Die private Durchsetzung von öffentlichem Wirtschaftsrecht

Herausgegeben von
PETER JUNG

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung
und Rechtsvereinheitlichung
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Mohr Siebeck

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Verhandlungen der Fachgruppe
für vergleichendes Handels- und Wirtschaftsrecht
anlässlich der 36. Tagung für Rechtsvergleichung
vom 14. bis 16. September 2017 in Basel

Herausgegeben von

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Vorwort

Die 36. Tagung der Gesellschaft für Rechtsvergleichung vom 14. bis 16. September in Basel stand unter dem Generalthema „Das Recht und seine Durchsetzung". Der vorliegende Band enthält sämtliche Referate, die in der Arbeitssitzung der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht zum Thema „Die private Durchsetzung von öffentlichem Wirtschaftsrecht" gehalten wurden. Ferner erfolgt der Abdruck eines von der Gesellschaft für Rechtsvergleichung ausgezeichneten studentischen Seminarbeitrags.

Vermeintliche Defizite in der behördlichen Durchsetzung und das Streben staatlicher Stellen nach Entlastung haben in den letzten Jahren verstärkt den Blick auf die private Durchsetzung öffentlichen Wirtschaftsrechts gelenkt. Das gilt namentlich für die kartell- und kapitalmarktrechtliche Regulierung. Pate stand vor allem das US-amerikanische Wirtschaftsrecht mit seinem traditionellen Rückgriff auf Instrumente des *Private Enforcement*.

Eine private Durchsetzung öffentlichen Wirtschaftsrechts setzt zunächst voraus, dass die Verletzung von entsprechenden öffentlich-rechtlichen Normen zu Ansprüchen von Privatpersonen führt. Eine zentrale Rolle kommt dabei im deutschen Recht den aus einer Verletzung so genannter Schutzgesetze folgenden deliktischen Ansprüchen zu. Da die Rechtsfigur des Schutzgesetzes auf der besonderen Ausgestaltung des deutschen Deliktsrechts beruht, vergleicht zunächst *Jean-Sébastien Borghetti* (Université Panthéon-Assas Paris II) die deutsche Praxis deliktsrechtlicher Sanktionierung im Kartell- und Kapitalmarktrecht mit derjenigen in Frankreich, wo man zwar auf eine deliktsrechtliche Generalklausel zurückgreifen kann, diese aber mit unterschiedlichen Kriterien (z. B. Erfordernis eines *dommage direct et certain*) wieder einschränkt. Im internationalen Verhältnis stellt sich die von *Jan von Hein* (Universität Freiburg) behandelte Frage, wie das öffentliche Wirtschaftsrecht zwischen Privatrechtssubjekten mit Hilfe des ordre public-Vorbehalts und international zwingender Eingriffsnormen durchgesetzt werden kann. Der in der Schweiz besonders ausgeprägten privaten Selbstregulierung widmet sich der Beitrag von *Rodolfo Straub* (SIX Swiss Exchange Zürich) am Beispiel der Selbstregulierung der Schweizer Börse, welche etwa auch die Handelsorganisation, die Regelberichterstattung, die Ad hoc-Publizität und die Offenlegung von Management-Transaktionen umfasst. Die weiteren Referate von *Peter L. Murray* (Harvard Law School), *Bonne van Hattum* (Universität Amsterdam) und *Benedict Heil* (Uni-

versität Frankfurt am Main) behandeln sodann ganz unterschiedliche nationale und supranationale Verfahren kollektiver Rechtsdurchsetzung, d. h. die US-amerikanische Class Action, den Kommissionsvorschlag betreffend Verbandsklagen und seine Auswirkung auf das niederländische Recht zur Abwicklung von Massenschäden (WCAM) sowie das deutsche Kapitalanleger-Musterverfahrensgesetz (KapMuG). Im rechtsvergleichenden Generalbericht von *Astrid Stadler* (Universitäten Konstanz und Rotterdam) werden diese prozessualen Beiträge zusammengeführt, in einen weiteren Rahmen gestellt und noch um Blicke in weitere Rechtsordnungen ergänzt.

Ich danke den Referentinnen und Referenten ganz herzlich für ihre Mitwirkung an der Tagung und die Veröffentlichung ihrer Beiträge in diesem Band. Für ihre Mithilfe bei der Organisation der Tagung und der Drucklegung bin ich Frau *Esther Jundt* und Herrn *Dr. Tizian Troxler LL.M.* in Basel zu Dank verpflichtet.

Basel, im August 2018 *Peter Jung*

Inhaltsverzeichnis

Tort claims for violations of supervisory regulations in French and German law

Jean-Sébastien Borghetti

For the sake of this contribution, supervisory regulations shall be understood as rules that are intended to regulate specific economic activities, or specific aspects of the general economic activity, such as antitrust rules, rules on the functioning of capital markets, of banks, etc.

These regulations are sometimes analysed as public law rules[1], as they are not directly aimed at regulating relations between private persons. Their violation, however, does not only pose a threat to the smooth and efficient functioning of the economic activities, which they purport to organise. It may also cause harm to individual persons (either legal or natural), whose interests (very often financial ones) have been hurt by this violation. An obvious example is the excessive price, which consumers must pay for products or services as a result of anticompetitive practices by professionals.

Such cases raise the questions if, and under what conditions, persons who suffer (financial) harm due to the violation of these regulations are entitled to be compensated for this harm by the author of the violation. These questions are generally regarded as difficult ones, if only because they stand at the junction of public and private law[2].

In French law, however, the first one receives a very clear answer, which is yes. For reasons that will be made clear in a moment, French law sees no problem at all in accepting that the violation of supervisory regulations may give rise to individual claims for compensation, if this violation has caused harm, be it pure economic loss, to private persons. This is actually nearly a non-issue in French law, and the very subject of this contribution is thus quite surprising from a French perspective. But it certainly starts to make sense when the French

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[1] See e.g., from a Swiss perspective, *B. Maurenbrecher*, Privatrechtliche Haftung für die Verletzung aufsichtsrechtlicher Vorschriften, in: Festschrift für Hans Caspar von der Crone zum 60. Geburtstag, Schulthess, 2017, p. 555, 557.

[2] It should be noted, however, that, while the divide between private and public law is particularly strong in French law, supervisory regulations are usually regarded in France as being part of private law.

position is contrasted to the German one. As is well known, German law is in principle reluctant to allow individual claims for the violation of supervisory regulations, even if it has become slightly more welcoming to them lately, partly under European pressure.

It is of course interesting to identify the reasons for these different approaches, to see how they materialise in specific contexts and to look at the concrete results they lead to. As comparative lawyers commonly experience, rules that look very different in the codes or in the books can lead to outcomes that are quite close in practice – and the reverse is also true, of course. It is therefore worth investigating if the apparently contrasting approaches of French and German law do indeed lead to results that are significantly different.

This can be done, obviously, from the perspective of the on-going debate on the private enforcement of supervisory regulations[3]. Is this type of enforcement efficient and/or desirable? Should it be combined with, or supersede public enforcement? This classic discussion shall not be reopened here, however, as it goes far beyond the subject of this contribution. It will be for the reader to decide if the elements put forward hereunder speak in favour or against private enforcement and its development. It should only be mentioned that the debate on private enforcement is not as developed in French law as it is in other legal systems, such as Germany's, or, even more so, the United-States'[4]. One reason for this might be that public enforcement has always been seen as quite natural in France, a country with a strong tradition of State interventionism and where the violation of a supervisory regulation very often constitutes a criminal offence. Even though the public enforcement of supervisory regulations is in fact not always very efficient, private enforcement is thus generally seen as a possible adjuvant to public enforcement, but not really as a substitute, or even a necessity.

The exact scope of this contribution also needs to be specified. As is indicated by its title, this short study is limited to tort claims for the violation of supervisory regulations. Claims in contract are therefore excluded. The title may further suggest that only claims brought before civil courts will be considered. This makes perfect sense from a German perspective, since, in German law, compensation claims associated with such violations will normally be brought before civil courts, and the existence of a contractual relationship does not as such bar the application of tort rules between the parties.

Things are different in French law, however. First of all, French courts have developed a strict no-option rule, known as 'règle du non-cumul', whereby liability in tort is inapplicable, and only contractual liability may apply, as soon

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[3] On this broader issue, see e.g. *R. Schulze* (ed.), Compensation of Private Losses, Sellier, 2011; *F. Wilman*, Private enforcement of EU law before national courts: the EU legislative framework, Edward Elgar Publishing, 2015.

[4] Even though French lawyers do not of course ignore it; see e.g. *J. Prorok*, La responsabilité civile sur les marchés financiers, dissertation Paris II, 2016, no. 76–78.

as there is a valid contractual relationship between the parties and the harm for which compensation is sought has something to do with that contract[5]. This means that some claims based on the violation of supervisory regulations will be in contract under French law, for example between a buyer and a seller who acted in breach of antitrust rules[6], whereas they would probably be in tort under German law.

Besides, it is possible in French law to bring a claim for damages before a criminal court, when the plaintiff is a direct victim of the offence for which the defendant is being prosecuted and when he has suffered harm as a result of it[7]. Criminal proceedings are to some extent more favourable than civil ones to plaintiffs, especially because the latter may rely on the investigation work and the evidence put forward by the public prosecutor. Given that violations of supervisory regulations often constitute criminal offences under French law, it therefore frequently happens that persons having suffered harm due to such violations choose to bring their compensation claim against the violator before a criminal court, and not a civil one[8]. The nature of the court that hears the case has normally no impact on the material rules that are being applied, however[9].

It should also be noted that, in many cases where a supervisory regulation has been violated, the plaintiff in theory has an option between suing the legal person that committed the violation, or suing the directors or board members who took the decision to commit this violation. Given the limited size of this contribution and the intricacies of directors' liability in German and in French law, which may cloud the main issues at stake, only the liability of companies will be considered here.

The contrast between French and German law as regards tort claims for violations of supervisory regulations originates in the differences between the tort law systems of both countries (I). In order to reveal this contrast, two concrete examples, drawn from capital markets law and competition law, shall be analysed (II). Finally, future perspectives and the possibility of a greater convergence between the systems will be considered (III).

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[5] On the origins of that rule, see *J.-S. Borghetti*, Strict Liability in Tort and the Boundaries of Tort Law, Essays in Honour of Jaap Spier, Jan Sramek Verlag, 2016, p. 19.

[6] *M. Chagny/B. Deffains*, Réparation des dommages concurrentiels, Dalloz, 2015, no. 45.

[7] Art. 2 *code de procédure pénale* (criminal instruction code).

[8] *J. Prorok* (Fn. 4), no. 177.

[9] It is an undisputed solution, though, that a civil fault in the sense of art. 1240 *code civil* (see under II.2) is necessarily established by the finding of the criminal court that the defendant committed a criminal fault.

I. General Rules on Tort Law

Be it in France or in Germany, supervisory regulations usually do not address, and consequently do not regulate specifically, damages claims that may arise due to harm caused to third parties by their violation. From this follows that normally the general rules of tort law apply, if at all, to such claims. Differences between French law and German law are in this respect quite strong. While the latter is markedly reluctant to allow tort claims based on the violation of public law rules, the former sees no problem in it.

Since German law (I) is probably more familiar to the reader than French law (II), they will be presented in that order.

1. German Law

German law is markedly restrictive as far as the scope of tort law is concerned. The main provision of the German civil code (BGB) on 'unlawful acts', section 823 I, sets a list of protected rights[10]. Personal or obligational rights are not part of them, which means that pure economic loss (reiner Vermögensschaden) is not directly compensable under that text[11], and victims of such a loss caused by the violation of a supervisory regulation must therefore rely on another legal basis to try and get compensation.

They may turn, first of all, to section 823 II BGB, which provides for the liability of the person who infringes a statutory provision intended to protect another person[12]. Section 823 II allows for the compensation of pure economic loss whenever the statutory norm that has been violated was intended to protect persons in the same situation as the plaintiff precisely from that type of harm[13]. German lawyers, and especially judges at the Bundesgerichtshof (BGH), Germany's highest court in civil matters, are usually rather strict when it comes to deciding if a statutory provision is intended to protect another person. In theory, the protective purpose of a norm should be appreciated based on the reg-

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[10] Section 823 par. I BGB: "A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this". Translations in English from BGB provisions are borrowed from the website www.gesetze-im-internet.de.

[11] But it may be compensated when the plaintiff's *Recht am eingerichteten und ausgeübten Gewerbebetrieb* has been violated.

[12] Section 823 par. II BGB: "The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability to compensation only exists in the case of fault".

[13] Section 823 par. II BGB also requires that the defendant was at fault, but the BGH has eased the evidentiary burden for the plaintiff and sets a rebuttable presumption that the violation of the protective norm was caused by the defendant's negligence.

ulator's or the legislator's intention, but trying to identify this intention often amounts to 'looking for what is not there', as some authors have put it[14]. In practice, judges usually seem to rely on a 'reasonable' interpretation of the statutory norm, influenced by a strong concern for the coherence and sustainability of the whole tort law system. As a result, the courts regard many supervisory regulations, whose violation does cause pure economic losses to various persons, as being aimed at protecting the general interest only, and not individual rights[15].

Another option, for those suffering pure economic loss caused by the violation of a supervisory regulation, is to turn to section 826 BGB, which deals with the intentional infliction of damage contra bonos mores[16]. Section 826 may in theory be relied on to compensate any type of harm, but, in practice, it is mostly relevant in cases of pure economic loss, when the plaintiff cannot rely on a protective statutory provision in the sense of section 823 II[17].

The first condition for the application of section 826 is that the defendant acted contra bonos mores. While it is by no means easy to define what 'good morals' mean in an increasingly pluralistic society, it seems accepted, in the business and commercial context, that an action is contra bonos mores when it runs counter the objectives of the existing legal and economic order. Section 826 has thus been relied on quite extensively in case of unfair competition, before the legislator adopted special provisions in that field. The second condition for section 826 to apply is that the damaging act must have been intentional. Courts have adopted a lax conception of intention in that context, and it is enough that the defendant knew for sure that his conduct would harm someone else, even if he did not purport to cause harm to the plaintiff (dolus eventualis). Even recklessness (Leichtfertigkeit) may amount to intention, in the sense of section 826[18].

When the conditions of liability are met, the defendant must compensate the harm caused to the plaintiff and for which he is liable. As in most legal systems, the full compensation principle applies. While the BGB is not very precise on how damages should be calculated, the BGH has developed detailed rules on the subject, depending on the context and the type of loss that has been suffered. The defendant's liability is reduced, however, if the plaintiff contributed to his harm through his own fault (section 254 par. I BGB), or if he failed to avoid or mitigate the loss through reasonable means (section 254 par. II BGB).

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[14] *H. Kötz/G. Wagner*, Deliktsrecht, 13th ed., Vahlen, 2016, no. 228, citing *G. Williams* (1960) 23 MLR 233, 244 writing on the English tort of breach of a statutory duty.

[15] For some examples, see *G. Wagner*, MüKoBGB, 7th ed., Beck, 2017, § 823, no. 404 ff.

[16] Section 826 BGB: "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage".

[17] *H. Kötz/G. Wagner* (Fn 14), no. 250.

[18] See *H. Kötz/G. Wagner* (Fn. 14), no. 266 ff.

2. French Law

The French civil code (code civil) sets a very general rule on tort law, now formulated at article 1240 (formerly 1382)[19]: "Any human action whatsoever which causes harm to another creates an obligation in the person by whose fault it occurred to make reparation for it". The formulation of this provision is out-dated, but the meaning is clear: "a person is liable for the harm caused by his fault", as the recently published reform bill on civil liability (projet de réforme de la responsabilité civile), which purports to reformulate this rule without changing it, puts it[20]. Not only is the rule extremely broadly formulated, but French courts take a rather lax approach to the three conditions which article 1240 sets for liability: fault, harm and causation.

Fault receives no official definition in French law, neither in the code civil nor in case law. However, the existence of fault is regarded by the Cour de cassation, France's highest court in civil matters, as a question of law, as opposed to a question of fact. This means that the Court, relying on the facts that have been ascertained by lower judges, decides, if asked, whether or not fault existed in any given case. In practice, the absence of a definition of fault, combined with the extreme terseness of the Cour de cassation's decisions, gives judges great leeway when deciding whether or not fault can be found in any given case[21]. The Cour de cassation, in particular, does not have to say precisely what elements it took into account to recognise the existence or the absence of fault, and its decisions on that count usually boil down to 'there was fault' or 'there was no fault', without any further precision.

This of course makes it quite difficult to say what exactly is fault under French law, and what its elements are. Scholars usually agree, however, that fault can be defined as the violation of a duty[22]. This duty can be the general duty of care (not to be found in any text, but whose existence is undisputed), whereby everyone is to act carefully, with a view to avoiding causing damage to others, in each

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[19] French contract law has been thoroughly reformed through Order (*ordonnance*) no. 2016-131 of 10 February 2016, which entered into force on 1st October 2016. This reform has entailed a renumbering of part of the *code civil*, and the general provisions on tort law, formerly arts 1382 to 1386, have become arts 1240 to 1244, without their content being modified.

[20] Art. 1241 *projet de réforme de la responsabilité civile*: "*On est responsable du dommage causé par sa faute*". The French ministry of Justice published the reform bill in March 2017. The French text of the bill, as well as an English translation by *S. Whittaker*, is available on the Ministry's website: http://www.textes.justice.gouv.fr/textes-soumis-a-concertation-10179/projet-de-reforme-du-droit-de-la-responsabilite-civile-29782.html.

[21] On the very specific judicial style of the *Cour de cassation* and its implications, see *J.-S. Borghetti*, Legal Methodology and the Role of Professors in France – *Professorenrecht* is not a French word!, in: J. Basedow/H. Fleischer/R. Zimmermann (ed.), Legislators, Judges, and Professors, Mohr Siebeck, 2016, p. 209.

[22] See e.g. *G. Viney/P. Jourdain/S. Carval*, Les Conditions de la responsabilité, 4th ed., LGDJ, 2013, no. 445 ff.

and every circumstance. It can also be any duty set out in a statute or regulation. Unlike, for example, English law, French law therefore does not distinguish 'ordinary' liability for fault and liability for the violation of a statutory duty. The violation of any duty, be it statutory or not, amounts to a fault, which in turn may give rise to liability based on article 1240 code civil if it has caused harm.

It should be added that the violation of a duty amounts to fault regardless of its author's inner dispositions, i. e. regardless of whether he acted intentionally or even negligently. As a matter of fact, case law has adopted a purely 'objective' conception of fault, which boils down to the unlawful behaviour, irrespective of the characteristics, capacities and state of mind of the person who adopted this behaviour[23]. A small child acting in a unreasonable way (for an adult) or violating a statutory duty will thus be liable in exactly the same way as an adult, if his behaviour has caused harm.

French law is equally broad minded when it comes to harm. Any type of harm can normally be compensated. Unlike section 823 par. I BGB, article 1240 code civil does not set a limitative, or even non-limitative, list of protected interests. Any interest (provided it is not unlawful) is therefore protected under the general liability for fault provision. Accordingly, compensation of pure economic loss has always been accepted under article 1240. Most French lawyers have actually never regarded it as an issue. Besides, French courts have long been willing to compensate loss of chance (perte de chance), i. e. the 'present and certain disappearance of a favourable eventuality'[24]. A compensable loss of chance can be recognised and compensated in a variety of contexts, including when the chance that was lost consisted in making a profit. French courts thus go very far in the way of compensating economic loss, since plaintiffs may obtain damages in tort not only for having lost earnings that were (nearly) certain, but also, in some circumstances, for the loss of mere profit expectancies.

Finally, French law is also rather unrestrictive as far as causation is concerned. The notion is not defined by the code civil and the courts have consistently refused to fill this gap. Most concepts used in other countries to limit causation are not known, or at least not used, in France. For example, the Cour de cassation has never adopted the adequate causation test and ignores the 'scope of the rule' principle (known in French as relativité aquilienne). The result is, once again, much leeway for the courts.

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[23] *G. Viney/P. Jourdain/S. Carval* (Fn. 22), no. 444.

[24] Here again, the reform bill on civil liability purports to confirm existing law. Its art. 1238 provides: "A loss of a chance is reparable only where it is the present and certain disappearance of a favourable eventuality. | This loss must be calculated by reference to the chance lost and cannot be equal to the advantage which this chance would have procured if it had been realised" ("*Seule constitue une perte de chance réparable, la disparition actuelle et certaine d'une éventualité favorable.* | *Ce préjudice doit être mesuré à la chance perdue et ne peut être égal à l'avantage qu'aurait procuré cette chance si elle s'était réalisée*").

If the conditions of liability are met, the defendant is bound to fully compensate the victim for the losses directly flowing from the harm. The defendant's debt will be reduced if the plaintiff's fault contributed to causing his own harm (a constant solution, which is however not mentioned in the code civil), but the Cour de cassation has steadily refused to impose on him a duty to mitigate his losses[25].

Neither the code civil nor the Cour de cassation set out clear rules on how damages should be measured. The Cour de cassation regards this as a question of fact, on which it exerts no control. Lower judges therefore freely decide on the amount of damages that should be awarded to the plaintiff, and there exist no official guidelines in this respect[26].

As may be suspected, the difference between French and German tort law is not only one of rules. The spirit of the whole tort system, and the way lawyers look at things, are quite different in the two countries. German lawyers are obviously eager to preserve legal certainty, hence the very precise character of many rules. Besides, the German system as a whole reflects a strong concern for the need to limit the scope of liability[27]. Things are very different in France. In the field of tort law, at least, the concern for legal certainty is clearly not as strong as the conviction, broadly shared among lawyers, that 'victims' – as plaintiffs tend to be systematically called – deserve to be protected and compensated[28]. Besides, the courts, and especially the Cour de cassation, have clearly rated the preservation of a large amount of judicial discretion above legal certainty.

Given the apocalyptic prophecies that are sometimes made about the economic consequences of an open-ended tort system, one might actually wonder how it is possible that her tort system has not made France bankrupt[29]. Part of the answer probably lies in at least two factors. The first one is that the awards granted by French judges are actually rather low. This is true for non-patrimonial losses, as some international comparisons suggest, but this is also true for economic losses[30]. Although there are not many studies on this issue, empirical evidence collected from various sources suggests that French courts are often

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[25] See the leading case Cass. 2e civ., 19 June 2003, no. 01-13.289 and 00-22.302, Bull. civ. II, no. 203.

[26] However, each appellate court has its own unofficial guidelines for the compensation of non-patrimonial losses flowing from personal injuries.

[27] See *J. Fedtke*, The Culture of German Tort Law, (2012) Journal of European Tort Law, 3(2), p. 183.

[28] See *J.-S. Borghetti*, The Culture of Tort Law in France, (2012) Journal of European Tort Law, 3(2), p. 158.

[29] Admittedly, the economic situation of France is not as flourishing as Germany's, but the country is not bankrupt and no economist seems to have suggested that France's economic difficulties should be traced back to the rules of tort law.

[30] See e.g. *Ph. Pierre/F. Leduc* (ed.), La Réparation intégrale en Europe. Études comparatives des droits nationaux, Larcier, 2012.

timid when it comes to compensating economic or financial losses. A second reason is that French lawyers do not exploit the full potential of the existing rules, and not as many claims are brought as could have been expected. This is rather surprising, considering that access to justice is relatively cheap and easy, but the fact is that there are many circumstances where tort claims could be brought, but are not. The violation of supervisory regulations actually is a good example of this.

II. Typical tort claims for the violation of supervisory regulations

Supervisory regulations are so diverse that it is not possible to consider tort claims that arise in connection with all of them. Examples have to be chosen. The focus will be here on damages claims for the violation of the ad hoc disclosure duty on capital markets (I) and for the violation of the prohibition of cartels and anti-competitive agreements (II), which are both particularly topical and illustrate the different approaches taken in Germany and in France.

1. Liability for damage caused by the violation of the ad hoc disclosure duty on capital markets

Capital market regulations include a number of rules on mandatory information by issuers of financial instruments. Rules are especially detailed for companies seeking to issue new instruments on the market, but issuers of financial instruments already on the market have an obligation to inform the public of inside information, which is likely to have a significant effect on the prices of those instruments or on the price of related derivative financial instruments. This obligation to disclose inside information, or ad hoc disclosure duty, as it is sometimes called, was set forth in the 2003 European Directive on market abuse[31], and is now found in the 2014 European Regulation on market abuse, which has repealed and superseded the latter[32]. This duty is therefore common to all legal systems in the European Union, including France's and Germany's.

The 2016 Regulation, and the 2003 Directive before it, only provide that Member States must ensure that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons who have violated the obligations imposed upon them by the European instrument[33]. They remain silent about the potential liability in tort for the violation of the

[31] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), art. 6.

[32] Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), art. 17.

[33] Art. 14.1 of the 2003 Directive and art. 30 of the 2014 Regulation.

above-mentioned disclosure duty. Member States have therefore been left on their own to deal with this issue, which may arise either where incorrect information has been made public (for example with the publication of deceptive reports on the issuer's financial situation), or where information that ought to have been disclosed has not been published, or has been published too late.

As could be expected, Germany and France have taken two very different paths in this respect, which clearly reflect the above-mentioned differences in their approach to tort law, but whose end-points may not be that far apart.

a) Germany

The disclosure duty set forth in the market abuse Directive, and now in the market abuse Regulation, is replicated at section 26 (formerly section 15) of the German Securities Trading Act (Gesetz über den Wertpapierhandel, known as WpHG)[34]. The WpHG also contains two provisions, sections 97 and 98 (formerly sections 37b and 37c), introduced in 2002, on civil liability for failure to publish insider information without undue delay (section 97) and civil liability for the publication of false insider information (section 98)[35]. German courts have been faced with several liability cases based on the alleged violation of section 26 WpHG, and they have had to decide both on the applicability of sections 823 par. II and 826 BGB to such claims, and on the conditions of application of sections 97 and 98 WpHG.

aa) Claims based on sections 823 par. II and 826 BGB

Investors having suffered financial losses due to the violation of section 26 WpHG have of course tried to rely on section 823 par. II to obtain damages, arguing that section 26 WpHG was a protective norm. One argument they could rely on is that section 26 par. III WpHG explicitly provides that sections 97 and 98 WpHG do not affect liability claims based on other provisions: "Schadensersatzansprüche, die auf anderen Rechtsgrundlagen beruhen, bleiben unberührt". Following the dominant doctrinal opinion[36], however, German courts have consistently ruled that section 26 must be regarded as a norm seeking to pro-

[34] The WpHG has been modified on several occasions. The latest modification has been made through the law of 23 June 2017 | 1693 and came into force at the beginning of 2018. It has resulted in the renumbering of the provisions that are discussed here, but the content of these has not been significantly modified.

[35] On the introduction of these provisions, in English, see *T. M. J. Möllers*, The Progress of German Information Disclosure Requirements: A Comparative Law Perspective in Light of Recent Developments in European Capital Markets Law, (2004) N.C.J. Int'l L. & Com. Reg., vol. 30, p. 279, 302.

[36] See eg *H. Kötz/G. Wagner* (Fn. 14), no. 228.

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