforcement in European Capital Markets Law, in GSELL B., MÖLLERS T.M.J. (eds.), *Enforcing Consumer and Capital Markets Law: The Diesel Emissions Scandal*, Intersentia, 2020, p. 405 et seq. Contra THOMALE C., Appendix to art. 30 MAR – Private Enforcement, in KALSS S., OPPITZ M., TORGLER U. and WINNER M. (eds.), *EU Market Abuse Regulation, A Commentary on Regulation EU, No. 596/2014*, 2021, p. 365 et seq.



liability regimes applicable to violations of the regulation in question<sup>74</sup>.

Regarding misleading information resulting from violations of the Market Abuse Regulation, a distinction must be made between the obligation to publish *ad hoc* disclosures (1) and the prohibition of market manipulation based on information (2).

### (1) Civil liability for misleading *ad hoc* information

The Market Abuse Regulation defines, in particular, the rules relating to the disclosure of inside information, which must be communicated promptly to the market. In particular, when an issuer is in possession of inside information, it is required, under Article 17 of the Market Abuse Regulation, to make this information public as soon as possible. This provision aims in particular at preventing abusive behavior exploiting undisclosed information, such as insider trading, and at ensuring equal access to information for investors<sup>75</sup>.

These information flows are usually described as *ad hoc* information, to reflect the fact that they are provided outside the framework of periodic information. Information triggers such a disclosure obligation on the part of the issuer when it reaches the level of materiality specified by the definition of "inside information" under Article 7 of the Market Abuse Regulation. However, the issuer may delay the publication of inside information when certain conditions are met<sup>76</sup>. This exemption applies when immediate disclosure would be prejudicial to the legitimate interests of the issuer, the delay would not mislead investors, and the issuer is able to ensure the confidentiality of the information.

As the Market Abuse Regulation does not specify whether a civil liability regime should apply in the event of a breach of its provisions, national legislators are free to shape national rules on civil liability for the dissemination of false or misleading *ad hoc* information as they wish.

Given the complete freedom to determine the civil liability regime applicable in such cases, only two of the jurisdictions under consideration have provided for the application of a special regime. In particular, Germany has developed a regime specifically tailored to defective *ad hoc* statements, while in the United Kingdom, this liability is governed by the same regime as that applicable to defective financial reports. The other three jurisdictions, on the other hand, rely on more general civil liability provisions. We will now examine the special regimes in Germany and the United Kingdom, followed by the general regimes applicable in Italy, Spain, and the Netherlands.

**Germany** is the only country to have developed an *ex novo* legislative provision governing civil liability for defective *ad hoc* information. These rules are set out in Sections 97 and 98 of the securities trading act (*Wertpapierhandelsgesetz* or *WpHG*)<sup>77</sup>, which apply respectively to cases where the violation consists of a failure to disclose inside information and cases where it consists of the disclosure of false information.

If *ad hoc* information is not published within the specified time frame, Section 97 of the *WpHG* applies. In this case, the issuer must compensate a third party for any loss caused by this failure in two cases. First, if the investor purchased the security after the failure to disclose<sup>78</sup> and still holds

<sup>74</sup> See THOMALE C., Appendix to Article 30 MAR, in KALSS S. et al., op. cit., note 71, p. 361 et seq.

<sup>75</sup> See KALSS S. and HASENAUER C., Article 17: Public Disclosure of Inside Information, in KALSS S. et al., op. cit., note 71, pp. 206-207.

<sup>76</sup> Article 17(4) of the Market Abuse Regulation.

<sup>77</sup> *Wertpapierhandelsgesetz* of 26 July 1994 (hereinafter "*WpHG*").

<sup>78</sup> More specifically, Section 97 of the *WpHG* refers to the event that triggers the inside information.



it when the inside information becomes known. Second, if the investor purchased the security before the obligation to disclose the inside information arose and sold it after the failure to inform the public. Thus, the investor will have standing to sue if he purchased at too high a price or sold at too low a price during the period in which the price of the securities was disrupted<sup>79</sup>. The provision also sets out the defenses available to the issuer, who may prove that the failure to disclose was neither intentional nor due to gross negligence<sup>80</sup>.

However, if the issuer discloses defective *ad hoc* information, Section 98 of the *WpHG* provides for a different regime. In this case, for the right to compensation to arise, it is necessary for the investor to have relied on the false information: in the case of a failure to publish, the legislator did not retain this requirement, considering that there can be no reliance in the absence of positive information. Pursuant to Section 98 of the *WpHG*, it is therefore necessary for the investor to have purchased the security after publication and to still hold the security after the falsehood has been revealed, or to have purchased the security before publication and to have sold the security before the falsehood was revealed. As in the case of Section 97 of the *WpHG*, this wording ensures that the investor will have standing to sue if he purchased at an inflated price or sold at too low a price during the period in which the price of the securities was disrupted<sup>81</sup>. The provision allows the issuer to escape liability if it proves that it was not aware of the falsehood or that its ignorance was not the result of gross negligence<sup>82</sup>.

Section 97(4) and Section 98(4) of the *WpHG* expressly provide that other liability regimes for intentional acts are applicable. This is clearly the case with Section 826 of the German Civil Code<sup>83</sup>. On the other hand, Section 823(2) of the German Civil Code, which concerns liability for intentional or negligent violation of a protective provision, is generally considered inapplicable<sup>84</sup>, insofar as the provisions of the Market Abuse Regulation are not considered to protect individual investors, but rather to ensure market integrity<sup>85</sup>.

The **United Kingdom** also provides for a special liability regime in the event of defective *ad hoc* information. The applicable provisions are the same as those applicable to financial reports, namely Section 90A and Schedule 10A of the FSMA. Given this overlap, we refer the reader to the discussion of the liability regime for defective financial reports above. We will simply note that, regarding *ad hoc* information, the scope of application covers all statements made through a regulated information service as defined in the provision. This inclusion ensures that fraudulent

---

<sup>79</sup> See HELLGARDT A., *Abschnitt 12. Haftung für falsche und unterlassene Kapitalmarktinformationen (paragraphes 97–98 WpHG)*, in ASSMANN H.-D., SCHNEIDER U.H. and MÜLBERT, P. O., *Wertpapierhandelsrecht: Kommentar WpHG MAR PRIIP MiFIR Leerverkaufs-VO EMIR, Vol. 2*, Otto Schmidt, 2023, p. 4153.

<sup>80</sup> Furthermore, the action fails if the investor was aware of the inside information at the time of purchase (before the failure to publish) or sale (after the failure to publish) of the security. V., more specifically Section 97(3) of the *WpHG*.

<sup>81</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4153. In other words, due to the “transaction requirement” (*Transaktionserfordernis*), investors who simply held on to their securities (or refrained from buying) on the basis of incorrect information are not covered by the provision. It should be noted, however, that the German Federal Court of Justice has indicated that persons who have refrained from a demonstrable planned purchase on the basis of defective information would be entitled to bring an action under Section 826 of the German Civil Code. See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4150.

<sup>82</sup> The action is not admissible if the investor was aware that the inside information was false.

<sup>83</sup> For references to case law recognizing the application of Section 826 of the German Civil Code to violations of rules relating to the disclosure of inside information, see PROROK J., op. cit., note 53, p. 212, note 15.

<sup>84</sup> For references to doctrine and case law excluding the application of Section 823 of the German Civil Code to breaches of insider trading rules, see PROROK J., op. cit., note 53, p. 212, note 14. The inapplicability can also be supported interpretatively on the basis of Section 26(3), sentence 2, of the *WpHG*.

<sup>85</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 958.



statements made in the absence of a disclosure obligation give rise to liability; in other words, the application of the regime is triggered by the use of a means of dissemination and not by the fact that the information had to be disclosed in accordance with the provisions of the Market Abuse Regulation<sup>86</sup>.

It should also be noted that this regime, which initially applied only to financial reports, was extended to *ad hoc* disclosures in 2010 following a review of legislative policy<sup>87</sup>. There were three main reasons for this extension. First, *ad hoc* disclosures sometimes need to be included in subsequent financial reports. In such cases, maintaining two different liability regimes would have led to confusion. Liability for financial reports would have been limited to intentional violations, while liability for *ad hoc* disclosures could have been based on negligence, in accordance with common law rules<sup>88</sup>. In particular, this would have led to a stricter liability regime for *ad hoc* disclosures, which must be prepared within a short time frame, than for financial reports, which can be prepared in an organized manner<sup>89</sup>. Second, issuers would have found it confusing to be subject to different liability regimes depending on the legislative provision that ultimately required the disclosure in question. Thirdly and finally, it was considered that there was no reason in principle to subject communications with such similarities to different liability regimes.

While Germany and the United Kingdom rely on specific legal provisions, the other three countries concerned rely on their respective general provisions on civil liability. In **Italy**, in particular, investors who have suffered losses as a result of defective *ad hoc* statements may invoke the general provision on tortious liability set out in Article 2043 of the Italian Civil Code, as well as other more specific liability regimes derived from company law. These include, in particular, Article 2395 of the Italian Civil Code, which extends joint and several tort liability to the member of the boards of the issuer<sup>90</sup>.

In **Spain**, the general civil liability clause provided for in Article 1902 of the Spanish Civil Code, which is typical of regimes inspired by French law, will apply<sup>91</sup>.

Finally, in the **Netherlands** too, investors will be able to invoke the general civil liability clause provided for in Article 6:162 in conjunction with Article 6:163 of the Dutch Civil Code, as shown by case law. For example, the Utrecht District Court held both Fortis Bank and its CEO liable for failing to provide an *ad hoc* statement when required to do so<sup>92</sup>.

## (2) Civil liability for market manipulation through the dissemination of information

In order to promote market integrity and the accuracy of price formation mechanisms, Article 15 of the Market Abuse Regulation prohibits market manipulation, which may consist of several types of activities defined in Article 12 of the same Regulation. In general, a distinction is usually made between transaction-based market manipulation and information-based market manipulation, depending on the means used to distort the price of a given security. In accordance with the scope

---

<sup>86</sup> See DAVIES P., *op. cit.*, note 49, p. 448.

<sup>87</sup> The legislative policy review to which we refer was conducted by Professor Paul Davies on behalf of HM Treasury and resulted in two main documents: the Davies Review of Issuer Liability – Liability for misstatements to the market: A discussion paper by Professor Paul Davies QC (hereinafter, “Davies Discussion Paper”), followed by a final document entitled Davies Review of Issuer Liability: Final Report by Professor Paul Davies QC (hereinafter, “Davies Final Report”).

<sup>88</sup> Davies Discussion Paper, *op. cit.*, note 85, paragraph 81.

<sup>89</sup> *Ibid.*

<sup>90</sup> See THOMALE C., Appendix to Article 30 MAR, in KALSS S. et al., *op. cit.*, note 71, p. 379.

<sup>91</sup> *Ibid.*

<sup>92</sup> See Kortekaas et al. v. Fortis, Utrecht District Court, judgment of 15 February, 2012 (JOR 2012/243). See also LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., *ibid.*, note 14, pp. 491-492.



of this report, we will focus on market manipulation through the dissemination of false or misleading information.

As we have already pointed out, the Market Abuse Regulation does not mention the consequences in terms of civil liability for a breach of its provisions. National legislators therefore have complete discretion to determine whether – and how – investors can obtain compensation for losses caused by market manipulation. It should be noted that none of the countries examined has adopted a special liability regime for market manipulation. This is therefore the only form of defective information addressed in this report that has not prompted a legislative response from lawmakers in the jurisdictions under review.

Despite the absence of any codification of a specific liability regime, the issue of compensation for losses caused by this type of market abuse has been debated in all the jurisdictions within our scope. In particular, the discussion has focused on whether general or ordinary tort-law provisions should apply.

In all the jurisdictions under consideration, it is generally accepted that market abuse may give rise to compensation, except for the United Kingdom. Italy, Spain, and the Netherlands, in particular, consider that their general or ordinary civil liability provisions are fully applicable. This is also the case in Germany, with one important clarification. In Germany, it is not disputed that intentional market abuse can give rise to compensation. However, the question of whether negligent violations can also give rise to compensation is debated. In order to better understand the specificities of each jurisdiction, we present above a brief overview of the applicable rules.

In countries that adopt a general provision on civil liability, such as **Italy** and **Spain**, any loss caused by market manipulation can be dealt with under Article 2043 of the Italian Civil Code and Article 1902 of the Spanish Civil Code, respectively.

In the **Netherlands**, case law grants compensation for losses caused by market manipulation by applying Articles 6:162 and 6:163 of the Dutch Civil Code. These articles, which require that the violated standard have a protective function with regard to the plaintiff, have, for example, allowed compensation to be awarded to investors who suffered losses as a result of misleading information disseminated by the Fortis bank<sup>93</sup>. Standards punishing or preventing false statements have been interpreted as having a protective function with regard to investors. Furthermore, case law considers that not only the issuer but also its directors may be held liable on this basis<sup>94</sup>.

In **Germany**, the provision relating to intentional offenses against public morals, set out in Section 826 of the German Civil Code, is considered applicable<sup>95</sup>. However, a mere violation of Article 12 of the Market Abuse Regulation is not sufficient. The act must also be particularly reprehensible. This would be conceivable if the tortfeasor had derived personal gain from the violation.

The applicability of intentional or negligent violation of a protective provision under Section 823(2) of the German Civil Code is a matter of debate. In fact, as we have already seen, it is unclear whether the prohibition of market manipulation has a protective scope with regard to individual investors or whether it is solely in the interest of public<sup>96</sup>. However, in the recent case concerning the

---

<sup>93</sup> *Ibid.*, p. 493.

<sup>94</sup> See BUSCH D., The private law effect of the EU market abuse regulation, *Capital Markets Law Journal*, 2019, Vol. 14, No. 3, p. 297.

<sup>95</sup> See FOERSTER M., paragraph 31. *Haftung für sonstige fehlerhafte Informationsversorgung*, in HABERSACK M. et al., op. cit., note 13, p. 1043 et seq.

<sup>96</sup> See VEIL R., *Private Enforcement*, in GSELL B., et. al., op. cit., note 71, p. 411 et seq. See also FOERSTER M., paragraph HCJP - 9 rue de Valois 75001 Paris - Tel.: 33 (0)1 42 92 20 00 -hautcomite@hcjp.fr -



takeover of Volkswagen/Porsche, the German courts expressed the view that prohibitions against market abuse are not intended to protect individual investors and therefore cannot form the basis for an action based on negligence<sup>97</sup>.

In the **United Kingdom**, case law has established that there is no cause of action for compensation for market abuse under the Market Abuse Regulation<sup>98</sup>, thereby confirming the conclusion already reached under the previous Market Abuse Directive<sup>99</sup>. Some authors are skeptical about the possibility of recognizing such a right of action in the future. In particular, they point out that courts have refused to recognize such rights when other remedies were available. Given that UK law provides for administrative sanctions and, to a certain extent, compensatory mechanisms such as disgorgement orders in relation to market abuse, it can be argued that it is unlikely that damages for market abuse will ever be awarded in the UK on the basis of tort liability<sup>100</sup>.

## 2.2 – The causation requirement

The usual basis for civil liability in the jurisdictions studied can be described as requiring four main characteristics to be present, namely a harmful act (the defective information), fault on the part of the defendant, the investor's loss, and causation between the harmful act and the alleged loss<sup>101</sup>.

Among the common features of the legal systems of the countries included in the study, it appears that the causation requirement is a source of some complexity. It is widely accepted that proving this element is one of the greatest obstacles for investors seeking to establish a defendant's civil liability. Our analysis revealed a consensus in principle that there is no particular distinction between the primary and secondary markets with regard to the application of the causation requirement. However, there may be differences in the type of causation required in relation to a given piece of defective information. With this in mind, the report examines causation in general, referring to a specific type of defective information only when necessary.

In particular, the concept of causation in the context of financial market liability has the distinctive feature of having a dual dimension, covering the two separate elements of the transaction and the

---

31. *Haftung*, in HABERSACK M. et al., op. cit., note 13, p. 1044 et seq.

<sup>97</sup> See LAMANDINI M. and RAMOS MUÑOZ D., Courts and the Law of Liability for Misstatements in Securities Offerings, in LAMANDINI M. and RAMOS MUÑOZ D. (eds.), *Finance, Law, and the Courts: Financial Disputes and Adjudication*, Oxford University Press, 2023, p. 272.

<sup>98</sup> See *Burford v London Stock Exchange* ([2020] EWHC 1183 (Comm)), spec. paragraphs 166 - 171. In particular, the Court examined whether a violation of the Market Abuse Regulation could be considered a “Euro-tort” under the doctrine adopted by the European Court of Justice in *Antonio Muñoz y Cia SA et al. v. Frumar Ltd et al.* (C-253/00). It ruled out this possibility, given that the Market Abuse Regulation limits the task of responding to infringements of the Regulation to national regulators alone. See paragraph 168 of the judgment.

<sup>99</sup> See *Hall v Cable and Wireless Plc* ([2009] EWHC 1793 (Comm)).

<sup>100</sup> See SORABJI J., *Enforcing Consumer and Capital Markets Law in England and Wales*, in GSELL B., et. al., op. cit., note 71, p. 139.

<sup>101</sup> Of these four features common to the legal systems of the countries examined, the analysis revealed that the existence of a lack of information is the least debated. This is explained in particular by the probative value of administrative sanction decisions taken by financial market authorities. In fact, in several countries, the existence of defective information can be proven by producing sanction decisions against issuers. For example, in Italy, the Milan Court of Appeal, in a judgment concerning Saipem's civil liability for defective information, explicitly described the administrative sanctions issued by Consob - the Italian financial markets authority - as “privileged evidence” (*prova privilegiata*) of the facts found in the decision. See Milan Court of Appeal, judgment of 19 October 2023, *Anchor Series Trust et al v. Saipem*, in *Le Società*, 5/2024, p. 599. In Spain, in the *Bankia* case, the Supreme Court upheld the findings of the lower courts based, among other things, on the sanctions imposed on the auditor who had reviewed the financial information included in the prospectus. Spanish Supreme Court, Civil Chamber, judgment of 3 February 2016, 24/2016, *Fundamentos de derecho, Séptimo, paragraph 1*. The relevance of administrative sanctions imposed by the AFM – the Dutch financial markets authority – as a “springboard” for establishing civil liability is highlighted by LENNARTS L. and ROEST J., *The Netherlands*, in CONAC P.-H. et al., op. cit., note 14, p. 515.



loss<sup>102</sup>. All the jurisdictions studied accept this requirement in principle. In particular, the requirement of causation between the defective information and the transaction – hereinafter referred to as transaction causation – expresses the need for the defective information to have played a role in the investor's decision to carry out a transaction involving the securities concerned by the defective information. On the other hand, the requirement of causation between the defective information and the loss – hereinafter, loss causation – refers to the need for the plaintiff's loss to be actually caused by the defective information, and not by other independent factors<sup>103</sup>.

The **transaction causation** serves to limit claims to situations in which the defective information was decisive in prompting the investor to engage in the transaction in question, whether a purchase or a sale. However, in some cases, continuing to hold a security on the basis of defective information may be relevant for civil liability purposes. In this case, the Anglo-American concept of causation between reliance on information and the plaintiff's conduct may be more appropriate to describe the application of this requirement, since continuing to hold a security is not a transaction.

Ultimately, the existence of a causal link between the defective information and the investor's decision implies that the investor relied on the defective information. Thus, the report will sometimes refer to the concept of investor **reliance** on defective information to indicate the existence of causation.

On the other hand, the requirement of **loss causation** aims to ensure that the only loss eligible for compensation is that which results from the defective information. This criterion is particularly important in an area such as the capital markets, where securities prices are influenced by a multitude of factors, often difficult to link precisely to a given price movement.

Regarding both the transaction causation and that of the loss, presumptions have been established to facilitate the task of the aggrieved investor seeking to establish the merits of his claim. In some cases, these presumptions have been established through a reversal of the burden of proof.

Since issues related to the requirement of loss causation are dealt with in more detail in the section on the calculation of damages, the following part of this section will examine the concept and rules applicable to transaction causation (2.2.1), as well as how the presumption of transaction causation is implemented in the jurisdictions studied (2.2.2).

### 2.2.1 - Causation of the transaction

As indicated, causation limits liability to cases where the defective information had an impact on the decision made by the investor who claims to have been harmed by the defective information. Indeed, it seems unfair to hold the author of the defective information liable when their actions did not cause the harm alleged by the plaintiff. From this perspective, this requirement seems to act as a filter against unfounded claims, whereby investors who did not base their decision on the defective information attempt to exploit it retrospectively to escape the unfavorable performance of their investment. However, more generally, the complexity of satisfying this condition is one of the determining factors in assessing the extent to which investors can actually benefit from a civil liability regime.

---

<sup>102</sup> See GELTER M., *General Report*, in CONAC P.-H. et al., op. cit., note 14, pp. 64 and 73.

<sup>103</sup> The terminology adopted in Germany to describe the requirements of causation of the transaction and causation of the damage is particularly revealing of their respective functions in establishing a defendant's liability. Transaction causation is referred to as “*haftungsbegründende Kausalität*” (causation establishing liability), while damage causation is referred to as “*haftungsausfüllende Kausalität*” (causation completing liability).



It is not surprising that the requirement for a causal link between the defective information and the transaction is not interpreted in the same way in the jurisdictions studied. Even within each jurisdiction, different forms of causation of the transaction are required in relation to different types of defective information. In addition, even the status of the investor (retail or professional) may play a role in how the requirement is taken into account. However, certain general trends can be identified. First, this form of causation can be described as direct or indirect, depending on whether the investor based their investment decision on the defective information itself or on another factor that was in turn influenced by the defective information.

Under the approach based on **direct transaction causation**, the claimant must prove that they personally read or perceived the defective information. Under this approach, the investor must prove that they were aware of the defective information and that this knowledge led them to make the investment decision in question. This is the strictest interpretation of the requirement and poses formidable obstacles for the claimant. In particular, meeting this requirement seems particularly complex -or even unrealistic – for retail investors, given that these investors do not generally read financial information<sup>104</sup>.

On the other hand, under an **indirect causation** requirement, it is sufficient for the claimant to prove that they relied on something that was influenced by the defective information, typically the general market sentiment that the defective information created or the price. This second form of requirement is often justified by general theories, the most relevant of which appear to be the German doctrine of *Anlagestimmung* or "investment environment" and the market fraud theory developed in the United States. Despite their dogmatic differences, both recognize the broad repercussions that defective information can have on financial markets and the investing public. Furthermore, the advantage of these doctrines is that they exempt the plaintiff from providing proof – often impossible to obtain – that they directly used the defective information.

The doctrine of *Anlagestimmung*, or "investment environment" provides that a given investment decision may be based on the general opinion of the market with regard to a certain security<sup>105</sup>. In other words, it recognizes that investors, when making their decisions, may simply be influenced by the common opinion or enthusiasm shared by the investing public regarding a particular financial instrument. Some authors even suggest that this doctrine has become a common feature of European civil liability regimes for prospectuses<sup>106</sup>. It is interesting to note that, in the past, this theory has been presented as the justification for a presumption of causation, as explained in more detail in the following section.

The use of **the market fraud theory** allows to consider that the investor made his decision based on the fact that the price had been correctly formed<sup>107</sup>. It is important to note that this theory presupposes that the market on which the financial instruments in question were traded was efficient, and therefore capable of adequately setting the price of these financial instruments on the basis of the information available at a given time<sup>108</sup>. This doctrine is often seen as a means of

---

<sup>104</sup> For an analysis of this issue, particularly in relation to secondary markets, see YLI-KANKAHILA H.M.K., *Moving Past Reliance – The Problem of a Reliance Requirement in Secondary Market Securities Litigation and Solutions from Select Jurisdictions*, *European Company and Financial Law Review*, 2023, Vol. 20, No. 3, p. 450 et seq.

<sup>105</sup> For an overview of the historical development of the German doctrine of *Anlagestimmung* in the context of prospectus liability and its enduring significance, see, for example, FRANCK J.-U., *Marktordnung durch Haftung*, Mohr Siebeck, 2016, p. 500 et seq.

<sup>106</sup> See LAMANDINI M. and RAMOS MUÑOZ D., op. cit., in LAMANDINI M. et al., op. cit., note 95, p. 268.

<sup>107</sup> See PIJLS A., *Prospectus Liability and Causation*, *Journal of European Tort Law*, 2023, Vol. 14, No. 2., p. 191.

<sup>108</sup> For a discussion of market fraud theory as developed and applied in the United States, see GEVURTZ F.A., *United States*, HCJP - 9 rue de Valois 75001 Paris - Tel.: 33 (0)1 42 92 20 00 -hautcomite@hcjp.fr -



reducing the obstacles faced by investors in proving transaction causation. However, in Europe, courts remain cautious and do not openly adhere to this theory, at least in the form that has been developed in securities litigation in the United States.

Some legal systems reinforce the requirement of causation by stipulating that the investor's reliance on the defective information must have been reasonable. This is an additional filter against unfounded claims, but it clearly complicates the claimant's task. It is interesting to note that the case law of the Court of Justice of the European Union (CJEU) may have implicitly recognized the possibility of imposing a reasonable reliance requirement. Indeed, it held that investors' reliance could be examined differently depending on **the type of aggrieved investor**. The behavior of professional investors is necessarily different from that of retail investors.

The CJEU's landmark ruling on this issue was in the case of the Spanish bank **Bankia**, which concerned civil liability in the primary market<sup>109</sup>. In its *Bankia*<sup>110</sup> ruling, the CJEU established two principles. In particular, both professional and retail investors are entitled to rely on the information contained in the prospectus, since the latter is published with the aim of safeguarding the interests of “*current and potential*” investors<sup>111</sup>. However, their position with regard to the transaction causation should not necessarily be considered identical. In particular, national legal systems may allow courts to examine the actual knowledge of professional investors at the time of the investment decision<sup>112</sup>.

In light of the *Bankia* judgment, the key question in assessing the confidence of a professional investor is therefore whether they had access to sources of information other than or alternative to the prospectus. If it turns out that these investors had access to other information, it will obviously be much more difficult to prove that their reliance on the defective prospectus was reasonable<sup>113</sup>.

Finally, it should be noted that in some cases, the requirement of transaction causation may appear contradictory. The contradiction arises when examining the effect of reliance on investors' behavior. In particular, two types of decisions may result from reliance on defective information<sup>114</sup>. The most radical effect of defective information is to cause the investor to engage or not engage in the transaction. In this case, in the absence of defective information, the transaction would not have

---

in CONAC P.-H. et al., op. cit., note 14, p. 128 et seq.

<sup>109</sup> In particular, with a view to its listing, Bankia had carried out a combined offering of its shares, with one tranche offered to retail investors and a subsequent tranche offered to professional investors. Since the offering was also aimed at retail investors, Bankia had to publish a prospectus, which would not have been necessary if the offering had been aimed solely at professional investors. Following the correction of Bankia's financial reports, it became apparent that the information contained in the prospectus was seriously inaccurate and gave a misleading picture of the bank's solvency. See Spanish Supreme Court, Civil Chamber, judgment of 1 June, 2021, No. 380/2021, *Fundamentos de derecho, Primero, paragraph 1*.

<sup>110</sup> In the action for damages, the defendant Bankia argued that professional investors, not being recipients of the prospectus, could not claim damages on the basis of a defective prospectus. In this context, the Spanish Supreme Court asked the CJEU to clarify two questions. In particular, it sought to determine whether professional investors and retail investors were entitled to claim damages for a defective prospectus, even though Spanish law exempted issuers from publishing a prospectus in cases where the offer was intended for professional investors (private placement). In the event that the CJEU ruled that professional investors could also claim damages for a defective prospectus, the Spanish Supreme Court asked a second question. Specifically, could national courts still assess in concrete terms whether the institutional investor in question had access to information other than that contained in the prospectus? The CJEU answered both questions in the affirmative. See CJEU, judgment of 3 June, 2021, *Bankia SA v. UMAS*, case C-910/19, paragraphs 27 and 40.

<sup>111</sup> CJEU, see above, note 108, paragraphs 32-33.

<sup>112</sup> *Ibid.*, paragraphs 42 and 44.

<sup>113</sup> A similar conclusion was reached in 2009 by the Supreme Court of the Netherlands in the *World Online* judgment, in which the Court emphasized that professional investors have a level of experience that makes it more difficult, in principle, to argue that they were decisively influenced by the prospectus. See BUSCH D., op. cit., note 92, p. 312, citing *World Online*.

<sup>114</sup> See PIJLS A., op. cit., note 105, p. 192.



taken place.

On the other hand, the defective information may simply have led the investor to conclude the transaction on terms different from those he would have accepted in the absence of defective information. Thus, if the investor simply asserts that he would have concluded the transaction at a different price, the obligation to prove the impact of the defective information on his decision seems superfluous<sup>115</sup>. However, the radical solution of removing the requirement of transaction causation is not explicitly adopted in the jurisdictions studied.

As we have seen, the requirement of transaction causation can take very different forms, depending on the jurisdictions and contexts in which it applies. Legal systems have marked differences.

In **Germany**, the requirement of direct reliance applies to *ad hoc* information when the investor seeks compensation for transaction-related losses<sup>116</sup>. This requirement is justified by the fact that, when requesting restitution, the investor considers that his free will has been infringed. In other words, he would not have entered the transaction if there had been no defective information. In this case, the question of the impact of the defective information becomes crucial. It is therefore considered that the plaintiff must fully prove not only that he was aware of the information (later revealed to be defective) but also that the content of the defective information determined his decision to invest<sup>117</sup>.

On the other hand, indirect reliance is required under the German civil liability regime for *ad hoc* disclosures if the investor seeks compensation for the difference in price. In this case, it is explicitly accepted that reliance may be based on the price of the financial instruments. In fact, in the *IKB* case<sup>118</sup>, which concerned the late disclosure of inside information, the German Federal Court of Justice ruled that if the investor claims compensation in the form of a price difference, he only has to prove that the defective information influenced the price of the securities<sup>119</sup>. If the investor only claims compensation for the adverse terms of a transaction (which he would have entered anyway), the alleged loss does not depend on whether or not he relied on the information in question, but on the price dynamics as influenced by the defective information<sup>120</sup>.

According to some commentators, German law has even codified the doctrine of *Anlagestimmung* as resulting from a form of indirect trust. Reference is made to the liability regime for prospectuses, insofar as Section 12(2)2 of the *WpHG (Wertpapierhandelsgesetz)* or securities trading act provides

---

<sup>115</sup> Maintaining the causation requirement for the transaction when the investor is only seeking compensation for the adverse terms of a transaction (which they would have entered into anyway) creates a significant evidentiary hurdle for the claimant and reduces the overall ability of investors to take advantage of the regime. However, the use of a presumption of transaction causation would facilitate the investor's position and mitigate the rigidity of the requirement in question. For a discussion of this point, see the overview of German debates on civil liability in the secondary market in PROROK J., op. cit., note 53, p. 231.

<sup>116</sup> This point is developed by HELLGARDT A., Abschnitt 12, in ASSMANN H.-D. et al., op. cit., note 77, pp. 4188–4189. The solution is radically different when the investor seeks compensation for the price difference.

<sup>117</sup> The high level of confidence required in Germany to bring an action for liability in relation to *ad hoc* disclosures (at least when the claimant is seeking compensation for transaction-related losses) is confirmed by the refusal of German case law to apply evidentiary facilities to such situations. For a discussion of how German case law has generally challenged the application of the *Anlagestimmung* theory to *ad hoc* information, see PROROK J., op. cit., note 53, pp. 217 and 222. The author points out in particular that German courts emphasize that *ad hoc* information is not intended to provide investors with all the information necessary for an investment decision, but only with specific information.

<sup>118</sup> See German Federal Court of Justice (BGH), judgment of 13 December 2011, XI ZR 51/10, (IKB).

<sup>119</sup> See BGH, see above, note 116, paragraph 67. See also VERSE D.A., Germany, in CONAC P.-H. et al., op. cit., note 14, p. 387, and HELLGARDT A., Abschnitt 12, in ASSMANN H.-D. et al., op. cit., note 77, pp. 4188 and 4190.

<sup>120</sup> See HELLGARDT A., Abschnitt 12, in ASSMANN H.-D. et al., op. cit., note 77, p. 4189. See also BGH, op. cit., note 116, paragraph 67.



that the right to claim compensation is excluded if the securities were not purchased on the basis of a prospectus<sup>121</sup>. Similarly, a requirement of indirect trust is sometimes considered to be applicable even where German law does not provide for a special civil liability regime, as in the case of defective financial reports. With regard to the latter, it is considered sufficient that the claimant has the investor's confidence in the accuracy of the information published and in the fact that the price of the securities is based on that accurate information<sup>122</sup>.

In the **Netherlands**, case law introduced the doctrine of indirect reliance in the landmark *World Online* ruling<sup>123</sup>. In this ruling, which concerned issues of liability in relation to prospectuses, the Court recognized that investment decisions may depend on a variety of factors. Given the difficulty of linking the investment decision to a specific piece of defective information, the Supreme Court of the Netherlands expressly adopted the concept of “*indirect reliance*” for example, when the investor relied on advice or “*prevailing opinions*” in the market. Thus, while maintaining the requirement of transaction causation, the Court shifted the object of that reliance. Under the indirect reliance model adopted by *World Online*, the investor may be considered to have relied not on the defective information itself, but rather on the advice or opinions that are presumed to have been formed, among other things, on the basis of the defective information.

Similarly, in **Spain**, the Supreme Court ruled in the *Bankia* case that it is not necessary for investors to have read the prospectus. In particular, the Supreme Court considered that the investor had not relied on the information contained in the prospectus, but rather on the share price, which was determined on the basis of information published by “*those who shape opinion on the capital markets*”<sup>124</sup>.

**Italy** is also interesting in this area because it is one of the jurisdictions in which the requirement of reasonable reliance is expressly codified. In particular, the Italian prospectus liability regime requires that the investor have reasonably relied (*ragionevole affidamento*) on a defective prospectus<sup>125</sup>. Despite this legislative intervention, legal doctrine and case law do not appear to have dealt with this subject in depth.

In the **United Kingdom**, the special liability regime applicable to defective financial reports and *ad hoc* information under Section 90A of the FSMA<sup>126</sup> contains a particularly strict requirement in matters of direct trust. It is interesting to note that this provision also contains an explicit codification of reasonable trust, which must be measured according to the circumstances of the case in question. The first case in which this provision was applied, concerning defective financial reporting, provided important guidance on how UK courts may apply the causation requirement in practice. The case in question concerned the purchase of the software company Autonomy by

---

<sup>121</sup> V. HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 891. It should nevertheless be noted that the BGH has ruled that the concept of *Anlagestimmung* is no longer relevant to discussions of liability issues relating to prospectuses, as the legislature has now expressly codified a presumption of causation. See BGH, XI ZB 24/16, paragraph 77.

<sup>122</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 978.

<sup>123</sup> Supreme Court of the Netherlands, judgment of 27 November 2009, (JOR 2010/43), *World Online*. In Dutch law, the requirement of causation is imposed by the doctrine of *condicio sine qua non*, which is normally applicable to civil liability in tort, see V. LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, pp. 489 and 495.

<sup>124</sup> See Spanish Supreme Court, Civil Chamber, judgment of 2 June, 2022, 463/2022, *Fundamentos de derecho, Decimocuarto*, paragraph 1, handed down in the *Bankia* case.

<sup>125</sup> FERRARINI G. and GIUDICI P., Italy, in CONAC P.-H. et al., op. cit., note 14, p. 459.

<sup>126</sup> The civil liability regime applicable to defective financial reports and *ad hoc* information is set out in Section 90A of the FSMA.



Hewlett Packard. Hewlett Packard claimed that it had been induced to acquire Autonomy on the basis of several pieces of defective information, including a distorted presentation of Autonomy's financial performance<sup>127</sup>.

To determine whether the plaintiffs had relied on this flawed financial information in their purchase decision, the court ruled that only publicly disclosed information that had been specifically reviewed could form the basis for such reliance. As the court stated unequivocally, “*if a document has not been reviewed, it cannot be relied upon*”<sup>128</sup>.

However, the Court was careful not to excessively restrict the conditions for concluding that causation existed in the transaction. On the one hand, the Court left the door open to a less restrictive concept, in that it accepted that a claim could still be made if the overall impression created by the combination of statements was false<sup>129</sup>.

Furthermore, the Court considered that the fact the defective information had some influence on the decision constituted sufficient evidence of the transaction causation, even if other considerations may have been the predominant causes of the decision in question<sup>130</sup>. As for the requirement of reasonable reliance, in the Autonomy case, the Court considered that this was a question of fact, without elaborating further on its possible characteristics or proposing a specific rule<sup>131</sup>.

A strict interpretation of the provision requiring the purchaser of the securities to prove good faith raised a different issue. In this case, the buyer was an *ad hoc* structure (SPV), whose directors were different from those of Hewlett Packard – the controlling shareholder of the SPV – which had reviewed the information and decided on the purchase<sup>132</sup>. The defendants argued that the reliance criterion was not satisfied, since it was the controlling shareholder who had (if applicable) relied on the information and not “*the purchaser of the securities*” as required by Section 90A of the FSMA<sup>133</sup>. However, the court circumvented this potential obstacle by emphasizing that the SPV was clearly subject to the “*controlling intent*” of its majority shareholder<sup>134</sup>.

In other cases, English law recognizes an indirect form of reliance, based, in particular, on the share price. This is the case under the special regime applicable to defective prospectuses under Section 90 of the FSMA<sup>135</sup>. In fact, the English prospectus liability regime only requires the investor to prove that the defective prospectus influenced the market price<sup>136</sup>. Thus, the indirect reliance

---

<sup>127</sup> UK High Court of Justice - Business and Property Courts of England and Wales - Business List, ACL Netherlands B.V. (as successor to Autonomy Corporation Limited) et al. v. Michael Richard Lynch et al., Summary of Conclusions of Mr Justice Hildyard dated 28 January, 2022, paragraphs 18 and 38.

<sup>128</sup> UK High Court of Justice, above, note 56, paragraph 505.

<sup>129</sup> UK High Court of Justice, above, note 56, paragraph 506.

<sup>130</sup> *Ibid.*, paragraph 515(1).

<sup>131</sup> *Ibid.*, paragraph 520.

<sup>132</sup> Consequently, the team that received the defective information and decided on the acquisition from HP, and the person to whom the SPV's actions were *de jure* attributable, were different persons. See UK High Court of Justice, above, note 56, paragraph 490(2).

<sup>133</sup> UK High Court of Justice, above, note 56, paragraph 484.

<sup>134</sup> *Ibid.*

<sup>135</sup> The causation requirement under the prospectus regime is inferred from Schedule 10A, which allows the defendant to escape liability by proving that the investor knew that the information was false or misleading. See MCMEEL G., United Kingdom, in BUSCH D. et al., op. cit., note 6, 591. On the causation requirement under the prospectus regime in the United Kingdom, see CHIU I.H.-Y., United Kingdom, in CONAC P.-H. et al., op. cit., note 14, p. 641, emphasizing that causation issues in this context are generally governed by the common law applicable to negligent misstatements.

<sup>136</sup> Professor Davies refers to what is described in this report as “direct reliance” as “reliance”, thereby emphasizing that the requirement of direct reliance is not currently provided for in Section 90 of the FSMA. However, the author emphasizes that  
[HCJP - 9 rue de Valois 75001 Paris - Tel.: 33 \(0\)1 42 92 20 00 -hautcomite@hcjp.fr](mailto:hautcomite@hcjp.fr)



requirement in Section 90 of the FSMA is considered to be a relaxation of the common law standard previously applicable to prospectus liability, under which it was necessary for the author of the defective statement to have intended the recipient to rely on it<sup>137</sup>.

Finally, English law excludes in certain cases the requirement of causation between the defective information and the transaction. In particular, the requirement of reliance does not apply at all in cases of “*dishonest*” delay in the disclosure of mandatory information. Indeed, it is considered illogical to apply it, since there can be no reliance on information that is not yet public<sup>138</sup>.

### 2.2.2 - The presumption of transaction causation

According to the general rules of procedure applicable to civil liability actions, the injured party, the investor, bears the burden of proof with regard to all elements of the claim.

However, proving certain requirements can be extremely difficult or nearly impossible for an investor. In particular, proving causation of the transaction is extremely difficult for aggrieved investors. This is certainly true if direct reliance is required, i.e., that the plaintiff perceived the defective information itself, but could also be a considerable obstacle in cases where indirect reliance is required.

To overcome these difficulties and help investors assert their rights, there are two possibilities<sup>139</sup>. On the one hand, the causation requirement can be interpreted as requiring only indirect reliance, as we saw above. On the other hand, from a procedural point of view, a presumption of causation can be introduced, which has the effect of reversing the burden of proof. Of course, both of these different approaches can be adopted, as is the case in several of the jurisdictions studied.

Given the difficulties plaintiffs encounter in proving their case, the availability of such facilities is an important feature in making a civil liability regime viable and truly enforceable. In particular, the absence of a presumption of causation contributes to making civil liability rules an “*alibi regime*”, since without this procedural facility, the possibility for investors to obtain compensation can become essentially illusory<sup>140</sup>.

With regard more specifically to the requirement of transaction causation, a presumption means that it is the defendant who must prove that the investor did not rely on the defective information. The most common presumption seems to be that of transaction causation, but some countries have also adopted forms of presumption of loss causation<sup>141</sup>.

---

the theory of market fraud applies, since it is still necessary to prove that the inaccurate statement influenced the market price. This latter condition is referred to in this report as “indirect reliance”, since in this case the investor did not rely on the defective information but on the price influenced, among other things, by the defective information. See Davies Discussion Paper, above, note 85, paragraphs 27 and 55.

<sup>137</sup> In particular, the concept of reliance within the meaning of Section 90 of the FSMA is considered to be a relaxation of the standard applicable to liability for prospectuses under common law. Under the latter, it was necessary for the author of the defective statement to have intended the recipient to rely on it. See Davies Final Report, op. cit., note 85, paragraph 30.

<sup>138</sup> Schedule 10A(5)(1). See also YLI-KANKAHILA H.M.K., op. cit., note 102, p. 473.

<sup>139</sup> See FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D. et. al., op. cit., note 26, paragraph 7.

<sup>140</sup> This point can be illustrated, for example, by reference to Section 90A of the FSMA, which does not provide for a presumption of causation. See PROROK J., op. cit., note 53, pp. 263 and 265. Given the restrictions of the English regime regarding causation and intent, it is not surprising that this provision has only been applied once, in the Autonomy case.

<sup>141</sup> Spanish case law explicitly adopts a **presumption of loss causation**. See, for example, Spanish Supreme Court, Civil Chamber, judgment of 21 December 2021, 890/2021, *Fundamentos de derecho, Quinto*, paragraph 9. In this judgment, the court stated that the investor's loss is presumed when the price of a share falls following the disclosure of defective information. It is therefore incumbent on the defendant to prove that the fall in the share price was due to other factors. Regarding the special German



In addition to its usefulness in lightening the procedural burden on plaintiffs, the appropriateness of a presumption of causation can be justified by several arguments<sup>142</sup>. These arguments are particularly evident in prospectus cases but could be extended to other forms of financial information. First, it is highly unlikely that retail investors have read the prospectuses, or indeed the financial reports. Therefore, any requirement that defective information be read directly conflicts with the reality of retail investment. Furthermore, the information published by issuers is normally reviewed by market analysts, who thus provide a channel for this information to be incorporated into the price of securities. In this context, it is reasonable to assume that investors have relied indirectly on the information published through its impact on the market price.

Several of the jurisdictions studied have adopted a presumption of causation, normally considered rebuttable. The most common way to create a presumption is to establish a reversal of the burden of proof, transferring that burden from the plaintiff to the defendant. This allows the defendant to escape liability by proving either that the transaction was not caused by the defective information or that the change in price was not due to the defective information.

The legal basis for causation presumptions may vary. While they are sometimes codified in legislation, in most cases they have been developed through case law. However, an analysis of case law reveals that courts in different countries have justified their application of the causation presumption on different grounds.

In **Germany**, the special regime for prospectuses is a clear case of codifying the presumption of transaction causation. In particular, Section 12(2)(3) of the *WpPG* provides that liability does not arise if the purchase of the securities was not based on the prospectus. German doctrine has inferred from this defense that the transaction causation is presumed<sup>143</sup>. It is interesting to note that the provision sets a time limit for the application of the presumption, namely six months from the publication of the prospectus (Section 9(1) of the *WpPG*)<sup>144</sup>.

Similarly, in the **United Kingdom**, the special regime for prospectuses includes a presumption of causation by codifying a reversal of the burden of proof under Schedule 10(6) of the FSMA. In particular, the defendant may escape liability if he proves that the plaintiff acquired the securities in question knowing that the information was false or misleading.

Even in the absence of an explicit legal basis for applying a presumption of causation in special national regimes, courts have sought other ways to justify such a presumption. This is the case in the Netherlands, notably in the *World Online* case mentioned above<sup>145</sup>. In that case, the **Dutch**

---

regime for prospectuses, Section 12(2)(2) of the *WpPG* includes, among the defenses to liability, the fact that the circumstances to which the defective information referred did not contribute to the fall in the share price.

<sup>142</sup> The reasons underlying the presumption of causation are discussed by DAVIES P., *Damages Actions by Investors on the Back of Market Disclosure Requirements*, in BUSCH D., AVGOULEAS E., and FERRARINI G. (eds.), *Capital Markets Union in Europe*, Oxford University Press, 2018, p. 325. The author further notes that even some professional investors, such as those who engage in index tracking, are reluctant to actually examine the information published.

<sup>143</sup> See MOCK S. Germany, in BUSCH D. et al., op. cit., note 6, p. 486. See also V. HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 891.

<sup>144</sup> The temporal relevance of a given piece of information in relation to the transaction causation is also examined by V. FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D. et al., op. cit., note 26, paragraph 7. The starting assumption is that information on financial markets is inevitably time-dependent. Thus, once the defective information is no longer relevant to the market, it is no longer possible to invoke reliance. In particular, defective information can lose its relevance in two ways: either because the defective nature of the information in question is revealed, or because new information is published that corrects the previously misleading information. Since these considerations relate to specific factual circumstances, this chronological relevance should be read as an implicit requirement of reasonable reliance.

<sup>145</sup> See above, note 121.



Supreme Court adopted a doctrine of indirect reliance. In addition, it approved the presumption that defective prospectuses induced the aggrieved investor to enter into the transaction. The Court justified this presumption in particular by referring to the predecessor of Article 11 of the Prospectus Regulation (requiring Member States to ensure that their civil liability regimes apply to breaches of EU prospectus rules) in light of the principle of effectiveness of EU law. The Dutch Supreme Court proceeded from the principle that one of the objectives of European prospectus legislation was to protect investors. Given the difficulties investors face in proving their case, the Court considered that the causal link should be presumed, otherwise the protection offered by the Community rules on prospectuses would prove illusory. Although sometimes contested in legal doctrine, this substantive law basis for the presumption of causation shows the extent to which EU law can influence the application of civil liability rules in the jurisdictions studied<sup>146</sup>.

In the *World Online* ruling, the Supreme Court also took the opportunity to clarify the scope of this presumption. In particular, the Court noted the difference between professional and retail investors, emphasizing that professional investors have a level of experience that makes it more difficult, in principle, to argue that they were decisively influenced by the prospectus<sup>147</sup>. With respect to professional investors, courts may therefore avoid applying such a presumption and require the plaintiff to prove that they relied on the prospectus<sup>148</sup>. For example, if a professional investor is familiar with the market in which the issuer operates and the prospectus contains an incorrect description of that market, the professional investor may already be aware of market conditions and may not rely on the misleading information<sup>149</sup>.

In **Italy**, too, case law has adopted a presumption of causation based on a teleological interpretation of the rules on prospectuses, but without direct reference to EU provisions. In particular, in the landmark *Tessival* ruling, the Italian Court of Cassation first noted that the rules on prospectuses are intended to protect potential investors and their ability to make informed decisions<sup>150</sup>. It also noted the central role assigned to the prospectus – even reinforced by a system of public control – in the context of a public offering of securities. Given this central function assigned to the prospectus by the legislator, the Court held that it could be assumed that the defective information contained in the prospectuses had influenced investors' decisions. However, the Court was careful to specify that defective information can only be subject to such a presumption if it is material, which excludes the relevance of minor defects in the information published<sup>151</sup>. In any event, this presumption is rebuttable, so that defendants are entitled to prove that the plaintiff would most likely have made the same investment decision in the absence of the defective information<sup>152</sup>.

---

<sup>146</sup> See PIJLS A., op. cit., note 105, pp. 198, 201, and 203. The author considers that the current Article 11(2) of the Prospectus Regulation does not provide a convincing legal basis for such a presumption of causation. Among other things, given that, under the CJEU's *Immofinanz* judgment (judgment of 19 December, 2013, C-174/12), Member States have considerable leeway in implementing provisions to apply the Prospectus Regulation. It is therefore difficult to see how a national regime that does not adopt the presumption could be considered contrary to Community law.

<sup>147</sup> See BUSCH D., op. cit., note 92, p. 312, citing *World Online* and arguing that the *World Online* presumption should be extended to violations of market abuse rules.

<sup>148</sup> Referring more broadly to the EU, it is suggested that there is a general trend towards a stricter assessment of causation when the action is brought by professional investors. See LAMANDINI M. and RAMOS MUÑOZ D., above, in LAMANDINI M. et al., op. cit., note 95, p. 268.

<sup>149</sup> See FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D. et al., op. cit., note 26, paragraph 7, note 37.

<sup>150</sup> See Italian Court of Cassation, judgment of 11 June, 2010, No. 14056, *Tessival v. Intesa Sanpaolo*, paragraphs 4.2 and 4.3.2.

<sup>151</sup> Italian Court of Cassation, judgment of 11 June 2010, No. 14056, *Tessival v. Intesa Sanpaolo*, paragraph 4.3.2.

<sup>152</sup> See AFFERNI G., *Causalità e danno nella responsabilità civile per false informazioni sui mercati finanziari: il caso Italease*, *Le Società*, 7/2015, p. 876, emphasizing that the defendant can avoid liability by proving that the plaintiff would have entered into the transaction even in the absence of the defective information. The question of whether the plaintiff would have entered into the transaction at the same price or at a different price has an impact on the calculation of damages.



As indicated, the presumptions of causation mentioned above are generally considered **rebuttable**, since they allow the defendant to prove that the investor would have entered the transaction anyway (or would have entered it on the same terms), even in the absence of defective information. In some cases, the grounds for excluding causation have been explicitly codified.

For example, the German securities prospectus act codifies certain grounds for rebutting the presumption. Thus, liability is excluded if the information contained in a prospectus has been corrected by means of information provided in a financial report or *ad hoc* information prior to the conclusion of the transaction<sup>153</sup>. In addition, a defendant can always prove that the purchaser of the securities was aware of the defective nature of the information<sup>154</sup>. In this case, it is concluded that the transaction, even if based on the prospectus, was not influenced by the defective information<sup>155</sup>.

More generally, German legal theory has examined several ways of rebutting the presumption of causation. In the past, it was argued that a prospectus cannot be considered to have caused a transaction when the market situation was such that the information in question could not have been the cause of the “*investment climate*”<sup>156</sup>. This is the case when there is extensive press coverage conveying negative information about the company, or when information that replaces previously published information is provided through *ad hoc* information<sup>157</sup>. However, this interpretation may no longer be valid since the Federal Court of Justice rejected the theory that this presumption constitutes a codification of the *Anlagestimmung* theory<sup>158</sup>.

However, there may also be reasons to exclude the admissibility of such a presumption of causation. For example, **German** case law tends to exclude the application of this presumption in the case of *ad hoc* information, when the investor claims compensation for transaction-related losses. This exclusion is justified by the fact that, when claiming such compensation, the investor alleges an infringement of his free will<sup>159</sup>. In other words, they would not have entered the transaction if there had been no defective information. Since, in this case, the question of the impact of the defective information becomes crucial, it is considered that the plaintiff must bear the entire burden of proof.

While continental courts seem to consider the presumption of causation as a legal rule, the **UK** approach is slightly different. In this jurisdiction, a “*presumption of inducement*” was upheld in the recent *Autonomy* case, which concerned issues of defective financial reporting. More specifically,

---

<sup>153</sup> Section 12(2)(4) of the *WpPG*.

<sup>154</sup> Section 12(1) of the *WpPG*.

<sup>155</sup> See MOCK S. Germany, in BUSCH D. et al., op. cit., note 6, p. 489. The third defense that allows liability to be excluded is, in accordance with the Prospectus Regulation, the fact that the purchase was made solely on the basis of the summary of the prospectus, see Section 12(2)(5) of the *WpPG*.

<sup>156</sup> D. A. VERSE, Germany, in CONAC P.-H. et al., above, note 14, p. 378.

<sup>157</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 892.

<sup>158</sup> More specifically, the BGH ruled that the concept of *Anlagestimmung* is not relevant when discussing issues of liability in relation to prospectuses, as the legislature has now expressly codified a presumption of causation. See BGH, XI ZB 24/16, paragraph 77. As a result, in order to escape liability, the defendant, i.e., the issuer, must prove that the investor was motivated by individual reasons to purchase the securities, which is virtually impossible to prove in practice.

<sup>159</sup> This point is developed by HELLGARDT A., Abschnitt 12, in ASSMANN H.-D. et al., op. cit., note 77, p. 4189. Furthermore, in the IKB case, the German Federal Court of Justice ruled out the possibility of applying the presumption of causation in the event of erroneous *ad hoc* information for at least two other reasons. First, the codification of this presumption within the framework of the special liability regime for prospectuses could not be applied by analogy. Indeed, the absence of a similar codification in the special regime for *ad hoc* information had to be considered an explicit choice by the legislator. Furthermore, with specific regard to cases of delayed or omitted *ad hoc* information, the Court held that a presumption based on the doctrine of *Anlagestimmung* (investment climate) could not be adopted. This doctrine presupposes that the publication of the information sent positive signals to the investing public. However, this latter element is clearly lacking when the information is omitted or delayed. See German Federal Court of Justice (BGH), judgment of 13 December, 2011, XI ZR 51/10, (IKB) paragraphs 63-64.



the court emphasized that a presumption of inducement applies as in all cases of tort of deceit. However, it was argued that this was not a presumption of law, but rather an “*inference of fact*”. To benefit from such an inference, it must be proven that the author of the false statement fraudulently intended his words to be understood in a certain sense and that the claimant understood them in that sense<sup>160</sup>. Thus, once again, the English approach seems to emphasize the factual nature of assessments concerning investor confidence in defective information.

## 2.3 - The fault requirement

To establish liability, it is also necessary to demonstrate the fault of the author of the false statement. More specifically, that he had a particular awareness linking his action (or inaction) to the resulting loss. The two most relevant subjective states in this context are intent, which reflects the defendant's knowledge of the falsity or misleading nature of the defective information, and negligence (simple or gross), which refers to a deviation from the required standard of care. A third concept, recklessness, which is particularly important in the UK legal framework, indicates the perpetrator's indifference to the truth or falsity of the information.

The jurisdictions examined can be divided into two groups. The first group includes legal systems that extend liability to both intent and negligence, without significant restrictions on the degree of negligence required. These are Italy, Spain, and the Netherlands. In contrast, the other jurisdictions take a more restrictive approach to negligence. In Germany, the defendant is generally liable only if their conduct can be classified as gross negligence. In the United Kingdom, liability for negligence is completely excluded in certain cases of defective information, particularly with regard to financial reports and *ad hoc* information.

To determine whether the defendant acted negligently, it is also necessary to verify the degree of diligence required in preparing information for public disclosure. In general, the assessment of the level of diligence required of the defendant normally depends on their role and proximity to the information in question. Consequently, the degree of diligence required of the issuer will be higher than, for example, that required of a member of the underwriting syndicate for a public offering of securities.

While this requirement is organized this way in substantive law, there is an interesting feature from a procedural law perspective. Several jurisdictions have introduced what is effectively a presumption of negligence, at least in their prospectus liability regimes. As with the transaction causation requirement, they have codified a due diligence defense, which allows the defendant to escape liability as long as they can prove that they exercised the required level of diligence. This reversal of the burden of proof greatly facilitates the task of the aggrieved investor in their efforts to obtain compensation for the losses they have suffered.

To assess in more detail the substantive and procedural implications of the rules on fault in our jurisdictions, it is necessary to examine the standard of fault applicable in each jurisdiction (2.3.1) as well as the cases of reversal of the burden of proof that codify a presumption of negligence (2.3.2).

### 2.3.1 - The relevance of intent or negligence

The approach taken by the jurisdictions studied regarding fault varies considerably. The main difference depends on whether they accept liability for both intentional fault and negligence, or

---

<sup>160</sup> UK High Court of Justice, see above, note 56, paragraph 515(2).



whether they limit or exclude liability in cases of simple negligence. For example, by limiting liability to cases of gross negligence or completely excluding the possibility of liability for negligence. Indeed, with regard to certain types of defective information, some jurisdictions only recognize liability in cases of intentional fault.

To better understand the rules applicable in each of the jurisdictions in our scope, we will now provide an overview. We will first examine the group of jurisdictions where negligence is applied more broadly, before proceeding to a more detailed analysis of its distinctive treatment in the German and English legal systems.

In **Italy**, in accordance with general civil liability rules, both the prospectus regime and other regimes applicable to defective information allow liability to be established on the basis of intentional fault or simple negligence<sup>161</sup>. There is some uncertainty as to the degree of diligence required. With regard to the prospectus regime, it is unclear whether the standard requires the highest level of diligence theoretically possible or simply a reasonable level under the circumstances<sup>162</sup>.

More generally, however, it can reasonably be assumed that where the defendant is an entity carrying on a commercial activity, a standard of professional diligence applies, in accordance with the general rules of the Italian Civil Code on the degree of diligence required of a professional<sup>163</sup>.

The situation is similar in **Spain**. The Spanish prospectus regime imposes liability based on intentional fault or simple negligence. In particular, the degree of diligence required varies depending on the defendant. In fact, issuers and guarantors are generally held liable as if it were a form of strict liability. This approach is justified in view of the key role played by these defendants in the publication of misleading information<sup>164</sup>. In the context of liability on the secondary market, the applicable standard remains intentional fault or simple negligence, derived from the general provisions on tort liability in the Spanish Civil Code<sup>165</sup>.

In the **Netherlands**, too, liability can generally be based on both intentional fault and simple negligence. In fact, under Dutch law, both the liability regimes applicable to prospectuses and the general provisions on torts (Article 6:162(3) of the Dutch Civil Code) require that the tort be committed through the fault of the defendant or be due to a cause for which the defendant is liable under the law or generally accepted principles<sup>166</sup>.

Dutch law also differentiates between the degree of diligence required of different defendants. In particular, issuers appear to be held to an almost strict liability standard. This result can be explained by the relationship that different categories of defendants have with the information to be disclosed to the public. From this perspective, issuers do not depend on information provided by third parties, unlike, for example, the lead underwriters of a public offering syndicate<sup>167</sup>.

---

<sup>161</sup> See TRIMARCHI P., *op. cit.*, note 33, p. 121. Confirming the relevance of intent and negligence, see Italian Court of Cassation, judgment of 11 June, 2010, No. 14056, Tessival v. Intesa Sanpaolo, paragraph 4.

<sup>162</sup> See GIUDICI P., Italy, in BUSCH D. et al., *op. cit.*, note 6, p. 514.

<sup>163</sup> Article 1176(2) of the Italian Civil Code.

<sup>164</sup> See REDONET SANCHEZ DEL CAMPO J., Spain, in BUSCH D. et al., *op. cit.*, note 6, p. 533.

<sup>165</sup> Articles 1101 and 1902 of the Spanish Civil Code. See also FUENTES NAHARRO M., Spain, in CONAC P.-H. et al., *op. cit.*, note 14, p. 623.

<sup>166</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., *op. cit.*, p. 483. See also FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., et al., *op. cit.*, note 26, paragraph 6.

<sup>167</sup> See also FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., et al., *op. cit.*, note 26, paragraph 6.



With regard to liability on the secondary market under Dutch law, liability arises in cases of both intentional fault and simple negligence on the basis of the ordinary provisions of tort law under the Dutch Civil Code.

While the jurisdictions examined above show a certain degree of liberalism regarding the defendant's required "*subjective*" state of mind for liability – extending liability to all degrees of negligence - the same is not true in Germany and the United Kingdom. These two countries have a different approach to liability for negligence. In particular, the German legal system requires at least gross negligence for both primary and secondary market liability, while the English legal system completely excludes liability for negligence in cases of secondary market liability.

In **Germany**, the defendant is liable under the same standard under both special regimes applicable to defective prospectuses and defective *ad hoc* information. In particular, liability is established if the violation is intentional or results from gross negligence. In principle, gross negligence occurs when the defendant has violated a duty of care (*Sorgfalt*) with particular severity, deviating from what a reasonable person in the same situation should have done<sup>168</sup>. It is also argued that this same standard – requiring either intent or gross negligence – should be extended to other types of defective information, such as defective financial reports<sup>169</sup>.

Under German law, the assessment of negligence requires consideration of the specific circumstances of the defendant. In the context of capital market liability, the duty of diligence is all the more intense the closer the defendant is to the information in question, with the result that the issuer is subject to a stricter liability regime than, for example, a member of the underwriting syndicate for a public offering of securities<sup>170</sup>. When the defendant is not the issuer, even if he is subject to a lower standard, he is still required to verify the information, at least when doubts arise as to its accuracy<sup>171</sup>.

The standard applicable to financial reports, which under German law are subject to ordinary civil liability, depends on the general liability provision invoked. Liability for intentional fault or negligence may be incurred under Section 823(2) of the German Civil Code, which imposes liability for the violation of provisions that are protective in nature with regard to the injured party. However, the standard applicable to intent and negligence is that required by the violated provision<sup>172</sup>. Thus, in principle, if the protective provision can be violated by simple negligence, civil liability could be imposed on the basis of simple negligence.

However, German doctrine suggests limiting the standard applicable to defective financial reports to intentional fault or gross negligence, considering the regime applicable to prospectuses and *ad hoc* information by analogy<sup>173</sup>. Among other considerations, it emphasizes that there is no valid reason to subject the person potentially liable for a defective financial report to a more severe liability regime (extended to simple negligence) than that applicable in the case of defective

---

<sup>168</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 893. See also MARKESINIS B. et al., op. cit., note 36, p. 54.

<sup>169</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, pp. 975–976.

<sup>170</sup> See MOCK S. Germany, in BUSCH D. et al., op. cit., note 6, p. 484. See also V. HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 893.

<sup>171</sup> See MOCK S. Germany, in BUSCH D. et al., op. cit., note 6, p. 484.

<sup>172</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, pp. 975–976.

<sup>173</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 977.



prospectuses and *ad hoc* information (which is triggered by gross negligence). In particular, this interpretation would create a general standard of civil liability for capital market information, regardless of the regime actually applicable to the defective information in question.

Finally, liability for defective financial reporting is incurred in accordance with Section 826 of the German Civil Code in the event of intentional violations that are contrary to public morals.

In this context, the hearings revealed Germany's great reluctance to extend liability and award damages on the basis of simple negligence. Thus, limiting liability to cases of intent and – at most – gross negligence appears to be a characteristic feature of the German system of liability for defective information on the capital markets.

In the **United Kingdom**, the standard applicable to prospectus liability is that of intentional fault or negligence. As for the degree of diligence applicable to information to be published in a prospectus, the defendant is required to have acquired a reasonable belief, formed by reasonable inquiry, as to the truthfulness and non-misleading nature of the information in question<sup>174</sup>. It should nevertheless be noted that, in accordance with common law, the English system does not distinguish between gross negligence and simple negligence and treats all cases of negligence without further specification.

On the other hand, a requirement strictly based on intent (fraud) applies to liability for defective financial reports and *ad hoc* information. In fact, liability under Section 90A of the FSMA only arises in cases of intentional fault or recklessness, two elements generally referred to together as “*fraud*”<sup>175</sup>. Liability for negligence is not provided for in this section<sup>176</sup>. If, in this context, intent means knowledge of the falsity or misleading nature of the statement made, recklessness indicates that the author of the statement did not care whether it was true or false<sup>177</sup>. Thus, recklessness is excluded to the extent that the defendant demonstrates his belief – even if unreasonable – in the statement they made<sup>178</sup>.

To assess the existence of such subjective states, it is necessary to examine whether they exist among persons exercising management functions within the issuer<sup>179</sup>. As in the common law tort of deceit, it is necessary that the manager in question had actual knowledge of the false or misleading nature of the information given<sup>180</sup>.

The recent *Autonomy* case<sup>181</sup> provides initial clarification on the requirements of Section 90A of the FSMA with regard to what the Court defined as the requirement of “*guilty knowledge*”. First, the Court states that the assessment of guilty knowledge is the same as that required in the context

---

<sup>174</sup> Schedule 10(1)(2) FSMA.

<sup>175</sup> See Davies Discussion Paper, above, note 85, paragraph 70.

<sup>176</sup> It should be noted that, while intent or recklessness is necessary to establish liability for false or misleading statements in financial reports or *ad hoc* disclosures, the even stricter requirement of “dishonesty” applies to delays in publishing *ad hoc* information. It has been argued that this is necessary because delays often have legitimate reasons. Consequently, if mere intent were sufficient to engage the issuer's liability, this would automatically trigger an excessive number of liability cases against issuers. See Davies Final Report, above, note 85, paragraph 47. Although civil liability for delays does not fall within the scope of this report, it is mentioned here as an example of an additional nuance in the degree of fault required in the UK system.

<sup>177</sup> UK High Court of Justice, *prec.*, note 56, paragraph 470.

<sup>178</sup> *Ibid.*

<sup>179</sup> Schedule 10A(3)(2)-(3).

<sup>180</sup> UK High Court of Justice, *op. cit.*, note 56, paragraph 468.

<sup>181</sup> *Ibid.*



of the tort of deceit, which means not only that the defendant knew of the defective nature of the information, but also that he understood it in its defective sense<sup>182</sup>. The Court took care to emphasize the very strict nature of this requirement, noting, among other things, that only statements known to be false can give rise to liability, and that it is necessary for the person making the statement to have been aware of the facts rendering the information false at the time of disclosure<sup>183</sup>.

The requirement is even more difficult to meet because of the applicable rules of evidence. In particular, in cases of deception, courts adopt the presumption that “*innocent incompetence*” is more common than fraud, which raises the evidentiary threshold that the plaintiff must meet<sup>184</sup>. Furthermore, if the defendant acted in accordance with the advice of reputable professionals, the court considers that fraud will be even less likely to be found<sup>185</sup>.

The exclusion of liability for negligence – even gross negligence – under the English regime of periodic and episodic disclosure appears to be a clear departure from other jurisdictions. It is therefore interesting to analyze the reasons that have been put forward to justify this English approach to the application of a negligence requirement in relation to liability in the secondary market.

This issue was addressed in particular in the Davies Review, which gave rise to several considerations on the advisability of introducing liability for simple negligence under Section 90A of the FSMA. Such a reform would have generalized the requirement applicable to liability in relation to prospectuses, which is considered to be an effective regime, even if generally costly for issuers<sup>186</sup>. In this context, Professor Davies argued that fraud was the most appropriate standard to apply to liability cases in the secondary market. In particular, the considerations put forward to support this position refer, on the one hand, to the incentives that such a regime would create for interested parties and, on the other hand, to arguments of legal clarity.

With regard to the first set of arguments, Professor Davies highlighted the costly consequences of adopting a negligence requirement. He first argued that liability for negligence would lead issuers to increase the cost of verifying disclosed information. In fact, verifying the truthfulness of information requires much more costly checks than those necessary to simply establish an “*honest belief*” in the truthfulness of a statement<sup>187</sup>. To illustrate this point, Professor Davies even defined it as a “*low-cost compliance standard*”<sup>188</sup>. In addition, the additional activities required would slow down the process of disseminating valuable information to the market, while encouraging more defensive communication<sup>189</sup>.

The rejection of negligence as an appropriate requirement was also motivated by the lack of certainty that such a standard would create. Indeed, the concept of negligence is flexible and highly dependent on the facts, requiring courts to examine what a reasonable person in the same situation as the defendant would have done<sup>190</sup>. Fraud, on the other hand, is a very easy standard for issuers

---

<sup>182</sup> On this “subjective test”, see *ibid.*, paragraph 448.

<sup>183</sup> *Ibid.*, paragraphs 469 and 477.

<sup>184</sup> *Ibid.*, paragraph 473.

<sup>185</sup> *Ibid.*, paragraphs 474–475.

<sup>186</sup> Davies Discussion Paper, above, note 85, paragraph 71.

<sup>187</sup> Davies Discussion Paper, above, note 85, paragraph 73.

<sup>188</sup> DAVIES P., above, in BUSCH D. et al., op. cit., note 140, p. 334.

<sup>189</sup> Davies Discussion Paper, above, note 85, paragraph 72, and Davies Final Report, above, note 85, paragraphs 9 and 23.

<sup>190</sup> See Davies Final Report, above, note 85, paragraph 7.



to understand, namely refraining from making statements that one knows to be false<sup>191</sup>.

The question of whether the intermediate requirement of gross negligence could be an appropriate solution was also examined. However, it was felt that even in this case, a serious problem of definition would arise, negating any possible advantages of theoretically restricting liability to the most serious cases of negligence. Indeed, the concept of gross negligence is not established or defined in English common law, and its actual meaning would remain unclear, creating the same risks of increased costs and defensive communications as simple negligence<sup>192</sup>.

Ultimately,<sup>193</sup> fraud was found to be the most appropriate basis for combating the type of behavior that has the most negative impact on commercial transactions<sup>194</sup>. Furthermore, the consequences of fraud-based liability are generally more difficult for directors to avoid, at least where rules are in place to prohibit insurance and indemnity in cases of proven fraudulent conduct<sup>195</sup>.

### 2.3.2 - The presumption of negligence

As noted above, plaintiffs may face significant obstacles in proving several elements of a civil liability action, including fault. In particular, proving the “*subjective*” state of mind of a defendant company may require access to information or documents that are not necessarily available to the plaintiff. As with the causation requirement, several jurisdictions have therefore introduced mechanisms providing for a presumption of negligence to make it easier for plaintiffs, while allowing defendants to rebut this presumption where appropriate.

The most common mechanism in the jurisdictions studied is the reversal of the burden of proof due to reasonable diligence, which allows the defendant to escape liability for defective information. In particular, all jurisdictions have introduced a codification of this reversal of the burden of proof in their prospectus regimes. A clarification should be made regarding the Netherlands, where the presumption applies only if the plaintiff is a consumer. In addition, in Germany, a presumption of negligence also applies to the regime of defective *ad hoc* information.

In **Germany**, under the prospectus regime, the requirement of intentional misconduct or gross negligence is inferred from one of the defenses available to the defendant. The defendant can avoid liability by proving that he was unaware of the defective nature of the information and that this ignorance was not due to gross negligence<sup>196</sup>. This means that the defendant's fault is presumed, since the burden of proof is reversed<sup>197</sup>. In principle, gross negligence occurs when the defendant has violated a duty of care (*Sorgfalt*) with particular severity, unlike what a reasonable person in the same situation should have done<sup>198</sup>.

---

<sup>191</sup> *Ibid.*, paragraph 8, further emphasizing that the requirement of fraud in the context of the tort of deceit was developed specifically with reference to misrepresentations.

<sup>192</sup> See Davies Discussion Paper, above, note 85, paragraph 76, and Davies Final Report, above, note 85, paragraph 25.

<sup>193</sup> The Davies Final Report also develops an additional line of argument, emphasizing the role of administrative enforcement. Indeed, defective disclosures can already be administratively sanctioned by the FCA on the basis of simple negligence. The advantage of applying this standard only when issuing administrative sanctions is that the FCA must take into account the seriousness of the violation. On the other hand, if private litigation were allowed for negligent disclosures, even a minor deviation from the required duty of care could result in significant economic liability, particularly for issuers whose securities are heavily traded. See Davies Final Report, above, note 85, paragraph 10 et seq.

<sup>194</sup> See DAVIES P., above, in BUSCH D. et al., op. cit., note 140, 335.

<sup>195</sup> *Ibid.*

<sup>196</sup> Section 12(1) of the *WpPG*.

<sup>197</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 893.

<sup>198</sup> *Ibid.* See also MARKESINIS B. et al., op. cit., note 36, p. 54.



The requirement of intentional fault or gross negligence also applies to the German regime for defective *ad hoc* disclosures, and in this case too, it is inferred from one of the defenses available to the defendant<sup>199</sup>. The defendant is exempt from liability, just as in the case of prospectus liability, if he proves that he was unaware of the defective nature of the information and that this lack of knowledge was not due to gross negligence<sup>200</sup>.

In **Italy**, the special liability regime applicable to prospectuses clearly provides for a presumption of negligence. This presumption was introduced by means of a reversal of the burden of proof, since the defendant can be relieved of liability if he proves that he exercised due diligence<sup>201</sup>. This is obviously a particularly advantageous system for plaintiffs. However, with regard to civil liability for other forms of defective information, plaintiffs cannot rely on similar codified provisions. In principle, the ordinary rule of burden of proof in civil liability applies, which means that the plaintiff will have to prove the required subjective state of mind on the part of the defendant.

Nevertheless, this theoretical distinction should not be exaggerated. In practice, German courts tend to adopt a flexible approach, often shifting the burden of proof in favor of plaintiffs in order to address the significant evidentiary challenges they face in non-prospectus cases<sup>202</sup>.

In **Spain**, the standard applicable to the special prospectus regime is also inferred from the fact that defendants may be exempt from liability if they can demonstrate that they exercised due diligence<sup>203</sup>. Here again, the subjective element is presumed on the basis of a reversal of the burden of proof<sup>204</sup>.

In the **Netherlands**, as indicated, there are two special regimes applicable to prospectuses, depending on whether the investor is a consumer or a professional. With regard to the procedural rules relating to the allocation of the burden of proof under these regimes, a distinction must be made. Thus, where the claimant is a consumer – and therefore the provision on unfair commercial practices applies – the burden of proof of the defendant's subjective state is reversed<sup>205</sup>. On the other hand, where the action is brought by a professional investor – and therefore the provision on misleading advertising applies – the reversal of the burden of proof is always possible. In such case, however, the reversal will only apply to defendants who participated in determining the content of the prospectus<sup>206</sup>.

In the **United Kingdom**, as in several other jurisdictions, liability for prospectus-related matters is

---

<sup>199</sup> Section 98(2) of the *WpHG*. See also HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p.4179.

<sup>200</sup> Section 98(2) of the *WpHG*.

<sup>201</sup> Section 94 of the *TUF*.

<sup>202</sup> FERRARINI G. and GIUDICI P., Italy, in CONAC P.-H. et al., op. cit., note 14, pp. 458–459.

<sup>203</sup> Article 74 of Royal Decree 814/2013. This defense of due diligence extends specifically to lead entities (*entidad directora*), in accordance with Article 72(3) of the same decree.

<sup>204</sup> See FUENTES NAHARRO M., Spain, in CONAC P.-H. et al., op. cit., note 14, p. 613. For a judicial application of the presumption of negligence, see Spanish Supreme Court, Civil Chamber, judgment of 21 December 2021, 890/2021, *Fundamentos de derecho*, *Quinto*, paragraph 2.

<sup>205</sup> Article 6:193j(2) of the Dutch Civil Code. See also V. LENNARTSL. and ROESTJ., The Netherlands, in CONACP.-H. et al., op. cit., note 14, p. 489.

<sup>206</sup> Article 6:195(2) of the Dutch Civil Code. While the scope of the liability regime provided for in the provision on misleading advertising covers those who publish an advertisement or allow it to be published (Article 6:194 of the Dutch Civil Code), the reversal of the burden of proof under this regime applies to defendants who are specifically involved in determining the content of the advertisement (Article 6:196 of the Dutch Civil Code). This means that the reversal of the burden of proof will not apply if the defendant is, for example, a member of the banking syndicate whose role did not involve determining the content of the defective prospectus. See V. LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, pp. 483–484.



subject to the defense of due diligence. The defendant may escape liability by proving reasonable belief, formed by reasonable inquiry, as to the truthfulness and non-misleading nature of the information in question<sup>207</sup>. Fault is therefore presumed through a reversal of the burden of proof<sup>208</sup>.

However, the defense of due diligence is only possible if certain other conditions are met. For example, if the reasonable belief persisted until the time of the purchase in question or if the defendant – upon becoming aware of the defective nature of the information – took reasonable steps to bring a correction to the attention of prospective purchasers<sup>209</sup>.

### III. Quantification of losses suffered by investors

Once the defendant's liability has been established, it is necessary to quantify the losses suffered by the plaintiff. The quantification of the loss suffered by investors differs depending on the measure of losses applied in the case in question (3.1) and may be based on the use of expert reports (3.2).

#### 3.1 - Alternative measures of losses

The courts are called upon to quantify the amount owed to aggrieved investors to compensate them for the loss suffered as a result of the defective information. In the jurisdictions studied, with the notable exception of the German prospectus liability regime, the measurement of losses is not enshrined in legislation but rather results from conceptualization in doctrine and case law. Despite this lack of legislative guidelines, the study revealed parallels in the way losses are calculated in the jurisdictions studied, showing that the methodologies adopted in different countries have several similarities.

In general, compensation awarded to aggrieved investors can only protect their “*negative interest*”. The idea that compensation should place the investor in the position they would have been in if the defective information had corresponded to reality (positive interest) is rejected. Since only their negative interest is protected, investors cannot claim the financial benefits they expected from the investment on the basis of their reliance on the defective information<sup>210</sup>. However, they can require to be placed in the position they would have been in if the defective information had never been published.

Within the framework of this limitation on compensation for negative interest, the applicable measure of losses generally depends on the factual basis alleged by the claimant. An aggrieved investor may invoke two different grounds for his claim, which are explained by the different impact of the defective information on the claimant's investment decision<sup>211</sup>. On the one hand, the investor may assert that, in the absence of defective information, he would not have entered the transaction in question. On the other hand, the investor may claim that, in the absence of defective information, they would have made the investment but under different conditions. In this case, even in the absence of defective information, the transaction would have been concluded, but the transaction price would have been different.

Based on these two alternative bases, two main measures of compensation emerge: compensation

---

<sup>207</sup> Schedule 10(1)(2) FSMA.

<sup>208</sup> See MCMEEL G., United Kingdom, in BUSCH D. et al., op. cit., note 6, 590-591.

<sup>209</sup> Schedule 10(1)(3) FSMA.

<sup>210</sup> For example, see for Germany V. HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4180. For Italy, see AFFERNI G., op. cit., note 150, p. 876.

<sup>211</sup> The two alternative bases for claims are highlighted, among others, by PIJLS A., op. cit., note 105, p. 192.



for transaction-related losses and compensation for the difference in price<sup>212</sup>.

The first measure of compensation – **compensation for transaction-related losses** – applies if the investor can prove that they would not have entered into the transaction without the defective information. In other words, the investor complains that the defective information led to a **decisive change in their investment decision**. Consequently, in this case, the investor must be restored to the position they would have been in if the transaction had never taken place. In some jurisdictions, notably Germany, this type of compensation may involve the cancellation of the transaction, for example by requiring the investor to relinquish ownership of the securities in exchange for the purchase price<sup>213</sup>. In other jurisdictions, compensation for transaction-related losses is achieved through monetary transfers, while the investor retains ownership of the securities. In economic terms, the measure of compensation for transaction-related losses is in effect equivalent to the economic cancellation of the investment decision<sup>214</sup>.

Regardless of the specific methods used to achieve this, offsetting transaction losses shifts market risk to the issuer, even when the change in the price of the securities is also due to reasons other than defective information. Nevertheless, in some jurisdictions, the principle of compensation for transaction losses may be limited in specific cases by the application of certain general rules on tort liability. These include the application of the doctrine of contributory negligence, which excludes compensation for losses that could have been avoided by selling a financial instrument in time.

In such cases, the award of damages will not place the investor in the exact economic position he would have been in if the transaction had not taken place.

Regarding the measure of compensation for transaction-related losses, there are other legal means for obtaining a similar amount of compensation. Indeed, certain jurisdictions deal with liability issues in the primary market not only from the perspective of tort law but also from that of contract law. In particular, they may apply the rules of **contractual nullity** to the purchase of financial instruments based on a prospectus. Indeed, a purchase based on a defective prospectus may be interpreted as being vitiated by error and therefore voidable. In this case, the transaction may be canceled, and the purchase price must be refunded by the issuer to the investor in exchange for the return of the financial instruments. As a result, the investor may obtain an amount equal to the purchase price. The use of contractual remedies for liability in the primary market is of some

---

<sup>212</sup> In particular, the essence of these different approaches is well captured by the names given to them by German legal doctrine, which distinguishes between “losses arising from the conclusion of a contract” (*Vertragsabschlussschaden*) and “losses due to the difference in share price” (*Kursdifferenzschaden*).

<sup>213</sup> This is the solution adopted by German law in cases where the investor still holds the securities, see below. Furthermore, this solution follows the rule in Section 249 of the German Civil Code, which gives priority to compensation in kind. It should be noted that the opposite solution may also apply. If shares have been sold at too low a price in a context of liability on the secondary market (where the issuer is not a party to the transaction), German law requires the liable issuer to deliver shares in kind to the investor and, in exchange, the investor to transfer an amount equal to the sale price to the issuer. See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4181.

<sup>214</sup> See NORROS O., *Determining Damages incurred by False Information on the Securities Market*, *European Business Law Review*, 2014, Vol. 25, No. 5, p. 633. Furthermore, it should be noted that, in order to emphasize the economic equivalence of such a measure of losses with the effects of rescinding a contract, some common law jurisdictions rightly use the terms “rescissory damages” or “restitution damages”.



practical importance in Italy<sup>215</sup> and Spain<sup>216</sup> and is in principle available in Germany<sup>217</sup> and the Netherlands<sup>218</sup>.

The second measure of losses – **compensation for a difference in price** – applies if the investor asserts that the transaction would have been concluded anyway, but at a different price<sup>219</sup>. Here, the investor complains that the defective information caused a **change in the market price of the financial instrument**. As a result, the investor must be placed in the position he would have been if the transaction had been carried out at a price unaffected by defective information<sup>220</sup>. To do this, it is first necessary to identify the price that the securities would have had in the absence of the defective information, generally referred to as the “*hypothetical price*”. This allows the investor to be awarded compensation equal to the difference between the price at which the transaction was carried out and the hypothetical price. For example, in the case of an excessive purchase price, the investor will be awarded the difference between the purchase price and the lower price that the financial instrument would have had in the absence of defective information.

However, the theoretical clarity of this model for calculating losses is hampered by the well-known complexity of price assessments for securities traded on financial markets. Naturally, the use of expert reports can provide courts with useful guidance in determining the appropriate amount of damages. Nevertheless, in addition to expert advice, other mechanisms are relevant in helping courts arrive at a final assessment of losses.

In fact, in several jurisdictions, the price decline recorded once the information has been revealed as defective is used to deduce the hypothetical price, i.e., the price that the securities would have

---

<sup>215</sup> In **Italy**, contractual remedies are generally used for violations of the rules transposing MiFID II, particularly when committed by issuers that are investment firms or banks. In such cases, an investor who claims to have been misled in the purchase of a financial instrument on the basis of a defective prospectus may seek the annulment of the contract by invoking Article 1428 et seq. of the Italian Civil Code on the annulment of the contract due to error on an essential quality of the subject matter of the contract. Other possible remedies include the possibility for the investor to request that the contract be declared null and void due to the violation of mandatory rules (Article 1418 of the Italian Civil Code) or the dissolution of the contract due to the issuer's breach of its contractual obligations (Article 1453 of the Italian Civil Code).

<sup>216</sup> In **Spain**, for example, several investors who purchased Bankia shares on the basis of a defective prospectus chose to seek rescission of the contract on the basis of Article 1266 of the Spanish Civil Code. Spanish Supreme Court, Civil Chamber, judgment of 3 February, 2016, 24/2016, *Fundamentos de derecho*, Octavo and Noveno.

<sup>217</sup> In **Germany**, the exercise of contractual liability actions is reserved by law for cases of prospectus liability (16(2) of the *WpPG*). The same reservation has been extended by the legislature to cases of *ad hoc* information (97(4) and 98(4) of the *WpHG*), but it is viewed with skepticism by legal scholars. See V. HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4192. With specific regard to prospectus liability, liability may arise on the basis of the principles of culpa in contrahendo under certain conditions. Two chambers of the Federal Court of Justice had developed divergent interpretations on this subject. This debate has now been settled in the sense that, within the scope of special liability for prospectuses, the liability of existing shareholders for breach of disclosure obligations on the basis of culpa in contrahendo (Section 280 (1) and (3), Sections 282 241(2) and Section 311(2) of the German Civil Code) is not excluded. As a result, the pre-contractual duty to disclose information now only applies to existing shareholders who themselves distribute the shares to investors or who assume responsibility for this when it is carried out by a third party. See BGH, Press Release, <https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2023/2023108.html>.

<sup>218</sup> In **the Netherlands**, contractual recourse for error (*dwaling*), applicable to contracts entered into on the basis of defective information on the primary market, is governed by Article 2:228 of the Dutch Civil Code. See FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., et. al., op. cit., note 26, pp. 605-606 on the various contractual remedies available under Dutch law.

<sup>219</sup> Compensation for the price difference corresponds to the American concept of “out-of-pocket damages”. See ROTHERMUND M., *Schadensberechnung bei fehlerhafter Sekundärmarktinformation*, Nomos, 2020, p. 171.

<sup>220</sup> See NORROS O., op. cit., note 212, p. 627.



had at the time of the transaction in the absence of the defective information<sup>221</sup>. This process partially avoids valuation difficulties by using the price of the financial instrument after the truth has been revealed as an approximation of the hypothetical price. However, such an approach is inherently imprecise, since the price movement in question may also be due to an excessive market reaction. Indeed, markets may overreact both when false information is published and when it is revealed to be defective<sup>222</sup>.

Nevertheless, the complexity of the assessment mentioned above can be mitigated to a certain extent by recourse to the general provisions of tort law. Several jurisdictions allow courts to adopt discretionary assessments when the amount of losses cannot be calculated precisely. These provisions allow for flexibility in cases where it is difficult or impossible to calculate losses precisely<sup>223</sup>.

In examining the merits of these two different approaches for calculating losses, legal scholars have observed that, from a deterrence perspective, damages for losses related to the transaction should be preferred. On the one hand, while compensation based on the price difference deprives the tortfeasor of the gain realized through the violation, the compensation for transaction-related losses deprives the issuer of all amounts collected from the sale of shares and therefore amounts to a penalty for the perpetrator of the offense<sup>224</sup>.

On the other hand, compensation for price differences appears to be a more flexible tool in several respects. First, the use of compensation for price differences makes it possible to adjust the distribution of market risk between the investor and the issuer, which is impossible with the measure of compensation for transaction-related losses. Take, for example, an investor who has purchased a security at an inflated price and, once the defective information is revealed, sees the value of that security collapse. The overall decline in price may be due in part to the defective information and in part to other factors, such as the general market trend. In this case, by using the price difference as a measure of compensation, the aggrieved investor is compensated for the portion of the loss in value due to the defective information, but bears the entire portion of the loss not related to the effects of the defective information.

Furthermore – at least when compensation for transaction-related losses requires the return of securities in kind – compensation for price differences may be less complex to apply in practice. Compensation based on price differences avoids the difficulties arising from company law related to the issuer's repurchase of its own securities<sup>225</sup>.

In addition to the measures of damages calculated according to the two alternative approaches indicated above, there appears to be systematic recognition of **compensation for loss of opportunity**. The latter plays a clarifying role, aiming to compensate the aggrieved investor for the gains he could have made by investing the money lost due to the defective information differently. In the jurisdictions studied, this measure of damages is never the only one available in principle to address the losses caused by defective information<sup>226</sup>.

---

<sup>221</sup> *Ibid.*, p. 628.

<sup>222</sup> *Ibid.*, p. 636.

<sup>223</sup> *Ibid.*

<sup>224</sup> DAVIES P., above, in BUSCH D. et al., op. cit., note 140, p. 326.

<sup>225</sup> See LAMANDINI M. and RAMOS MUÑOZ D., above, in LAMANDINI M. et al., op. cit., note 95, p. 261.

<sup>226</sup> Compensation for loss of opportunity is recognized in all the jurisdictions studied. Furthermore, this type of compensation is also required on the basis of the effectiveness of EU law. Based on the principle of effectiveness, in a case concerning damages caused by violations of competition law, the European Court of Justice ruled that this was a necessary component of compensation in the same way as actual loss. See CJEU, judgment of 13 July 2006, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA, [HCJP - 9 rue de Valois 75001 Paris - Tel.: 33 \(0\)1 42 92 20 00 -hautcomite@hcjp.fr](http://hcjp-9.rue.de.valois.75001.paris)



In order to provide a better overview of the specific features of each of the two alternative measures of damages, it is necessary to examine how these approaches are applied in the jurisdictions. Compensation for transaction-related losses will be examined first (3.1.1), followed by compensation based on the price difference (3.1.2).

### 3.1.1 - Compensation for transaction-related losses

As a general rule, compensation for transaction-related losses applies when the investor can prove that, in the absence of defective information, he would not have entered into the transaction concerning the financial instruments in question. In other words, the measure to be applied is one that places the investor in the position it would have been in had it not entered the transaction in question. Consequently, the investor must be protected from any economic consequences arising from the transaction. From an economic point of view, the measure in question is equivalent to a total rescission of the transaction. In order to clarify the general characteristics outlined above, it is useful to provide a concise overview of how each of the jurisdictions studied implements this approach.

Among the jurisdictions studied, Germany stands out as the only one to have legislatively codified, in certain cases, the amount of damages. In particular, the German legislator has set the amount of damages applicable under the special prospectus liability regime, which provides for compensation for transaction-related losses. This measure applies in all cases, regardless of the factual basis of the claim. With regard to civil liability for other types of defective information, German case law provides for the alternative between compensation for transaction-related losses and compensation for the price difference, depending on the basis of the investor's claim.

With regard to the measure of damages in the context of prospectus liability and in order to ensure compensation for transaction-related losses, German law distinguishes between cases where the purchaser of the securities still holds them at the time of the claim and cases where the purchaser has already sold the securities<sup>227</sup>. If the claimant **still holds the securities**, the law provides for the rescission of the transaction, with the investor having to return the securities to the issuer in exchange for the purchase price paid<sup>228</sup>. To ensure the predictability of the extent of liability, the amount of the purchase price recoverable by the investor is capped at the amount of the offer price<sup>229</sup>. In addition, since the investor must be placed in the position he would have been in if no transaction had taken place, he is entitled to reimbursement of incidental expenses usually associated with such transactions, such as brokerage fees.

If the investor has **sold** their securities, full compensation is still guaranteed but through a different mechanism. In this case, the investor is entitled to claim the difference between the purchase price and the sale price. The amount of the purchase price that can be claimed is, again, capped at the offer price. In all cases, the investor is also entitled to claim incidental costs related to the purchase and sale, such as brokerage fees.

Regarding the timing of the sale, it is not necessary for the provision in question to apply, for the sale to have preceded the disclosure of the defective information<sup>230</sup>. Given that a period of falling

---

Case C-295/04, paragraph 95.

<sup>227</sup> Section 9 of the *WpPG*. See also VERSE D. A., Germany, in CONAC P.-H. et al., op. cit., note 14, p. 379.

<sup>228</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 895.

<sup>229</sup> Section 9(1) of the *WpPG*.

<sup>230</sup> See HABERSACK M., paragraph 28. *Prospekthaftung*, in HABERSACK M. et al., op. cit., note 13, p. 896.



prices can be expected after the disclosure of defective information, the question of the fault of the investor who fails to limit potential losses by selling the securities may arise. However, it is interesting to note that in Germany, the application of the doctrine of contributory negligence for failure to sell securities during a period of falling prices is excluded<sup>231</sup>.

Thus, under the special prospectus liability regime, compensation for transaction-related losses is guaranteed in all cases, regardless of whether the investor still holds the securities and regardless of the factual basis for the claim. It is not surprising that this measure has been criticized by experts, who believe that it shifts market risk to the issuer, since the investor is also relieved of the portion of the price decline due to reasons other than defective information<sup>232</sup>.

Unlike the liability regime for prospectuses, the German regime for **defective *ad hoc* information** does not provide a statutory measure of damages<sup>233</sup>. Thus, case law has had to take a position on the remedies available, since it has been established that investors can only be protected for their negative interest<sup>234</sup>.

In particular, in the landmark *IKB* case, the German Federal Court ruled that an investor who has suffered a loss as a result of defective *ad hoc* information is entitled to two types of damages: compensation for transaction-related losses or compensation based on the price difference<sup>235</sup>. In principle, compensation for transaction-related losses is considered appropriate when the investor claims that their free will was violated regarding the investment decision<sup>236</sup>. Under this measure, the market risk is transferred to the issuer, regardless of the specific reason that led to the price decline. It is interesting to note that this type of market risk transfer has been expressly declared acceptable by the German Federal Court<sup>237</sup>.

However, the practical significance of compensation for transaction-related losses to recover losses due to defective *ad hoc* information is limited. This is due in particular to the difficulties of proof faced by the claimant, who bears the burden of proving the transaction causation.

For compensation for transaction-related losses to be complete, a distinction must be made (as in the case of liability for defective prospectuses) depending on whether or not the investor still holds the shares. If the investor **still holds** the securities, he must return them (along with any benefits he has derived from them, such as dividends) to the issuer in exchange for reimbursement of the purchase price he paid. This is the case even if the issuer is clearly not a party to a secondary market transaction<sup>238</sup>. On the other hand, if the investor has **sold** the securities, two alternative methods are provided to ensure full compensation. First, the issuer could provide the investor with the quantity of shares sold in exchange for the sale price. This mechanism corresponds to the rescission of the transaction required under the prospectus liability regime. On the other hand, and more easily, the investor could receive the difference between the purchase price and the sale price<sup>239</sup>.

---

<sup>231</sup> *Ibid.*

<sup>232</sup> VERSE D. A., Germany, in CONAC P.-H. et al., op. cit., note 14, p. 380.

<sup>233</sup> *Ibid.*, p. 387.

<sup>234</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4180.

<sup>235</sup> See German Federal Court of Justice (BGH), judgment of 13 December 2011, XI ZR 51/10, (IKB).

<sup>236</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., above, note 77, p. 4181.

<sup>237</sup> See VERSE D. A., Germany, in CONAC P.-H. et al., op. cit., note 14, p. 388, nt. 115. The possibility of applying in rem relief to a situation where the liable party is not a party to a contract has been viewed critically by German legal scholars. It has been argued that such relief would force the issuer to engage in a transaction that it never intended to undertake. On the other hand, it has been pointed out that such a remedy in kind aims to place the victim (and not the author of the defective information) in the situation in which they would have been without the defective information. For an overview of this debate, see PROROK J., op. cit., note 53, pp. 228-229

<sup>238</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, pp. 4181 and 4184.

<sup>239</sup> *Ibid.*, p. 4185.



Whether or not the investor still holds the securities, he is entitled to claim the costs normally incurred in connection with the purchase or sale of securities<sup>240</sup>. Reimbursement of these costs is necessary to completely eliminate the economic consequences of the transaction for the investor. In addition, the investor is entitled to claim loss of opportunity/loss of earnings, provided that they can prove what alternative investment they would have made<sup>241</sup>.

Compensation for transaction-related losses in cases of defective *ad hoc* information has been strongly criticized by German legal scholars, who have called for a review of the conclusions of the *IKB* ruling<sup>242</sup>. In particular, it has been pointed out that while the civil liability regime for defective *ad hoc* information protects the investor's free will, it is unclear why only information that has an impact on the price can give rise to liability<sup>243</sup>. The criticism is particularly interesting with regard to **ESG information** contained in *ad hoc* information<sup>244</sup>. In fact, if the objective is to compensate for harm caused to free will, it is argued that even defective ESG information that does not have a clear impact on price should give rise to liability, provided that it is the basis for the investment decision<sup>245</sup>.

Furthermore, regarding *ad hoc* information, outside the special liability regime, the possibility for the aggrieved investor to claim compensation for transaction-related losses is permitted on the basis of the general provisions of tort law. In particular, in the event of an intentional violation of public morals under Section 826 of the German Civil Code and an intentional or grossly negligent violation of a protective standard under Section 823(2) of the German Civil Code<sup>246</sup>.

With regard to **financial reports**, compensation for transaction-related losses is considered adequate in the event of an intentional violation of public morals under Section 826 of the German Civil Code, whereas it is generally excluded in the event of a grossly negligent violation under Section 823(2) of the German Civil Code<sup>247</sup>. In the latter case, it is considered that the rules on periodic disclosure merely protect investor reliance on the correct formation of prices and cannot therefore be invoked to protect the interests of an individual investor<sup>248</sup>. Furthermore, if compensation for transaction-related losses applied to erroneous financial reports, this would shift the market risk to the issuer. However, it is clear that the investor would have faced this market risk even if the financial report had been correct<sup>249</sup>.

In **Italy**<sup>250</sup>, measures of damages for defective information have been developed over time by case law and have not yet been fully established. Consequently, the analysis below reflects a schematic

---

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*, p. 4182. Compensation for transaction-related losses for the processing of *ad hoc* information is only criticized with reference to the specific regime of Section 98 *WpHG*, since compensation for transaction-related losses is undoubtedly permitted in the event of an intentional breach of public policy under Section 826 of the German Civil Code.

<sup>243</sup> Furthermore, it is argued that the decision to refrain from a given transaction on the basis of *ad hoc* information should also give rise to liability. See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4183.

<sup>244</sup> With regard to the liability regime for *ad hoc* information with ESG relevance, it has been argued that liability can only be based on the provision of Section 826 of the German Civil Code in cases of intentional harm to public policy. See BINGEL A., HOLTkamp N., *Ad-hoc-Pflicht für Nachhaltigkeitsinformationen*, AG 13-14/2024, p. 489.

<sup>245</sup> The subject is discussed, among others, by FRANCK J.-U., op. cit., note 103, p. 547.

<sup>246</sup> See GBEKOR S., *Schaden, Kausalität und Kausalitätsbeweis beim Schadensersatzanspruch des Anlegers wegen Verletzung der ad hoc-Publizitätspflicht*, Nomos, 2019, p. 120.

<sup>247</sup> See HABERSACK M., paragraph 28. Prospekthaftung, in HABERSACK M. et al., op. cit., note 13, p. 978.

<sup>248</sup> *Ibid.*, p. 979.

<sup>249</sup> *Ibid.*

<sup>250</sup> The information presented in this subchapter is largely based on a detailed written note provided by Professors Matteo Gargantini and Michele Siri.



model of the solutions prevailing in case law published to date<sup>251</sup>. Regardless of the still evolving nature of the system, the Italian courts distinguish between the factual scenario in which the investor would not have purchased at all if he had known the truth and the scenario in which the investor would still have purchased but under different conditions<sup>252</sup>. This allows courts to adjust damages accordingly, often by resorting to a provision of the Italian Civil Code allowing courts to adjust damages in equity when the calculation of damages is difficult or impossible (Article 1226 of the Italian Civil Code).

In principle, compensation for transaction-related losses is required when the court is convinced that, in the absence of the defective information, the investor would not have entered the transaction involving the financial instruments affected by the defective information. Italian case law has examined the particular cases of purchase at an excessive price. It remains to be seen whether Italian courts would apply the same conclusions in cases of sale at an excessively low price, although such an extension seems plausible at first glance. In the case of a purchase at an excessive price, the amount necessary to compensate the investor must in principle be equal to the total amount paid for the subscription in order to place the plaintiff in the position he would have been in if he had never entered the contract<sup>253</sup>.

However, the principle of compensation for transaction-related losses, which is accepted in principle by Italian case law, is subject to two corrections. First, Italian courts apply the principle of contributory negligence. In fact, the amount owed to the investor is in any case reduced by the amount of losses that they would have avoided by selling the security in a timely manner. Under the general principles of tort law (Articles 1227 and 2056 of the Italian Civil Code), the aggrieved party cannot claim compensation for losses that they could have avoided by exercising ordinary diligence. This application of the principle of victim's contributory negligence has been criticized by legal scholars. In particular, it has been pointed out that it obliges the investor to sell his securities quickly after the disclosure of the information as defective, even if this does not make sense from an economic point of view<sup>254</sup>.

There is also a second limitation to the principle of compensation for transaction-related losses. In certain cases, Italian courts – even when convinced that the investor would not have purchased those specific securities – have still deducted the impact of downward market trends from the amount to be compensated. In this way, the plaintiff continues to bear the market risk. To justify this approach, the courts emphasize that even if the securities in question had not been purchased, the investor would still have purchased securities listed on the stock exchange, which would therefore have been affected by the same market trends<sup>255</sup>.

Given the two corrections mentioned above, the method for obtaining compensation for transaction-related losses depends on whether the investor **still holds** the securities or has already sold them. If the investor still holds the securities, it is entitled to receive the purchase price, less any losses it would have avoided by selling the securities in time and the amount of the price decline due to general market trends.

If, on the other hand, **securities were sold**, the investor is entitled to damages equal to the purchase

---

<sup>251</sup> See, in particular, Milan Court of Appeal, judgment of 19 October 2023, Anchor Series Trust et al. v. Saipem; Court of Milan, judgment of 18 May 2017, No. 5894, Finleonardo v. Unipolsai – Fondiaria; Milan Court of Appeal, judgment of 15 January, 2014, No. 118, REC et al v. Banca Italease et al.

<sup>252</sup> See AFFERNI G., above, note 150, p. 876, regarding the *Italease* case.

<sup>253</sup> See ARRIGONI M., *Nesso di causalità e quantum del risarcimento nella responsabilità da prospetto*, Le Società 12/2017, p. 1372, on the *Unipolsai* case.

<sup>254</sup> ARRIGONI M., above, note 251, p. 1374.

<sup>255</sup> See BARBARESI V., *Responsabilità da false informazioni al mercato : prescrizione e risarcimento del danno*, Le Società, 8-9/2021, p. 971, notes 20 and p. 973.



price minus the sale price. However, a reduction to account the victim's contributory negligence may apply depending on the timing of the sale. In fact, the courts will have to assess whether the sale was made early enough to prevent further losses. If the court determines that the sale intended to mitigate losses was made with unreasonable delay, the investor will have to bear the losses due to its late action. Thus, the difference between the purchase price and the sale price will be reduced by the amount of losses that the investor could have avoided by selling on time. In this case, some Italian courts determine the amount to be discounted by examining the average price of the securities between the time the defective information was disclosed and the time of sale<sup>256</sup>.

In all cases, the damages to which the investor is entitled include compensation for **loss of opportunity**, generally set at the official interest rate. However, the investor may demonstrate that it suffered higher losses and be compensated for them<sup>257</sup>. In addition, the investor is entitled to post-judgement interest accruing from the date of the judgement until the damages are paid.

In **Spain**, the legal provision relating to **prospectus liability** explicitly authorizes compensation for "all damages and losses" (*todos los daños y perjuicios*) suffered by the investor as a result of the defective information<sup>258</sup>. The legislation does not provide any further guidance on the method of determining compensation. In general, the measure of loss has been interpreted as the difference between the purchase price of the security and the value of the security in the absence of the defective information<sup>259</sup>. Payment of this price difference and the fact that the investor retains the security at its residual price guarantee compensation for transaction-related losses. In addition, legal doctrine has emphasized that the very broad wording of the legal provision relating to prospectus liability allows investors to claim other losses, including loss of opportunity<sup>260</sup>. However, it is recognized that proof of alternative and more lucrative investments may be difficult to provide.

Regarding the measurement of damages in the context of civil liability **on the secondary market**, the distinction based on the factual basis of the claim applies. In particular, compensation for transaction-related losses must be granted when the investor would not have purchased the securities in the absence of the defective information<sup>261</sup>.

In the **United Kingdom**, regarding the **liability regime for prospectuses** under Section 90 of the FSMA, it is suggested that the measure of damages should be determined by analogy with that applicable under the common law tort of deceit. The latter aims to place the victim in the position they would have been in if the breach had not occurred<sup>262</sup>. The measure of damages will depend on the type of claim made by the plaintiff, whether they would not have purchased the security in the absence of the defective information, or whether they would still have purchased it, but on different terms<sup>263</sup>. Furthermore, according to general principles of common law, all losses suffered by the investor that the tortfeasor could reasonably have foreseen at the time of the harmful event are recoverable by the investor<sup>264</sup>.

Regarding the amount of damages applicable in the event of **defective financial reports or ad hoc information** pursuant to Section 90A of the FSMA, it should be noted that this provision does not

<sup>256</sup> See ARRIGONI M., above, note 251, p. 1373.

<sup>257</sup> See, for example, Milan Court of Appeal, judgment of 19 October, 2023, Anchor Series Trust et al v. Saipem.

<sup>258</sup> Article 38(2) of Ley 6/2023 de 17 de Marzo de los Mercados de Valores y de los Servicios de Inversión.

<sup>259</sup> See FUENTES NAHARRO M., Spain, in CONAC P.-H. et al., above, note 14, p. 611.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, p. 623.

<sup>262</sup> See MCMEEL G., United Kingdom, in BUSCH D. et al., op. cit., note 6, pp. 591-592.

<sup>263</sup> *Ibid.*, p. 592.

<sup>264</sup> *Ibid.*



prescribe a specific measure of damages. This lack of legislative intervention was considered unproblematic in the context of the Davies Review. Indeed, it was considered that issues of damages for defective information are similar to those arising in other sectors. It was therefore deemed unnecessary to constrain the courts with a specific methodology<sup>265</sup>.

Despite this lack of guidance, some lessons can be learned from the recent judgment in the *Autonomy* case – the first to apply this provision – even though the court reserved discussion of the measure of losses for a later judgment. In particular, the court confirmed that the measure depends on the factual basis of the claim<sup>266</sup>.

Similarly, the issue of recovery of incidental costs, such as transaction costs, has not yet been conclusively resolved by the UK courts.

In the **Netherlands**, there is still no clear judicial guidance on the calculation of damages<sup>267</sup>. However, several models for calculating damages have been developed and are discussed in Dutch legal literature<sup>268</sup>. In general, they reproduce the characteristics examined above with reference to the other jurisdictions studied.

### 3.1.2 - Compensation for price difference

In the jurisdictions studied, compensation for price differences is generally awarded when it is established that, in the absence of defective information, the investor would still have purchased the securities, but under different conditions. The investor is therefore entitled to be placed in the position he would have been in had he entered the transaction on the terms that would have existed in the absence of the defective information. In the case of an overpriced purchase, the aggrieved investor is entitled to claim the difference between the purchase price and the hypothetical price that the securities would have had in the absence of the defective information. In addition, in the context of this measure of losses, it is necessary to exclude the decrease in the price of the securities due to factors other than the defective information. The latter amount is, in fact, an expression of the market risk that the investor would have faced even if the misleading information had not existed. To clarify the general features mentioned above, it is useful to provide a brief summary of how each jurisdiction studied puts this approach into practice.

In **Germany**, measuring damages by price difference is primarily permissible in relation to ***ad hoc* disclosures**. The special German liability regime for *ad hoc* disclosures does not contain any provisions relating to losses, unlike the liability regime for prospectuses, which requires compensation for transaction-related losses in all cases<sup>269</sup>. It was therefore up to the courts to determine the type of compensation available to investors who suffered losses as a result of defective *ad hoc* information. In the ***IKB*** case, the Federal Court of Justice ruled that in such cases, two alternative measures of damages apply, at the investor's discretion: compensation for transaction-

<sup>265</sup> Davies Final Report, above, note 85, paragraph 60.

<sup>266</sup> UK High Court of Justice, above, note 56, paragraph 4056.

<sup>267</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, p. 490.

<sup>268</sup> For a detailed example of the measures of damages applicable in cases of prospectus liability – based on the assertion that, in the absence of defective information, the shares would not have been purchased – see FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., et al., op. cit., note 26, paragraph 8. See also the analysis in PIJLS A., *Determining Economic Loss Due to Misrepresentations on the Stock Market Using Forward Casting*, European Company and Financial Law Review, 2024, Vol. 21, No. 3-4.

<sup>269</sup> Consequently, compensation for price differences is not possible under the German prospectus liability regime. This is the result of an explicit choice by the German legislature, since the *WpPG* requires damages to be measured in the form of compensation for transaction-related losses.



related losses or compensation for price differences.

The compensation to which the investor is entitled under this latter measure is the difference between the purchase or sale price and the hypothetical price that the securities would have had if the defective information had not existed<sup>270</sup>. In other words, the hypothetical price that the financial instrument would have had if the issuer had complied with its *ad hoc* disclosure obligations<sup>271</sup>. However, the investor is not entitled to claim compensation for costs related to the sale or purchase of the securities, such as brokerage fees<sup>272</sup>. This is because the claim may give rise to compensation for the difference in price. However, in this case, the transaction would have taken place even in the absence of defective information. Therefore, these transaction costs would have been incurred anyway. Nevertheless, the aggrieved investor is entitled to claim compensation for loss of opportunity<sup>273</sup>.

Calculating the hypothetical price can easily give rise to sensitive issues. As a solution, some legal scholars suggest examining the impact of the false information on the market when it is disclosed. In this way, the price after disclosure of the false information is used as an approximation of the hypothetical price of the securities<sup>274</sup>. However, such an approach would lead to a hypothetical price that includes excessive market reactions to the revelation that a given piece of information is false. To avoid this drawback, another part of the legal doctrine suggests determining the hypothetical price by examining the average between the price at the time the defective *ad hoc* information is published and the price at the time the defective information is revealed as such<sup>275</sup>.

A specific problem related to the risk of excessive market reactions was examined with reference to what is known as **reputational loss** (*Reputationsschaden or Skandalschaden*). In particular, it was noted that the downward correction in prices following the disclosure of defective information does not generally reflect only the emergence of the truth. It also reflects the negative effects on the issuer's reputation once it becomes known that it has violated the rules to which it was subject<sup>276</sup>. Such loss is clearly not caused by the conclusion of the transaction as such. The question could therefore arise as to whether reputational loss should also be compensated under a compensation model for price differences<sup>277</sup>? Legal opinion is divided on this issue, but first-instance case law on defective information has held that reputational loss must be compensated<sup>278</sup>. However, it is sufficient to note the impact of the position that excludes the possibility of compensating reputational loss. In this case, the issuer would be allowed to prove the amount of damages related to the scandal, since the higher these damages are, the lower the compensable losses for the investor

---

<sup>270</sup> From a theoretical point of view, legal doctrine emphasizes that the hypothetical price may not coincide with the “real value” of the securities, which could also depend on information that is not known even to the issuer at a given moment, or on information that the issuer was not required to disclose under the rules on *ad hoc* disclosure; on the other hand, the concept of real value is relevant when it comes to awarding compensation for transaction-related losses and the investor still holds the securities. In this case, this type of compensation requires the difference between the actual value of the securities and the price paid to be awarded, see SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, p. 949.

<sup>271</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4185.

<sup>272</sup> *Ibid.*, p. 4188.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*, p. 4186.

<sup>275</sup> *Ibid.*, p. 4186, note 540.

<sup>276</sup> *Ibid.*, p. 4187.

<sup>277</sup> The question of compensation for reputational damage arises only in cases where compensation for price difference is sought. In fact, when the objective is compensation for transaction-related losses, such damage is compensable by definition. See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., op. cit., note 13, pp. 948-949.

<sup>278</sup> This is the case in the decision of the Stuttgart Regional Court in the *Volkswagen* case, which ruled in general terms that collateral damages may be compensated. See ROTHERMUND M., op. cit., note 217, p. 245 note 925.



under a price difference compensation model<sup>279</sup>.

The considerations outlined above reveal the flexible nature of the measure of compensation for the price difference. In particular, they highlight how, under this model, the damages awarded to the claimant can be reasonably adapted to the specific circumstances of the case. It is because of this flexibility, which allows for a balanced distribution of market risk, that German legal doctrine considers this measure of compensation to be preferable for dealing with defective *ad hoc* information<sup>280</sup>.

The measure of damages for price difference is applicable when the losses are related to defective financial reports<sup>281</sup>. Regarding the question of the calculation applicable to losses caused by defective financial reports, the considerations developed above concerning *ad hoc* information also apply.

In conclusion on the German system, it should also be noted that the general provisions of procedural law give judges a certain degree of discretion in calculating damages. In particular, German courts may assess damages at their discretion under Section 287 of the German Code of Civil Procedure. This provision adds an additional element of flexibility to that inherent in the measurement of damages for price difference.

In **Italy**, too, compensation for price difference is considered applicable when the investor would have concluded the transaction anyway, but under different conditions.

Indeed, the use of compensation for transaction-related losses is considered unfair to the defendant in cases where the investor would have concluded the transaction anyway. As indicated, Italian case law has not developed a uniform methodology for calculating such losses, but it is nevertheless possible to reconstruct the general characteristics of the system.

Italian case law has examined, in particular, the cases of purchase at an excessive price. It remains to be seen whether Italian courts would apply the same conclusions in cases of sale at an excessively low price, although such an extension seems plausible at first glance. In the case of a purchase at an excessive price, the loss to be compensated is the difference between the price at which the securities were purchased and the hypothetical price at the time of purchase<sup>282</sup>. The discussion in Italian doctrine on the concrete characteristics of this calculation is similar to that set out above with reference to Germany. From an operational point of view, Italian courts tend to consider the fall in price after the defective information was disclosed as such to deduce the hypothetical price<sup>283</sup>. It has also been suggested that the average price of the security within a reasonable period of time after the defective information was disclosed should be examined<sup>284</sup>.

---

<sup>279</sup> See HELLGARDT A., *Abschnitt 12*, in ASSMANN H.-D. et al., op. cit., note 77, p. 4187.

<sup>280</sup> *Ibid.*, p. 4184.

<sup>281</sup> See SEULEN G., paragraph 29. *Haftung für fehlerhafte Sekundärmarktpublizität*, in HABERSACK M. et al., above, note 13, p. 978.

<sup>282</sup> This measure of damages was recently upheld by the Italian Court of Cassation. See Italian Court of Cassation, judgment of 21 December 2024, No. 33841, paragraph 25. It is interesting to note, however, that the Italian Court of Cassation did not expressly link this solution to a specific factual basis (alleged by the plaintiff).

<sup>283</sup> This is the approach taken by the Milan Court of Appeal in the recent *Saipem* case. It has been observed that this approach should be applied with caution, given that the loss to be compensated is the difference between the purchase price and the hypothetical price at the time of the transaction and not at the time of the claim, see BRUNO S., *Responsabilità extracontrattuale dell'emittente per informazioni non corrette sul mercato finanziario*, *Le Società*, 5/2024, p. 612.

<sup>284</sup> See ARRIGONI M., above, note 251, p. 1373. For example, the Milan Court of First Instance considered a three-month time window in the *Freedomland* case. See Milan Court, judgment of 25 July 2008, LS et al v Freedomland et al.



An important element often discussed in Italian case law and doctrine concerns the need to avoid the transfer of market risks. To this end, studies of events on hypothetical price developments may be necessary<sup>285</sup>. Italian courts have proposed several practical approaches to exclude price declines due to market trends from compensation without embarking on lengthy technical discussions. In particular, some courts have excluded from compensation downward trends measured either in the market as a whole or in the specific market sector in which the responsible issuer operates<sup>286</sup>.

In all cases, the damages to which the investor is entitled include compensation for loss of opportunity, generally set at the official interest rate. However, the investor may prove that it suffered greater losses. In addition, the investor is entitled to interest accrued from the date of the judgment until the payment of damages.

Finally, Italian courts may resort to a provision of the Italian Civil Code allowing courts to adjust damages in equity when the calculation of damages is difficult or impossible (Article 1226 of the Italian Civil Code). Italian courts very often make use of this power to arrive at a final calculation of damages, even when expert reports are available.

In the **United Kingdom**<sup>287</sup>, regarding the **prospectus liability** regime under Section 90 of the FSMA, it is suggested that the measure of damages should be determined by analogy with that applicable under the common law tort of deceit. The latter aims to place the victim in the position they would have been in if the breach had not occurred<sup>288</sup>. It is therefore clear that the measure of damages will depend on the type of claim made by the plaintiff, i.e., whether they would not have purchased the security in the absence of the defective information, or whether they would still have purchased it, but on different terms<sup>289</sup>. Furthermore, according to general principles of common law, all losses suffered by the investor that the tortfeasor could reasonably have foreseen at the time of the harmful event are recoverable by the investor<sup>290</sup>.

There is also no legislative guidance on the measurement of damages applicable in cases of **defective financial reports or ad hoc information** under Section 90A of the FSMA. This lack of legislative intervention was not considered problematic in the context of the Davies Review. Indeed, it was considered that issues relating to damages in the event of defective information are similar to those arising in other sectors. It was therefore deemed unnecessary to constrain the courts with a specific methodology<sup>291</sup>.

Despite this lack of guidance, some insights can be drawn from the recent ruling in the *Autonomy* case – the first to apply this provision – even though the court reserved discussion of the measure of losses for a later judgment. In particular, the court confirmed that the measure depends on the factual basis of the claim<sup>292</sup>. When the plaintiff asserts that he would have bought anyway, but

---

<sup>285</sup> See BARBARESI V., above, note 253, p. 972.

<sup>286</sup> For example, in the *Freedomland* case, the Milan Court examined downward trends measured either in the market as a whole or in the specific market sector in which the responsible issuer was active. See Milan Court, judgment of 25 July 2008, LS et al v Freedomland et al.

<sup>287</sup> Given the state of the debate in the United Kingdom and the lack of conclusive information, we will simply reproduce here, for the reader's convenience, the considerations already made regarding compensation for transaction-related losses.

<sup>288</sup> See MCMEEL G., United Kingdom, in BUSCH D. et al., op. cit., note 6, pp. 591–592.

<sup>289</sup> *Ibid.*, p. 592.

<sup>290</sup> *Ibid.*

<sup>291</sup> Davies Final Report, above, note 85, paragraph 60.

<sup>292</sup> UK High Court of Justice, above, note 56, paragraph 4056.



under different conditions, it is necessary to determine what those alternative conditions would have been<sup>293</sup>. In the specific case of *Autonomy*, it was therefore necessary to determine at what lower price the shareholders of the target company would have accepted the acquirer's offer<sup>294</sup>.

In the United Kingdom, in cases where the claimant argues that he would not have purchased the financial instruments in the absence of defective information, the question of the recoverability of incidental costs, such as transaction costs, has not yet been conclusively resolved by the courts.

In **Spain**, the measurement of damages in civil liability cases depends on the usual distinction based on the factual basis of the claim. In particular, compensation for the difference in price is considered to be payable when the investor would still have purchased the securities in the absence of the defective information<sup>295</sup>.

In the **Netherlands**, there is not yet any clear judicial guidance on how to calculate losses. However, several models for calculating damages have been developed and discussed by Dutch legal scholars<sup>296</sup>. In general, they reflect the characteristics examined above with reference to the other jurisdictions studied.

### 3.2 - The use of expert reports

The principles of full compensation and compensation for price differences are only the starting point for assessing the amount of losses to be compensated in a case of defective information. In some cases, complex assessments are necessary to evaluate the hypothetical price of the securities at a given point in time. These types of assessments are particularly crucial with regard to compensation for price differences, since in this case, determining the hypothetical price of the securities is an essential part of the calculation. In addition, determining the portion of the price movement that is due to defective information – and that which is due to other factors, such as general market risk – is essential for accurately allocating market risk.

Our analysis has revealed that in the jurisdictions studied, it is common practice to use expert opinions to assist courts in assessing claims for damages. The procedural rules governing the commissioning and assessment of expert reports vary and depend on the rules of civil procedure applicable to the cases in question. For example, German courts may appoint experts on their own initiative, even in the absence of a specific request from the parties. Similarly, in Italy, court-appointed experts generally take into account the comments of the parties' experts when drafting their final report.

In other jurisdictions, such as the **United Kingdom**, despite the fact that expert reports are clearly used, no litigation case has yet resulted in a final court decision based on expert reports. It has been suggested that this is because courts often handle civil liability proceedings through split trials, dealing first with liability issues – for example, whether there was a misleading statement and what should have been disclosed. This approach is intended to encourage settlements before moving on

---

<sup>293</sup> *Ibid.*, paragraph 4056.

<sup>294</sup> *Ibid.*, paragraph 4058.

<sup>295</sup> See FUENTES NAHARRO M., Spain, in CONAC P.-H. et al., op. cit., note 14, p. 623.

<sup>296</sup> For a detailed example of the damages applicable in cases of prospectus liability – based on the assertion that, in the absence of defective information, the shares would not have been purchased – see FRANX J.P., *Prospectusaansprakelijkheid*, in BUSCH D., et al., op. cit., note 26, paragraph 8. See also the analysis in PIJLS A., above, note 266.



to the more detailed quantum phase, where individual losses are assessed.

Experts can use several methods to carry out their assessments. The most common method is **event studies**<sup>297</sup>. However, in some cases, other methods such as the discounted cash flow method may be applied. The choice of loss assessment method is particularly delicate, as applying different methods to the same set of facts can lead to very different assessments<sup>298</sup>.

However, the results obtained by expert analysis are incorporated rather flexibly into court decisions on the extent of losses. In fact, these expert reports are normally interpreted in light of the powers generally conferred on courts to deal with cases in which it is difficult to determine the precise amount of losses. For example, provisions such as Section 287 of the German Code of Civil Procedure and Article 1226 of the Italian Civil Code allow courts to exercise a certain degree of discretion in determining the amount of damages.

A recent Italian case may help illustrate some of the problems associated with the use of expert reports. In the *Saipem* case, the Milan Court of Appeal was asked to rule on a question of civil liability due to the alleged delays with which the issuer had informed the public of certain information likely to have a significant impact on the stock market price<sup>299</sup>. Once the relevant information was disclosed, the downward adjustment in the share price was approximately €10. To calculate the extent of the losses, it was therefore necessary to assess the value of the issuer's shares if the *ad hoc* information had been disclosed in a timely manner.

In this dispute, the court-appointed expert deemed the use of event studies inappropriate. This was because, around the time of the allegedly defective information, several other events had occurred that could have had a significant impact on the share price. Among other things, during this period, one of *Saipem's* main shareholders had sold its shares outside the regulated market through an accelerated book-building procedure. This had led to a downward adjustment in the share price<sup>300</sup>. In this context, the possibility of precisely distinguishing the effect of the delay from that of other confounding factors was considered limited.

The expert report was based on the discounted cash flow method. According to this model, the decrease in the value of the shares was estimated at approximately three euros. It can be assumed that this valuation was considered to be in stark contrast to the actual downward adjustment in the market price of the shares, which was approximately ten euros. Faced with such a discrepancy in values, the court invoked its powers of equity under Article 1226 of the Italian Civil Code. On this basis, it therefore assessed the loss per share at its discretion by taking the average of the two values.

On the one hand, the judgment in question illustrates the difficulty courts face in assessing losses, even when their deliberations are supported by expert evidence. On the other hand, it reveals the impact that the courts' discretionary power in determining damages can have on obtaining a level of compensation deemed adequate.

---

<sup>297</sup> For a discussion of the use of event studies in general, see V. NORROS O., above, note 212, p. 646 et seq. See also PROROK J., op. cit., note 53, p. 320.

<sup>298</sup> The phenomenon whereby different valuation models produce very different results is documented by FERRELL A., SAHA A., Forward-casting 10b-5 Damages: A Comparison to Other Methods, 2011, Harvard Law School Discussion Paper, available on SSRN, p. 24. The authors show how, in the assessment of the same case study, three different methods lead to an assessment of relevant losses per share of \$14.25, \$8.11, or \$1.11, respectively.

<sup>299</sup> See Milan Court of Appeal, judgment of 19 October 2023, Anchor Series Trust et al v. Saipem. Although the case concerned a failure to disclose *ad hoc* information, its conclusions are applicable to issues of defective information more generally.

<sup>300</sup> See BRUNO S., above, note 280, p. 602.



## IV. Procedural law aspects

The effectiveness of civil liability regimes for flawed public information does not depend solely on substantive law rules. Indeed, the ability of investors to avail themselves of liability regimes also depends on the court competent to hear cases of liability for flawed information (4.1), the forms of class action available (4.2), and the extent to which legal costs can be recovered (4.3).

### 4.1 - The designated court

Cases involving civil liability for defective information normally require the competent court to examine complex factual issues and make difficult calculations of losses, often relying on expert reports.

In the jurisdictions studied, competence to rule on civil liability for defective information generally lies with the ordinary courts. However, these matters are usually referred to sections or chambers specializing in commercial or financial disputes, which ensures that they are dealt with by judges with a certain degree of expertise. In addition, an additional factor may encourage the development of specialization in certain jurisdictions. When competence is based on the issuer's registered office, disputes tend to be concentrated in large cities where listed issuers generally have their headquarters. For example, in Italy, cases are often heard in Milan or Rome, while in the Netherlands, disputes are often conducted in Amsterdam.

Some jurisdictions have gone further and created courts specializing in business law or securities law matters. For example, in the Netherlands, investors have the option of bringing cases before the Dutch Commercial Court, which focuses on international commercial disputes. In the United Kingdom, cases involving material misrepresentation that are particularly high in value may be heard by judges on the “Financial List”, which deals specifically with disputes relating to financial markets.

To clarify the general characteristics outlined above, a concise overview of how each of the jurisdictions studied assigns jurisdiction in cases of civil liability for significant defective information is necessary.

In **Germany**<sup>301</sup>, cases involving defective information are brought before the regional court (*Landesgericht*) with jurisdiction over the issuer's registered office, regardless of the value of the request. Regional courts are often organized into specialized divisions, with certain chambers dedicated to banking and capital markets cases.

On appeal, cases are heard by specialized chambers of a higher regional court (*Oberlandesgericht*). Finally, the third instance – limited to questions of law – is heard by the Federal Court of Justice (*Bundesgerichtshof*). The latter is organized into “*senates*”, each with a specific area of specialization. In the event of defective information, the case may be heard by the senate responsible for prospectuses or by the senate responsible for company law.

However, in the case of class actions using model proceedings (*Kapitalanleger-Musterverfahren*), the structure of the dispute is different. In model proceedings, general questions of civil liability (concerning the interpretation of disclosure obligations, the requirement of fault, etc.) are addressed and decided by the higher regional courts, while individual cases are then decided by the lower

---

<sup>301</sup> The information presented concerning **Germany** is based on the national report presented by national experts during hearings conducted by the working group.



courts, which must consider the interpretation of the higher regional court to be binding (see *below* the chapter on class actions).

In **Italy**<sup>302</sup>, the courts with jurisdiction over civil liability actions relating to defective information are the ordinary courts. However, it should be noted that the Italian legal system includes specialized sections within the civil courts known as “business courts”<sup>303</sup> (*tribunali delle imprese*). Consequently, if disputes relating to cases of defective information fall within the matters reserved by law to the business court, the ordinary civil court has jurisdiction and, within it, the business court has jurisdiction.

This jurisdiction covers all disputes concerning inaccurate information on the primary and secondary markets, with the exception of those involving bondholders alone and only when they file a complaint against the company alone (rather than filing a direct complaint against the directors alternatively or cumulatively).

More recently, the exclusive jurisdiction of commercial courts has been extended to class actions, regardless of the legal basis for the mass claim<sup>304</sup>.

In **Spain**<sup>305</sup>, ordinary civil courts have jurisdiction to rule on civil liability cases involving defective information, where the defendant is an issuer. However, in order to hold the directors of issuers liable, plaintiffs must bring proceedings before the commercial courts.

In the **Netherlands**<sup>306</sup>, civil liability cases involving defective information fall within the jurisdiction of the ordinary courts. However, due to the concentration of listed companies and financial institutions in Amsterdam, these cases are generally heard by the Amsterdam District Court at first instance and by the Amsterdam Court of Appeal on appeal.

International commercial disputes may also be brought before the Netherlands Commercial Court, both at first instance and on appeal. This court, which has been active since 2019, was created to strengthen the Netherlands' position as a leading country for international legal disputes and may be chosen for international disputes concerning commercial or civil matters. Notably, litigation before this court is conducted entirely in English and its judgments are also rendered in English. However, if the case is brought to the third instance before the Supreme Court of the Netherlands, the language of the case will be Dutch.

The Dutch Commercial Court handles a wide range of commercial cases, including cases involving liability for prospectuses. In general, however, its jurisdiction remains subject to the rules on international jurisdiction laid down in EU regulations.

In the **United Kingdom**, complaints relating to defective information are generally heard by the Business and Property Courts and, more specifically, by judges on the Financial List, who are selected for their expertise. This list, established in 2015, includes experts specializing in cases that require particular financial expertise, generally with a value of £50 million or more<sup>307</sup>.

---

<sup>302</sup> The information presented concerning **Italy** is based on the relevant passages of a written note submitted to the working group by the Italian national experts.

<sup>303</sup> Legislative Decree No. 168 of 27 June 2003.

<sup>304</sup> Article 840-ter of the Italian Code of Civil Procedure.

<sup>305</sup> The information presented concerning **Spain** is based on the national report presented by national experts during hearings conducted by the working group.

<sup>306</sup> The information presented concerning the **Netherlands** is based on the national report presented by national experts during hearings conducted by the working group.

<sup>307</sup> See Part 63A – Financial List of the Civil Procedure Rules, 1998 No. 3132 (L. 17).



## 4.2 - The existence of class actions and compensation systems

The risk of widespread losses is an inevitable consequence of defective information in financial markets, where large numbers of investors can trade large numbers of financial instruments over long periods of time<sup>308</sup>. The effects of defective information often give rise to numerous small individual losses which, when aggregated, form a considerable amount. Thus, the existence of class action in cases of civil liability for defective information is, in principle, an important factor in protecting the right of aggrieved investors to obtain compensation.

In Europe, the subject of class actions remains highly sensitive, as the debate is shaped by concerns about the perceived excesses of American-style class actions<sup>309</sup>. As a result, the class action mechanisms that exist in the jurisdictions studied are often accompanied by strict safeguards, which, to some extent, make them less attractive to aggrieved investors.

The legal frameworks for class actions vary from country to country. Most of the jurisdictions we deal with follow an opt-in model, requiring investors to be proactive in order to benefit from the available forms of class action. The Netherlands and the United Kingdom are exceptions, as these jurisdictions provide for opt-out class action models, whereby aggrieved investors benefit from the results of the class action unless they explicitly declare their intention not to be bound by those results.

As an alternative or complement to class actions, some countries have developed different solutions, such as the German *Kapitalanleger-Musterverfahren* – a procedure aimed at centralizing decisions on common issues while allowing subsequent actions on individual issues – or the Dutch rules on collective settlement of mass claims, which encourage agreements between representative organizations and responsible companies for the benefit of aggrieved investors.

Overall, experience shows that class actions in Europe tend to be highly complex and lengthy and often fail to produce conclusive results. In this context, out-of-court settlements frequently serve as a resolution mechanism, particularly in the Netherlands and Germany, where they often mark the end of collective proceedings.

In this context, over the last decade, the United Kingdom has experimented with the involvement of regulatory authorities in imposing or promoting compensation schemes at the expense of companies found liable for harmful conduct. In principle, such a solution makes it possible to radically avoid recourse to legal action<sup>310</sup>.

At the same time, in countries such as Italy and Spain, experience with class actions remains limited. It remains to be seen whether recent innovations, such as the new Italian class action system, will significantly change the landscape.

From a general perspective, it is worth highlighting a recent development at EU level. European Directive (EU) 2020/1828 has harmonized certain aspects of representative actions – i.e., actions brought by an entity on behalf of a group – with a view to obtaining an injunction or damages on

---

<sup>308</sup> See BENÖHR I., *Collective Redress in the Financial Sector and the New EU Deal for Consumers*, *European Review of Private Law*, 2019, Vol. 27, No. 6, p. 1346, note 3.

<sup>309</sup> See GELTER M., *General Report*, in CONAC P.-H. et al., *ibid*, note 14, p. 82.

<sup>310</sup> Following the example of the United Kingdom, legal scholars in some countries have proposed involving the relevant financial markets authority in the awarding of compensation to aggrieved investors. See, for example, in Dutch legal doctrine, BUSCH D., *Een rol voor de AFM bij afwikkeling van massaschade in de financiële sector*, *Ondernemingsrecht*, 2017/83, p. 459 et seq. French legal doctrine has also put forward similar proposals, see, for example, ROBERT-HAWES M., *Some modest proposals to provide viable damage remedies for French investors*, in TISON M., DE WULF H., VAN DER ELST C., and STEENNOT R. (eds.), *Perspectives in Company Law and Financial Regulation*, Cambridge University Press, 2009, p. 228.



behalf of aggrieved consumers<sup>311</sup>. This legislation applies in particular to cases of liability relating to prospectuses and is therefore relevant to the discussion in this report<sup>312</sup>. However, the relative novelty of this instrument makes it difficult to assess its effects.

The following section of this chapter provides an overview of the characteristics of class action mechanisms available for cases of defective information in financial markets in certain relevant jurisdictions. This overview covers both judicial and, where applicable, extrajudicial forms of class actions.

In **Germany**, lawmakers have addressed the issue of class actions with an original solution, rather than simply replicating other potentially available solutions such as the American class action or representative action<sup>313</sup>. In particular, German lawmakers have devised a system known as the “*model proceedings in capital markets*” (governed by the *Kapitalanleger-Musterverfahrensgesetz* or *KapMuG*)<sup>314</sup>. This form of class action is specifically applicable to losses caused by “*public information on capital markets*” which includes, in particular, information provided in prospectuses, *ad hoc* information, and financial reports<sup>315</sup>.

The main feature of the system is that common issues relating to the existence of defective information are decided by a higher regional court (*Oberlandesgericht*), whose final decision is binding on the lower regional courts (*Landesgericht*) that have to rule on individual cases on issues such as causation and quantum<sup>316</sup>.

The procedures can be described in three main stages<sup>317</sup>. The first stage is the application for a model procedure. In particular, at least ten applications for the establishment of a model procedure must be filed with the trial court. The applications must arise from civil liability actions pending before a lower regional court and must explain why the issues proposed for the model case are also relevant to other similar actions<sup>318</sup>. In addition, applications may be submitted by both plaintiffs and defendants in such actions.

If the regional trial court considers the claims to be well-founded, they are entered in the register of claims (*Klageregister*) and the establishment of a model case is announced publicly<sup>319</sup>. As a result, all pending civil liability cases that depend on the same circumstances as those to be

---

<sup>311</sup> Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers (OJ L 409, December 4, 2020, pp. 1-27). See GSELL B., The new European directive on representative actions, *Common Market Law Review*, 2021, Vol. 58, No. 5, p. 1355 et seq.

<sup>312</sup> See Annex I, No. 60 of Directive (EU) 2020/1828.

<sup>313</sup> See LANGE S., Einleitung, in VORWERK V. and WOLF C., *Kapitalanleger-Musterverfahrensgesetz Kommentar*, Beck, 2020, 2nd edition, p. 18.

<sup>314</sup> *Kapitalanleger-Musterverfahrensgesetz* of 19 October 2012 (BGBl. I 2012 p. 2182), hereinafter referred to as “KapMuG”. The establishment of the capital markets procedure originated in the *Deutsche Telekom* case of 2001. In that case, approximately 17,000 investors brought civil liability actions relating to prospectuses against Deutsche Telekom before the Frankfurt Lower Court, which quickly led to congestion in the Lower Court. On the *Deutsche Telekom* case, see generally TILP A. and ROTH T., The German Capital Market Model Proceedings Act as Illustrated by the Example of the Frankfurt Deutsche Telecom Claims, in VAN BOOM W.H. and WAGNER G. (eds.), *Mass Torts in Europe: Cases and Reflections*, De Gruyter, 2014, p. 131 et seq.

<sup>315</sup> As specified in Sections 1(2)(1), 1(2)(6) and 1(2)(8) of the KapMuG, respectively.

<sup>316</sup> Note that the *KapMuG* regime has recently been reformed to address issues such as excessive length of proceedings, as demonstrated by the model case against Porsche and Volkswagen, which began in 2016. See STÜBINGER M. and RODE P., *Die Reform des Kapitalanleger-Musterverfahrensgesetzes*, AG 17/2024, p. 240.

<sup>317</sup> See REUSCHLE F., *Das Kapitalanleger-Musterverfahrensgesetz: Erfahrungen und Perspektiven*, in REDENIUS-HÖVERMANN J and HALFMEIER A., *Kapitalmarkt und kollektiver Rechtsschutz*, CH. Beck., 2022, p. 80.

<sup>318</sup> Sections 2(1) and 2(3) of the KapMuG.

<sup>319</sup> Sections 4 and 5 of the KapMuG.



established in the model case may be suspended at the request of the plaintiffs<sup>320</sup>. The court of first instance then issues a referral order setting out the issues to be determined (*Feststellungsziele*) in the model case and forwards this order to the higher regional court.

The second phase consists of conducting the model proceeding before the superior regional court, which may, if necessary, reformulate the elements to be established as defined by the lower courts<sup>321</sup>. At this stage, the superior regional court appoints a model plaintiff and defendant to conduct the case. The other plaintiffs in the suspended lawsuits are considered “*participants*” in the model proceeding. As such, they retain the right to intervene in the proceedings, provided that their intervention does not conflict with that of the model plaintiff<sup>322</sup>. Model proceedings are conducted in accordance with the general rules of civil procedure<sup>323</sup>. However, special rules of evidence apply. For example, the court may order the defendant or a third party to produce documents<sup>324</sup>.

Once the model proceeding has been opened, to ensure broad protection of investors' interests, claims that have not yet been the subject of legal action may be communicated to the Higher Regional Court, which has the effect of suspending the limitation period for these claims<sup>325</sup>.

The outcome of a model proceeding can be one of two types. On the one hand, the legal action may end with a decision ruling on the issues to be established; in this case, the decision is subject to appeal before the Federal Court of Justice<sup>326</sup>.

In particular, the Higher Regional Court may also issue partial model judgments in order to speed up the overall proceedings<sup>327</sup>.

On the other hand, model proceedings may end with a settlement or amicable agreement (*Vergleich*) between the model parties. In particular, the parties to the model proceedings may either submit a proposal for an amicable settlement to the court or accept a settlement proposal submitted by the court itself<sup>328</sup>. Participants may, in particular, comment on the proposed settlement<sup>329</sup>. Once the settlement has been approved by the court, it takes effect unless more than 30% of the participants communicate their refusal of the settlement<sup>330</sup>.

---

<sup>320</sup> Section 10(2) of the *KapMuG*. In the previous version of the law, suspension was determined automatically. The newly introduced voluntary suspension was justified by the need to reduce the number of participants in the model case procedure in order to speed up the proceedings. With regard to the tension between this reasoning and other objectives of the model procedure, such as preserving uniform case law and reducing the burden on lower courts, see KIRCHNER C., LÜHMANN T., and TAUFMANN J., *Reform des Kapitalanleger-Musterverfahrensgesetzes*, 2024, Neue Juristische Wochenschrift, p. 2362.

<sup>321</sup> Section 9(1) of the *KapMuG*.

<sup>322</sup> Among other things, participants (i.e., plaintiffs in suspended lawsuits) may request that the scope of the elements to be established by the higher court be broadened; see Section 12 of the *KapMuG*.

<sup>323</sup> Certain exceptions apply, see Section 14 of the *KapMuG*.

<sup>324</sup> See Section 17 of the *KapMuG*. Consequently, the court may also require plaintiffs, participants, or third parties to produce evidence necessary for the defendant's defense. Given the evidentiary problems encountered by plaintiffs, legal scholars have emphasized that this reform of the rules of evidence would strongly encourage plaintiffs to resort to model proceedings. See KIRCHNER C. et al., op. cit., note 318, p. 2363. However, it has also been pointed out that these new rules increase the risk that companies' internal documents will become accessible to the public. See STÜBINGER M. et al., above, note 314, p. 241.

<sup>325</sup> This notification must be made to the Regional Superior Court within six months of the commencement of the standard proceedings. See Section 13 of the *KapMuG*. On the former Section 10 of the *KapMuG*, see WIGAND J., paragraph 10 *KapMuG - Anmeldung eines Anspruchs*, in VORWERK V. et al., op. cit., note 311, p. 147 et seq.

<sup>326</sup> Section 23 *KapMuG*.

<sup>327</sup> See STÜBINGER M. et al., above, note 314, p. 241

<sup>328</sup> Section 20(1) of the *KapMuG*.

<sup>329</sup> Section 20(1) of the *KapMuG*.

<sup>330</sup> Section 21(3) of the *KapMuG*.



The third phase of the model proceedings is the continuation of individual actions in the first instance. In particular, at this stage, the courts of first instance are bound by the decision adopted at the end of the model proceeding procedure and must rule on individual issues such as causation and the amount of damages.

The model proceedings have been tested in practice since 2001, for example in the *Deutsche Telekom*, *Steinhoff*, and, more recently, *Wirecard* cases. It is therefore possible to make a general assessment of their advantages and disadvantages. In terms of advantages, model proceedings help to avoid conflicting case law<sup>331</sup> and the duplication of evidence gathering and assessment. More generally, they help to ease the burden on lower courts, which could easily become overwhelmed in cases involving mass losses. In terms of investor protection, they are important in ensuring access to justice even for investors whose losses may be too small to make it worthwhile to pursue them individually<sup>332</sup>.

However, despite these advantages, several shortcomings are often recognized. Indeed, it is generally acknowledged that these proceedings are extremely complex, which contributes to their excessive length. Experience to date has shown that they can last for decades, as was the case in the *Deutsche Telekom* case, which inspired their introduction. Furthermore, to date, the most important model proceedings have not resulted in judicial clarification of the underlying substantive issue, but have been resolved through out-of-court settlements.

Another question arises as to the role of the *KapMuG* in the broader context of collective redress schemes under German law. Initially, this law was intended to be temporary, but it has been extended until now. In the meantime, the German legislator has transposed the European Directive on representative actions<sup>333</sup>. This could raise issues regarding the relationship between the two types of actions. Indeed, different plaintiffs could bring both types of actions in parallel for the same issues; consequently, differences in the decisions rendered as a result of the different types of actions cannot be ruled out<sup>334</sup>.

In **the Netherlands**, there are two main ways to obtain compensation for mass losses caused by defective information on the capital markets. In particular, Dutch law provides for representative class actions and the possibility for courts to make binding an agreement between the legal entity and a representative entity in order to compensate aggrieved investors<sup>335</sup>.

Firstly, there is **representative class action**, provided for in Articles 3:305a to 3:305d of the Dutch Civil Code. Under these provisions, the initiative to bring class action is reserved for legal entities that are mandated by their statutes to represent the interests of a group of investors. In particular, these representative entities may be either pre-existing entities with a general mandate to protect investors or entities established *ad hoc* to bring a class action against a specific defendant<sup>336</sup>. In particular, the court may only admit a representative action if the representative entity is deemed sufficiently representative and adequate to protect the interests of investors: for example, the class action may be declared inadmissible if the representative entity does not have the expertise and

<sup>331</sup> See STÜBINGER M. et al., above, note 314, p. 240.

<sup>332</sup> See RADTKE-RIEGER A., paragraph 1 *KapMuG - Anwendungsbereich*, in VORWERK V. et al., op. cit., note 311, p. 34.

<sup>333</sup> See *Gesetz zur gebündelten Durchsetzung von Verbraucherrechten* of 8 October 2023 (BGBl. 2023 I Nr. 272, p. 2).

<sup>334</sup> Section 1(3) of the *KapMuG*. See BAYAT G., *Die Prospekthaftung im Abhilfeverfahren*, *Zeitschrift für Bank- und Kapitalmarktrecht*, 2024, p. 224

<sup>335</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., *ibid*, note 14, p. 499.

<sup>336</sup> See BOSSELAAR M., *Collectief schadeverhaal in de financiële sector; easier said than done!?*, *Tijdschrift voor Financieel Recht*, 9/2022, p. 206. The two entities that have been particularly active in pursuing class actions on behalf of aggrieved investors are the *VEB (Vereniging van Effectenbezitters)* and *Consumentenbond*.



knowledge necessary to bring a class action<sup>337</sup>.

In any event, a class action is only admissible if the representative entity has first attempted to reach an amicable settlement with the potential defendant<sup>338</sup>. Regarding the conduct of the class action, the ordinary rules of civil procedure apply. It should be noted, however, that this class action operates on an opt-out basis, at least for investors domiciled in the Netherlands. In order not to be bound by the judgment rendered at the end of the class action, investors must expressly declare their intention to opt-out. For investors domiciled outside the Netherlands, the decision is binding only on those who have opted to participate; however, a court may still order an opt-out system for foreign investors at the request of one of the parties to the dispute.

In the past, representative actions could only result in a declaratory judgment that the defendant company had acted wrongfully<sup>339</sup>. It was considered that a collective action was not the appropriate tool to address the specific issue of investors' compensation<sup>340</sup>. Thus, previously, aggrieved investors had to bring individual actions to quantify damages on the basis of a declaratory judgment. However, collective actions can now also be used to obtain a decision on damages<sup>341</sup>.

Since its introduction, the representative class action tool has been used in several high-profile cases against companies operating in the financial sector, such as Fortis, Converium, and DES. During our analysis, it was suggested that the 2016 reform, which allowed for class actions for damages, slightly tipped the balance in favor of investors. Indeed, the knowledge that courts can award damages on a collective basis may encourage companies to seek out-of-court settlements. This suggestion seems to be reinforced by the fact that many class actions have indeed ended in settlements confirmed by the Amsterdam Court of Appeal, as we explain in more detail below.

The second form of collective redress provided for under Dutch law is the provision relating to **collective settlements** (*overeenkomsten*) aimed at ensuring compensation for mass losses, as set out in Articles 7:907 to 7:910 of the Dutch Civil Code and Articles 1013 to 1018a of the Dutch Code of Civil Procedure. This legal tool, introduced in 2005, allows representative entities whose statutes provide for a mandate to protect investors to negotiate a settlement with a company to ensure that the latter pays compensation to the victims of its wrongdoing.

Once an agreement has been reached on a draft settlement, it must be approved by the Amsterdam Court of Appeal and thus becomes binding on all persons entitled to compensation<sup>342</sup>. In particular, the court may reject the parties' proposal if it appears unreasonable. For example, if the amount of compensation appears too low in view of the extent of the loss caused by the responsible company<sup>343</sup>. Once the settlement has been approved, the terms of the settlement are generally made public and published on the representative entity's website.

As with the class action mechanism, autonomy is recognized for aggrieved investors who do not

---

<sup>337</sup> See 305a(2) of the Dutch Civil Code.

<sup>338</sup> See 305a(3)(c) of the Dutch Civil Code.

<sup>339</sup> See ARONS T.M.C., *Collectieve geschilbeslechting in de financiële sector*, in BUSCH D. et al., op. cit., note 26, p. 637 et seq.

<sup>340</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., *ibid*, note 14, p. 503.

<sup>341</sup> The innovation of allowing representative entities to obtain not only a declaratory judgment but also a decision on damages was introduced by the *Wet Afwikkeling Massaschade in Collectieve Actie (WAMCA)*, in force since 1 January 2020. See ARONS T.M.C., above, in BUSCH D. et al., op. cit., note 26, p. 640. Decisions on damages in the context of class actions are often based on an abstract calculation made with reference to a division of investors into groups.

<sup>342</sup> Article 7:907(1) of the Dutch Civil Code.

<sup>343</sup> Article 7:907(3)(b) of the Dutch Civil Code.



wish to be bound by the results of the class action. Investors whose rights fall within the scope of the settlement may opt out once the court has approved the settlement<sup>344</sup>. The possibility of opting out may encourage courts to examine proposed settlements properly<sup>345</sup>. If investors are convinced that they can obtain a higher amount of compensation through other means, they can simply opt out of a settlement they consider inadequate<sup>346</sup>.

The mass losses settlement tool has been applied several times in practice to date. Among the most notable cases are the *Dexia*, *Shell*, *Converium*, and *Fortis/Aegeas* cases, which were often preceded by class action proceedings<sup>347</sup>. For example, the settlement in the Fortis case provided for compensation to shareholders who had acquired or retained their shares during specific periods in which the price of the financial instruments had been disrupted by defective information concerning, among other things, Fortis's proposed takeover of ABN AMRO<sup>348</sup>. To calculate the amount of compensation due, the settlement divided investors into purchasers and holders<sup>349</sup>. It then set, for each relevant period, the amount of compensation due per share for purchasers and holders respectively<sup>350</sup>.

It is interesting to note that shareholders who were proactive in bringing an action against *Fortis/Aegeas* or joining a representative organization were rewarded with a 25% increase in the basic compensation to which they were entitled<sup>351</sup>. This difference was justified by the fact that otherwise, non-active claimants would have benefited from the results of the class action without contributing to its costs, for example through contributions or success fees owed to representative organizations<sup>352</sup>. Finally, the amount that the company will have to pay is capped at a maximum nominal amount, which gives the company certainty as to the costs of the settlement<sup>353</sup>.

However, this experience with collective settlements in the Netherlands has revealed a significant shortcoming. Indeed, payment of the amounts agreed upon in a settlement tends to be slow. In several cases, full payments were only finalized after several years. For example, the settlement of the *Fortis/Aegeas* case mentioned above was declared binding in 2018, but the payments owed by *Fortis/Aegeas* were not fully executed until June 2022<sup>354</sup>.

In the **United Kingdom**, the use of collective redress for civil liability in capital markets has been developing slowly, as evidenced by a number of class actions brought in the wake of the global

---

<sup>344</sup> Article 7:908(2) of the Dutch Civil Code.

<sup>345</sup> See the discussion in the *Fortis/Aegeas* settlement, where the court explicitly recognizes the relationship between the adequacy of the compensation amount and the likelihood that investors will be able to withdraw from the settlement

<sup>346</sup> See ARONS T.M.C., above, in BUSCH D. et al., op. cit., note 26, p. 650.

<sup>347</sup> For a list of the eight settlement cases up to 2021 and other references, see ARONS T.M.C., above, in BUSCH D. et al., op. cit., note 26, p. 652.

<sup>348</sup> See the decision of the Amsterdam Court of Appeal making the settlement in the *Fortis/Aegeas* case binding. See Amsterdam Court of Appeal, judgment of 13 July 2018 in the *Fortis/Aegeas* case (ECLI:NL:GHAMS:2018:2422), paragraph 4.

<sup>349</sup> It is interesting to note that, in order to justify the right to compensation for investors who had merely held their shares, the representative entities argued that it was necessary to compensate them for the loss of opportunity to invest elsewhere. See Amsterdam Court of Appeal, judgment of 13 July 2018 in the *Fortis/Aegeas* case, paragraphs 5.28 and 5.33.

<sup>350</sup> See Amsterdam Court of Appeal, judgment of 13 July 2018 in the *Fortis/Aegeas* case, paragraphs 4.3 and 4.4. Approximately, for each relevant period, holders were entitled to receive about half of the compensation due to purchasers.

<sup>351</sup> See Amsterdam Court of Appeal, judgment of 13 July 2018 in the *Fortis/Aegeas* case, paragraphs 4.2 and 4.7.

<sup>352</sup> *Ibid.*, paragraph 5.1.3.

<sup>353</sup> *Ibid.*, paragraphs 4.5, 4.7, and 4.8.

<sup>354</sup> See BOSSELAAR M., above, note 334, p. 207. For more details on the even longer payment period required under the agreement concluded by Dexia, see V. BOSSELAAR M., above, note 334, p. 207, note 12.



financial crisis<sup>355</sup>. In addition to certain forms of case management<sup>356</sup>, collective redress under English law is provided for by representative class actions.

Under English law, **representative actions** allow a plaintiff or group of plaintiffs to bring an action in their own name, but also as representatives of a larger group of persons sharing the “*same interest*”<sup>357</sup>. Even if the persons sharing these interests are not parties to the representative actions<sup>358</sup>, they may benefit from the results of English representative actions since the latter are characterized by an opt-out principle. According to this principle, potential plaintiffs do not need to be actively involved in the action, nor even to be aware of the action in progress<sup>359</sup>.

Despite its potential, this remedy has traditionally not been used very often due to several limitations. First, English courts tend to interpret the “*same interest*” requirement very narrowly with regard to the subject matter of the dispute<sup>360</sup>. For example, in disputes relating to securities law, it may be considered that the “*same interest*” does not exist since the shareholders did not purchase their shares under the same share purchase agreement. Similarly, the individual remedies sought are considered to be different from one another, since each plaintiff seeks damages tailored to their own loss<sup>361</sup>. Furthermore, in principle, this type of action is not considered appropriate for assessing the amount of damages owed, since the court's determination should be limited to the “*same interest*” of the claimants. However, case law allows the use of representative actions to claim damages when the amount of damages to be compensated can be determined on an aggregate basis<sup>362</sup>.

Regarding their application to civil liability actions for defective information, although theoretically possible, representative actions have been rejected in the past, with courts favoring traditional procedures.

Despite these restrictions on collective redress actions, an interesting trend has emerged in the United Kingdom. In particular, there has been a growing tendency to set up **compensation schemes at the initiative of regulatory authorities** such as the *Financial Conduct Authority* (FCA) to ensure compensation in cases involving multiple aggrieved investors. Through these collective redress mechanisms, the offending company creates a fund to compensate those harmed by its conduct, and redress is provided without recourse to legal proceedings.

This involvement of the regulator in class actions can take various forms. First, the FCA has the power, under Section 384 of the FSMA, to require the persons guilty (among other things) of market manipulation to set up restitution schemes for persons harmed by the wrongful conduct. Initially hesitant to use these powers, the FCA changed its policy in 2017 following the *Tesco* case, in which it was established that a publicly traded company had engaged in market manipulation through false

---

<sup>355</sup> DAVIES M., MIDDLETON O. and WATRET T., *The Increasing Prevalence of Class Actions in the UK*, 2021, *Business Law Review*, Vol. 42, No. 4, p. 168.

<sup>356</sup> The Group Litigation Order (GLO) is a case management tool under Section 19.21 et seq. of the Civil Procedure Rules that allows the judge to deal with "common or related issues of fact or law" concerning a large number of claimants. However, the mechanism operates on an opt-in basis, requiring potential claimants to apply for inclusion in a specific register in order to benefit from the advantages of this procedure. At the same time, the opt-in logic makes it difficult to identify potential claimants. The advantage of such a system for the centralized discussion of common issues is that the court's judgment and orders are binding on investors who have requested to be included in an *ad hoc* register. The GLO was used, for example, in the litigation over the RBS rights issue, a prospectus case that was finally settled in 2017. See DAVIES M. et al., *ibid*, note 353, p. 169.

<sup>357</sup> See Section 19.8 of the Civil Procedure Rules. See also SORABJI J., *ibid*, in GSELL B., et al., *op. cit.*, note 71, p. 144.

<sup>358</sup> See SORABJI J., above, in GSELL B., et al., *op. cit.*, note 71, p. 143.

<sup>359</sup> See DAVIES M. et al., above, note 353, p. 168.

<sup>360</sup> *Ibid.*, p. 170.

<sup>361</sup> See SORABJI J., *op. cit.*, in GSELL B., et al., *ibid*, note 71, p. 145.

<sup>362</sup> *Ibid.*, p. 144.



financial reports<sup>363</sup>. As a result, all persons who had purchased Tesco shares during the period covered by the defective information had suffered a loss equal to the purchase price inflated by the defective information<sup>364</sup>.

To remedy these losses, the FCA ordered Tesco to set up a restitution scheme under which aggrieved investors could receive compensation for their losses, provided they waived their rights to pursue Tesco. Some investors chose to pursue independent actions, but these actions were withdrawn before reaching court, and the terms of these withdrawals were not disclosed.

In addition to using its statutory powers to require restitution payments, the FCA can promote remediation schemes in various ways, as illustrated by the recent *H2O* case. The case concerned an asset manager operating in France and the United Kingdom, among other countries, which was investigated and sanctioned by the Enforcement Committee of the French *Autorité des Marchés Financiers* (AMF) and the UK FCA.

H2O was initially subject to a heavy financial penalty of €75 million from the AMF, which ruled that the asset manager had invested the cash assets of its UCITS funds in financial instruments that were not eligible as assets of those funds<sup>365</sup>. In addition, it was found that the asset manager had invested in financial instruments that, according to the investment fund prospectuses, were not authorized<sup>366</sup>. Ultimately, it was found that this jeopardized the fund's liquidity, leading to a suspension of redemptions to investors<sup>367</sup>.

The FCA's investigation into H2O also revealed breaches in procedures for managing conflicts of interest and the provision of false or misleading documents to the FCA<sup>368</sup>. When assessing the action to be taken, the FCA refrained from imposing a financial penalty. This decision was justified by the fact that the asset manager had volunteered to set up a fund to compensate the investors concerned. In addition, consideration was given to the fact that the AMF had already imposed heavy financial penalties and that adding a further financial penalty would have reduced the amount available to the company to offer reimbursement to the investors concerned<sup>369</sup>. In return, investors who are reimbursed through the fund will have to waive their right to pursue H2O<sup>370</sup>.

In **Italy**, investors who have suffered losses due to defective information on the primary and secondary markets can avail themselves of the class action mechanism as amended in 2020<sup>371</sup>. The rules on class actions previously applicable could only be invoked by consumers, and this status was not unanimously granted to investors by Italian case law<sup>372</sup>.

This type of class action allows for the collective protection of “*homogeneous individual rights*”

---

<sup>363</sup> FCA, Final Notice to Tesco plc and Tesco Stores Limited (hereinafter, "FCA Tesco Final Notice"), paragraphs 4.3 et seq.

<sup>364</sup> FCA Tesco Final Notice, paragraph 6.2.

<sup>365</sup> AMF, *Commission des sanctions*, Decision No. 12 of 30 December 2022, upheld by the *Conseil d'Etat* on 13 June 2025 (No. 471548). The sanction against the asset manager was supplemented by two financial penalties of €15 million and €37.73 million against two individuals.

<sup>366</sup> AMF, Decision No. 12 of 30 December 2022, for example paragraphs 107 et seq.

<sup>367</sup> AMF, Decision No. 12 of 30 December 2022, paragraph 326.

<sup>368</sup> FCA, Final Notice to H2O AM LLP (hereinafter, "FCA H2O Final Notice"), paragraphs 5.9 and 5.11.

<sup>369</sup> FCA H2O Final Notice, paragraph 2.20.

<sup>370</sup> *Ibid.*, paragraph 2.19.

<sup>371</sup> In Italy, class actions are currently governed by Articles 840-bis et seq. of the Italian Code of Civil Procedure, introduced by Law No. 31 of 12 April 2019.

<sup>372</sup> Currently, Italian law also provides for a type of class action specifically available to consumers, introduced to implement European Directive 2020/1828 and governed by Articles 140-ter et seq. of Legislative Decree 206/2005 (Consumer Code). The limitation to consumers may make this type of class action inaccessible to investors.



and operates on an opt-in basis<sup>373</sup>. The possibility of acting as a plaintiff is extended to both individuals and representative organizations, provided that the latter are registered in an official register<sup>374</sup>. In both cases, however, the plaintiff must be able to represent the class<sup>375</sup>. If the action is brought, it will fall within the competence of the commercial section of the court with jurisdiction over the place where the defendant has its registered office<sup>376</sup>.

The opt-in rule obviously allows any individual claimant to bring an individual action regardless of the existence of a class action. However, the scope of defendants is limited to companies, and the subject matter of the claim is limited to the loss caused by the professional activity of the defendant companies<sup>377</sup>.

The class action procedure is divided into two phases. The first phase aims to verify the admissibility of the action. Once the action has been deemed admissible by the court, potential claimants can decide whether to join the collective action<sup>378</sup>.

In the second phase, which constitutes the core of the procedure, the court must examine the merits of the plaintiff's claim. To do so, the judge may, in particular, order the defendant to present evidence, while taking certain precautions to protect sensitive information<sup>379</sup>. In particular, to determine the defendant's liability, the court may take into account statistical data and simple presumptions<sup>380</sup>.

This second phase ends with the judgment, which may award damages or, if the plaintiff is a representative entity, find that the defendant has infringed upon the homogeneous individual rights for the protection of which the collective action was brought.

An interesting feature of the Italian collective action model is that a second time window for *opt-in* is granted to potential claimants once the judge has rendered his decision and found the defendant liable<sup>381</sup>. To enable the exercise of this second right to participate, the judgment must also define the characteristics of potential claimants who may join the action after the judgment is published, determining the documents required to be recognized as part of the class. For example, in the case of a collective action for defective information on the financial markets, the court must define the means by which a person can prove that they were a shareholder during the given period.

Given its relatively recent adoption, it is not yet possible to assess the merits of the new system. Despite the initiation of proceedings under this regime in financial markets law, no collective action has yet reached the stage of *res judicata*.

In **Spain**, as in Italy, experience with collective actions is limited. However, in the *Banco Popular* case, investors attempted to bring a collective action against the bank. Furthermore, in the *Bankia* case, after losing a large number of cases, the bank proposed an out-of-court mechanism to compensate investors. Finally, from a more general perspective, it should be noted that in Spain, the draft law transposing European Directive (EU) 2020/1828 is currently under discussion.

---

<sup>373</sup> Article 840-bis of the Italian Code of Civil Procedure.

<sup>374</sup> Article 840-bis of the Italian Code of Civil Procedure.

<sup>375</sup> Article 840-ter of the Italian Code of Civil Procedure.

<sup>376</sup> Article 840-ter of the Italian Code of Civil Procedure.

<sup>377</sup> Article 840-bis of the Italian Code of Civil Procedure.

<sup>378</sup> Article 840-quinquies of the Italian Code of Civil Procedure.

<sup>379</sup> Article 840-quinquies of the Italian Code of Civil Procedure.

<sup>380</sup> Article 840-quinquies of the Italian Code of Civil Procedure.

<sup>381</sup> Article 840 sexies(1)(e) of the Italian Code of Civil Procedure.



### 4.3 - Attorney's fees and recovery of litigation costs

Economic incentives to engage in and pursue litigation are a crucial factor in the evolution of securities litigation. In particular, it is interesting to examine what economic incentives may guide the behavior of various key players in the context of litigation, including the parties, their attorneys, and the directors and officers of the defendant issuer. For these categories, economic incentives are determined by the rules governing the allocation of legal costs between the parties, the possibility of contingency fees to compensate attorneys, and the availability of insurance for directors and officers.

The allocation of legal costs between plaintiffs and defendants once a judgment has been rendered determines which party bears the risk of an unsuccessful lawsuit. In all of the jurisdictions studied, legal costs are generally borne by the unsuccessful party, under what is commonly known as the “*loser pays*” rule<sup>382</sup>. However, the costs incurred by the winning party are not necessarily reimbursed in full. In fact, all jurisdictions provide for certain limitations to prevent the losing party from being required to reimburse an excessive amount to the winning party. This objective is achieved by providing for remuneration within the framework of professional rates, by subjecting recoverable costs to ceilings set by law, or by allowing a certain degree of discretion to the judge in determining the final amount of costs to be settled.

The availability of contingency fees is another incentive for litigation, this time on the part of attorneys. Under these agreements, attorneys can be remunerated based on a percentage of the damages awarded or may be radically excluded from remuneration if the case is unsuccessful. Continental courts are generally cautious when it comes to authorizing such mechanisms. Some completely prohibit forms of contingency fees or subject them to strict limitations. In contrast, the United Kingdom appears to be an exception, as it authorizes contingency fees more liberally than continental jurisdictions.

Finally, insurability or litigation costs and the awarding of damages influence how directors and officers of a potentially liable issuer assess litigation risk. Indeed, the existence of insurance – usually in the form of directors and officers insurance (D&O) – may discourage the beneficiaries of the insurance from properly monitoring the issuer's conduct. However, when such insurance can cover at least part of the losses to be compensated to investors, it increases the possibility for investors to receive compensation for the losses suffered.

To better understand how these economic incentives play out in the jurisdictions studied, a brief overview of the rules applicable in each jurisdiction is necessary.

In **Germany**, the rule applicable to legal costs is that of the “*loser pays*”, codified in Section 91 of the German Code of Civil Procedure. Thus, if the plaintiff succeeds in winning the case, all legal costs deemed reasonably necessary in the context of the dispute in question will be reimbursed by the defendant who has lost the case<sup>383</sup>. Consequently, the risk of an unsuccessful civil liability action lies with the plaintiff.

Contingency fees are in principle permissible, but they are subject to strict conditions set out in the law on attorneys' fees. For example, they are permissible when, in the absence of a contingency fee agreement, the attorney's client would reasonably be likely to refrain from bringing the claim<sup>384</sup>.

<sup>382</sup> For a discussion of the loser-pays rule and its implications, see GELTER M., General Report, in CONAC P.-H. et al., op. cit., note 14, p. 25, note 133.

<sup>383</sup> See KULMS R., Enforcement of Company and Securities Laws in Germany, in GSELL B. et al., op. cit., note 71, p. 391.

<sup>384</sup> Section 4a (*Erfolgshonorar*) of the *Rechtsanwaltsvergütungsgesetz*, the German law on attorneys' fees.



The “*loser pays*” rule is also the default rule in **Italy**<sup>385</sup> under Article 91 of the Italian Code of Civil Procedure. Under Italian law, attorneys' fees are reimbursed not on the basis of actual costs, but on the basis of reasonable costs, according to a scale provided by the Ministry of Justice. The costs of technical advice advanced by the claimant may also be reimbursed by the losing party.

However, Italian law provides for three relevant exceptions to the “*loser pays*” rule. First, the court may exclude from recovery excessive or unnecessary costs incurred by the winning party<sup>386</sup>. Secondly, courts may compensate the legal costs of both parties when the dispute concerns legal issues that are entirely new or have been the subject of inconsistent case law<sup>387</sup>. Furthermore, if the plaintiff rejects a reasonable offer of compensation from the defendant, the plaintiff's compensation costs are reduced<sup>388</sup>.

Regarding contingency fees, the law allows for remuneration systems calculated as a fraction of the claim or even of the expected value that the lawsuit could award<sup>389</sup>. On the other hand, contingency fees that involve the right to compensation calculated as a fraction of the value actually awarded to the party at the end of the lawsuit are simply prohibited<sup>390</sup>. Litigation costs are insurable in Italy, but this is not very common, although it is becoming increasingly widespread through directors and officers insurance policies (D&O).

In **Spain**, costs are in principle reimbursed by the losing party under Article 394 of the Spanish Code of Civil Procedure<sup>391</sup>. However, certain exceptions apply, particularly in cases of particular uncertainty in law or fact, or where the claim is only partially successful. Regarding the reimbursement of attorneys' fees, a cap applies to the amount that can be recovered<sup>392</sup>.

In the **Netherlands**, the “*loser pays*” rule, provided for in Article 237 of the Dutch Code of Civil Procedure, may or may not apply depending on the type of action brought<sup>393</sup>. It applies, for example, to actions based on certain general tort provisions<sup>394</sup>, in which costs include the other party's legal fees, expert fees, and court costs. However, costs are not reimbursed at their actual amount, but within the framework of fixed rates. In addition, the court may exclude the reimbursement of costs deemed unnecessary<sup>395</sup>.

In other cases, such as when the action is brought under the 2005 Collective Settlement of Mass Damages Act (*WCAM*)<sup>396</sup>, each party must bear its own costs.

Regarding conditional fees, “*no win, no fee*” agreements are expressly prohibited<sup>397</sup>. However,

---

<sup>385</sup> The information presented concerning **Italy** is based on the relevant passages of a written note submitted to the working group by the Italian national experts.

<sup>386</sup> Article 92(1) of the Italian Code of Civil Procedure. See the 50% reduction in expert fees that the successful plaintiff was able to recover in a case involving a false prospectus for the issuance of shares - from €400,000 to €200,000 on the basis of a fair and equitable assessment. See Milan Court, judgment of 18 May 2017, No. 5894, handed down in the *Unipolsai* case.

<sup>387</sup> Article 92(3) of the Italian Code of Civil Procedure.

<sup>388</sup> Article 91(1) of the Italian Code of Civil Procedure.

<sup>389</sup> Article 13, paragraph 3, of Law No. 247 of 31 December 2012, the Italian law on the status of attorneys.

<sup>390</sup> Article 13(4) of Law No. 247 of 31 December 2012, the Italian law on the status of attorneys.

<sup>391</sup> Article 394 of the *Ley de Enjuiciamiento Civil*.

<sup>392</sup> Article 394, paragraph 3, of the *Ley de Enjuiciamiento Civil*.

<sup>393</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, p. 511.

<sup>394</sup> In particular under Articles 6:162 to 194 of the Dutch Civil Code.

<sup>395</sup> Article 237(1) of the Dutch Code of Civil Procedure.

<sup>396</sup> *Wet collectieve afhandeling massaschade* of 16 July 2005 (*WCAM*).

<sup>397</sup> See Article 25(2) of the Dutch Bar Association's Code of Conduct.



agreements providing for fees proportional to the damages awarded in the event of a victory are permitted. Nevertheless, they must be in line with a rate that is customary and generally accepted among attorneys in professional practice<sup>398</sup>.

Regarding the insurability of litigation costs, in the Netherlands, D&O insurance may cover legal costs and may also cover part of the damages that directors are required to pay<sup>399</sup>.

Finally, in the **United Kingdom**, the “*loser pays*” rule generally applies, so that the winning party can recover reasonable and proportionate legal costs, including expert fees. However, under the rules of civil procedure, the court has discretion to determine the amount of costs to be reimbursed.

Contingency fees are permitted in two forms. Firstly, under what are known as *Conditional Fee Arrangements* (CFAs). This type of agreement, also known as “*no win, no fee*”, allows clients to pay no fees or reduced fees if the case is lost, with a success fee payable if the case is won. In addition, *Damages-Based Agreements* (DBAs) are permitted. Under these agreements, attorneys receive a percentage of the damages awarded if the case is won.

---

<sup>398</sup> See Article 25(3) of the Dutch Bar Association's Code of Conduct.

<sup>399</sup> See LENNARTS L. and ROEST J., The Netherlands, in CONAC P.-H. et al., op. cit., note 14, p. 513.



## ***COMPOSITION OF THE WORKING GROUP***



## ***COMPOSITION OF THE WORKING GROUP*** **on investors' compensation for false information**

### **CHAIRMAN**

- **Pierre-Henri CONAC**, Professor, University of Luxembourg, Luxembourg Center for European Law (LCEL)

### **RAPPORTEURS**

- **Johan PROROK**, Professor, Jean Monnet University Saint-Etienne
- **Enrico SARTORI**, PhD Student, University of Luxembourg

### **PARTICIPANTS**

- **Emmanuelle BOURETZ**, *Avocat*, Vivien & Associates
- **Matthieu BROCHIER**, *Avocat*, Darrois Villey Maillot Brochier
- **Muriel DE SZILBEREKY**, *Déléguée Générale*, ANSA
- **Arthur DETHOMAS**, *Avocat*, Hogan Lovells
- **Olivier DOUVRELEUR**, *Avocat général*, Court of cassation
- **Christine GUÉGUEN**, *Conseillère d'Etat en service extraordinaire*
- **Jules LECHÊNE**, PhD Student, HCJP
- **Marie-Aude NOURY**, *Avocat*, Squair
- **Alain PIETRANCOSTA**, Professor, Sorbonne Law School
- **Louis-Marie PILLEBOUT**, *Avocat*, Simmons & Simmons
- **Nicolas RONTCHEVSKY**, Professor, University of Strasbourg, Senior Counsel, Hogan Lovells
- **Caroline RUELLAN**, Chairman, SONJ Conseil
- **Isabelle URBAIN-PARLEANI**, Professor, Paris Descartes University
- **Tom VAUTHIER**, *Avocat*, Bredin Prat



## AMF

- **Geoffroy LELASSEUX**, *Juriste*, AMF
- **Océane MARGARON**, *Juriste*, AMF

## CHANCELLERY

- **Julien GOLDSZLAGIER**, *Chef du bureau du droit des affaires*, DACS, Ministry of Justice

## TREASURY

- **Mehdi EZZAIM**, *Adjoint au chef du bureau Épargne et marchés financiers*, DGT



***LIST OF PERSONS  
INTERVIEWED***



## ***LIST OF PERSONS INTERVIEWED***

### **FRANCE**

- **Françoise Mari (June 26, 2024)**, Director of Financial Risks, Liberty. Similarly, a hearing was held on the methods used to determine damages in French courts
- **Olivier Péronnet (July 10, 2024)**, Chartered Accountant, Auditor, Expert at the Paris Court of Appeal and accredited by the Court of cassation, Founding Partner, Finexsi

### **SPAIN (10 July 2024)**

- **Professor Isabel Fernández Torres**, Complutense University of Madrid
- **Francisco Leon and Fernando Bedoya**, *Avocats*, Pérez-Llorca Law Firm, Madrid

### **ITALY (12 September 2024)**

- **Professors Matteo Gargantini and Michele Siri**, University of Genoa
- **Attorneys Emanuele Grippo and Daniele Vecchi**, Gianni & Origoni Law Firm

### **GERMANY (10 October 2024)**

- **Professor Rüdiger Veil**, University of Munich
- **Michael Brellochs and Henner Schlaefke**, Noerr Law Firm

### **AUSTRIA (7 November 2024)**

- **Professor Walter Doralt**, University of Graz

### **NETHERLANDS (5 December 2024)**

- **Professor Danny Busch**, University of Nijmegen

### **UNITED KINGDOM (23 January 2025)**

- **Professor (emeritus) Paul Davies**, University of Oxford, Harris Manchester College
- **Matt McCahearty**, Solicitor, Macfarlanes
- **Gregory Denton Cox**, Barrister