The Risk of Reverse Convertible Bonds: German Capital Market Law and Investor Protection

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A. Introduction(1)

[1] In times of a continuously expanding proliferation of investment and financing possibilities in the hands of banks, investment funds and individual capital investors, particular attention should be paid to the effects that new financial instruments are likely to have not only on concrete financing and investing modes but also on the further development of legal rules in this field. As the German capital market has been considered unable - at least until the widely marketed Deutsche Telekom IPO - to get rid of its persisting prejudice of being structurally lagging behind other countries' systems (2), the legal treatment of emerging financial instruments deserves greatest attention. (3) The rocket science of new financial instruments challenges law's aim to rightly assess the real quality of these instruments and to strike an adequate balance between the interests involved against a national policy background and EU demands. (4) While the past few years have been a time of great legislative activity in the field of company and capital market law in Germany (5), only a closer look at court decisions reveals the true pressure resulting from a fast moving capital market on traditional legal perceptions. The so-called *Aktienanleihe*-Decision by the Federal Court of Justice, [FCJ] (*Bundesgerichtshof - BGH*) of 12 March 2002 marks an important step in the ongoing process of Germany's developing capital market law. (6)

B. The Case Background and Holding

[2] The facts are the following: plaintiff claims compensation for financial losses incurred during a reverse convertible bonds transaction against the defendant bank. Plaintiff sues out of a right transferred to him from the predecessor in right and assignor, who is retired and had bought reverse convertible bonds, issued by the B. AG, at a price of 99,15 with a nominal value of DM 50.000 in July 1998. The bonds bore a coupon as high as 10%, and, at maturity in August of 1999, could be redeemed either at their nominal value or through the conversion into 61 *Volkswagen* shares per DM 10.000 bonds at the issuer's choice. At maturity, the issuer had paid an interest of DM 5.000 and delivered 305 *Volkswagen* shares, whose share price had fallen from DM 188 to DM 108 since the bonds' acquisition in July 1998. Plaintiff claims payment of DM 17.060 against the defendant after having sold the shares for DM 32.940. He alleges that the bank had not properly (, i.e. in writing) informed his predecessor in right about the nature and risks of the executed transaction.

[3] The *Landgericht* (Regional Court) dismissed the case. (7) The *Kammergericht* (Higher Regional - Appeals - Court) allowed the appeal amounting to DM 12.060. (8) The FCJ remanded the case to the Regional Appeals Court upon appeal on points of law (*Revision*) by the defendant.

[4] The FCJ held that reverse convertible bonds are not stock exchange futures, and that therefore no written form of information is required. (9) However, the question, whether or not the bank had properly informed the private investor about the nature and risks of the executed transaction, remains open and therefore needs to be answered by the Regional Appeals Court.

C. A Matter of Terminology

[5] A clear definition of the nature and structure of reverse convertible bonds is crucial to the understanding of the FCJ's decision. Therefore, a brief terminological introduction is necessary before we examine more closely the normative framework of securities regulation and investor protection, in particular in light of the FCJ's decision.

[6] More widely spread and better known than ‘reverse convertible bonds' are ‘convertible bonds'. A convertible bond is a fixed income security which can be converted into a fixed number of the company's own underlying shares at the investor's option. From an investor's perspective, a convertible bond seems an attractive investment as the coupon is usually higher than a treasury bill with the same or a similar maturity. At maturity, i.e., when the stipulated time period comes to an end, the bond can be redeemed either through a cash settlement or through conversion into the underlying shares. The investor will regularly choose the first option should the stock price be below the nominal value, while he will use the latter should the stock price be above the redemption value, which in most cases will be the nominal value.

[7] In comparison, a reverse convertible bond is also a fixed income security with a conversion option. The only

difference is that the conversion is at the issuer's option. At maturity, the issuer will exercise his ('put') option, if the share price is below the nominal value of the bond. In this case, it makes no sense from the issuer's perspective to redeem the bond through a cash settlement. Therefore, the investor is in a position of an option writer (*Stillhalter*), i.e. should the issuer exercise his option, the investor has no choice but to accept the redemption in shares. Here, the nominal and redemption value can differ. The difference between the coupon and the market interest rates is regarded as the premium and compensation for the investor. (10)

I. Investment and Risk

[8] A security and its functioning in general can adequately be grasped only with regard to its risk. Put simply, investments are always connected to a risk related to unpredictable future returns. Capital market history displays rich evidence that the returns to investors have varied according to the risks they have borne. (11) Over the past decades, safe securities like treasury bills have provided a much lower average return than common stocks. (12) In addition, short-term treasury bills are as safe an investment as an investor can make. There is no default risk, while prices tend to be relatively stable due to their short maturity. In contrast, long-term government bonds are securities with price fluctuation according to varying interest rates (bond prices fall when interest rates rise and rise when interest rates fall). An investor in corporate bonds accepts an additional risk of default. Finally, a common stock investor has a direct share in the risk of the company.

[9] The reverse convertible bond which the FCJ had to deal with is of a different nature and unfolds in a different risk assessment. Its risk profile is different from convertible bonds as well as a number of other financial instruments because it is a structured product. Neither is it plain debt nor plain equity, and the issuer is not a company, but rather a financial institution which structures and sells the security. In terms of risk, this means that the return is even more unpredictable than the one of a common stock investment. Besides the fluctuation of bond prices and the risk of default of the issuer, the investor bears the risk of default of the company whose shares are underlying the reverse convertible bond. In the light of recent, dramatic cases of insolvency among even prominent companies, the last mentioned risk is not simply fictitious. Unlike institutional investors a private investor will, in most cases, not have the expertise to hedge his risks. The total loss of his investment is only limited by the coupon, or the difference between the coupon and the market interest rate.

II. The Law's View of the Market: Investors, Consumers, and Standards of Care

[10] In light of the revolutionary availability of such structured financial instruments to the private investor, the main question appears to be how existing rules and laws protect the (financial) interests of private investors. In other words: against which *ordnungspolitischen* (policy and economic order) background are we to understand the legislative activities on the field of capital market law in Germany in the past years? And, to follow, who is the financial actor at which the law has been addressing its regulatory attempts? Yet, there is a striking contrast between the legislators' assumptions as to the private autonomy competencies on the part of the individual investor and the highly complex cluster of varying fact situations involving different financial instruments. While the courts are asked to define and redefine the nature and functioning of these instruments, their central role is in assessing the relevant duties of care in the context of these instruments. As becomes more than clear from the recent FCJ decision, the courts are regularly struggling with an inherent desire to define general, abstract duties of care in order to mark liability on the part of the issuer while inevitably noting that the concrete circumstances of both the involved instruments and the facts of the case do escape such generalizing attempts. (13) Whether the correct answer to this difficulty is the cautious, piecemeal approach taken by the FCJ or a possibly more abstract take, remains open to discussion. Our impression is that the path chosen by the FCJ is a promising indication of the Court's dedication to a careful and sensitive assessment of new financial instruments with regard to investor interests in need of protection. The FCJ, by unfolding the liability issues in a two-step procedure (the first being the instrument's qualification and contextualization under German securities law, the second being the assessment of private law duties to inform (14)), shows a considerable awareness of the yet immature state of the law in this field. In this fast developing field where the law is constantly trying to catch up with financial innovation, the Court suggests a self-regulatory approach, which rejects overly abstract and generalizing standards in favour of a more contextual approach. In order to better understand the outlined case law on investor protection it is necessary to sketch to some extent the normative background of German securities regulation.

D. German Securities Regulation: Normative Background and Legislative History

[11] Effective as of 1 July 2002, the Fourth Financial Markets Promotion Act (Viertes *Finanzmarktförderungsgesetz* (15)) has brought about major changes affecting, *inter alia*, the Securities Trading Act (STA, *Wertpapierhandelsgesetz* (16)) and the Securities Exchange Act (SEA, *Börsengesetz* (17)) all of which are relevant statutes with regard to securities regulation and investor protection.

[12] According to Sec. 31 Sub. 2 Sen. 1 STA, investment services enterprises (18) are required to demand from their customers particulars as to their experience or knowledge of transactions intended to be the subject of investment services or non-core investment services, of the aims they pursue with those transactions and of their financial situation (No. 1) and to furnish their customers with all pertinent information (No. 2), in so far as this is necessary to protect their customers' interests and with regard to the type and scope of the intended transactions. The customers are not obliged to furnish information if so requested pursuant to sentence number 1 above, Sec. 31 Sub. 2 Sen. 2 STA.

[13] With regard to the extent of the information to be provided according to Sec. 31 Sub. 2 Sen. 1 No. 2 STA, at the latest before the acceptance of the customer's order, the customer is, insofar as necessary and with regard to his statements, to be informed about the nature and risks of the forms of investment *as well* as of other relevant facts, for example of the possibility of putting a limit on an order, especially in markets of low liquidity and a minimum number of orders. This can be done through standardised brochures. (19) The information must be correct, complete and unequivocal as well as structured and is to be presented in an appropriate manner. With regard to the content and form of the information, the securities services firm shall take into account the customer's knowledge of and experience in the relevant form of investment. (20) This means that, as a general rule, the duty to provide adequate information can be carried out orally. (21)

[14] The urgent necessity to fill these formula with concrete meaning becomes evident when they are being applied to a concrete fact situation. If a private investor (consumer, *Verbraucher* (22)) wants to buy and sell derivatives and warrants (financial futures, *Finanztermingeschäfte* (23)) there are specific requirements regarding the content and form of the information to be provided by enterprises which conduct financial futures transactions commercially or, on a scale which requires a commercially organised business undertaking, which purchase, sell, arrange or provide information on such transactions. As remarked before, financial futures transactions can be highly rewarding, but these chances are mirrored in great risk exposure. Therefore, the consumer has to be informed *in writing* about the risks specified in Sec. 37 d Sub. 1 Sen. 1 STA. Furthermore, the written information has to be signed by the consumer before the contract is concluded, and it shall be repeated before each subsequent period of two years has elapsed respectively (Sec. 37 d Sub. 1 Sen. 2,3 STA). If the enterprise has violated the duty to provide information pursuant to Sub. 1 it shall be liable to compensate the consumer for the damage resulting from such violation (Sec. 37 d Sub. 4 Sen. 1 STA). In case of dispute among the parties about whether or not the enterprise met the obligations pursuant to subsection 1 and whether or not it is responsible for the violation, the burden of proof rests with the enterprise (Sec. 37 d Sub. 4 Sen. 2 STA). The consumer's claim for compensation shall become time-barred after three years of the date on which the claim arises (Sec. 37 d Sub. 4 Sen. 3 STA), a statute of limitations equalling that of a tort claim under German Law (Sec. 852 BGB).

[15] In contrast to the new regulation, the old regime operated with a "non-binding"-model in the case that the private investor lacked legal competence to engage in a stock exchange futures transaction (*Börsentermingeschäftsfähigkeit*). In connection with these stock exchange futures transactions (*Börsentermingeschäfte*) (24), the duties which investment services enterprises had to perform, as established by the FCJ in a previous ruling (25), were two-fold: First, the consumer had to be legally competent to engage in a stock exchange futures transaction. He gained this legal compentence by being handed out written information on the risks of stock exchange futures by the enterprise and by signing this information. A standardized brochure published by the Central Associations of the Credit Services Sector (*Spitzenverbände der Kreditwirtschaft*) called "Important Information on the Risks of Loss When Dealing with Futures" (*Wichtige Informationen über Verlustrisiken bei Börsentermingeschäften*) was regarded sufficient to adequately inform the investor of these risks. (26) If the investor had not been handed out written information, and if he had not been provided with written information within one year thereafter or been repeated before each subsequent period of three years has elapsed, all respective transactions executed in between are not considered binding for the investor. As a consequence, he could reclaim the balance of his profits and losses for this reason. (27) The second duty which investment services enterprises had to perform was that the content of the written information, which the private investors had to be provided with, had to meet the requirements set forth in Sec. 53 SEA, Sec. 31 Sub. 2 STA.

E. The ruling of the Federal Court of Justice

[16] The FCJ's *Aktienanleihe*-decision was made under the old regime. If reverse convertible bonds were to be classified as stock exchange futures, the bank would have had to inform the defendant's predecessor in right in writing which it disputelessly didn't.

[17] The legal classification of reverse convertible bonds is controversial. Some legal scholars hold that reverse convertible bonds are stock exchange futures because the investor acts as an option writer because of the issuer's (put) option. (28) However, the jurisdiction as well as most the legal scholars reject its classification as a stock exchange future. (29)

[18] The difficulty in classifying any financial instrument as a stock exchange future lies in the absence of a definition in the (old) SEA. Therefore, the courts did develop, over time, criteria for classification. (30) According to the prevailing case law of the FCJ stock exchange futures are standardised contracts which are to be fulfilled by both sides at a later date, i.e. at maturity, and which have a connection to a futures market. (31) The particular dangers of these transactions, from which investors, who aren't legally competent to engage in a stock exchange futures transaction, are (were) protected by the (old) Sec. 53 et seq. SEA, lies in the fact that they, in contrast to spot transactions for which investors have to use cash or a credit amount instantly, induce investors to speculate for an advantageous but uncertain development because of the deffered time of fulfillment (*hinausgeschobener Erfüllungszeitpunkt*). (32) Ideally, the investor can liquidate his futures investment without having used his own funds and without having borrowed additional credit through a profit-making offsetting transaction (*Glattstellungsgeschäft*). Altered circumstances can lead to adverse developments. In such a case, an option writer who, as a private investor, will, in most cases, not have hedged his investment risks, will have to use additional funds to acquire the underlying currencies, commodities or securities. (33) Therefore, the risk of having to use unforeseen additional (borrowed) funds, as well as the risk of leverage and the risk of total loss are typically connected with stock exchange futures transactions. (34)

[19] The first and major criterion to be examined by the FCJ is the time of fulfilment in order to distinguish (stock exchange) futures transactions - with all the connected risks described above - from spot transactions. (35) The time of fulfilment is determined by the subject matter of the contract. In a reverse convertible bonds transaction, this is made up of the delivery of the bonds as well as of the payment of the agreed price. The delivery of the underlying shares, into which, at maturity, the bonds might be converted at the issuer's choice, is a modality of repayment, but not part of the contract's subject matter. (36) Therefore, the FCJ points out correctly that the cash payment as well as the delivery of the converted shares doesn't constitute the fulfillment of the contract of purchase, but rather fulfills the obligation of repayment constituted by the bonds. (37) Hence, the payment of the agreed price, which has to be made instantly (38) by the investor, is neither a margin (*Sicherheitsleistung*) nor a prepayment for the underlying shares into which the bonds might be converted. (39) Therefore, there is no danger that he will have to use additional (borrowed) funds at maturity. (40)

[20] According to the FCJ, there is no leverage risk involved in reverse convertible bonds transactions. In the Court's view, the investor's risk is always limited to the level of funds available to him: hence, the investor does not have the possibility to superproportionally participate in the performance of the underlying shares with a relatively small amount of funds. (41) Because the sum of the price of the underlying shares equals the nominal value of the bond the investor pays the "full" price for the shares. But unlike a direct investment in stocks, with reverse convertible bonds there is no superproportional participation in either the positive or negative performance of the underlying shares.

[21] Accordingly, the risk of total loss in a reverse convertible transaction is not as high as is the case in a stock exchange futures transaction. In this kind of transaction the risk of total loss occurs especially with regard to the above mentioned deffered and thereby fixed (limited) time of fulfillment. (42) Option premia, for example, can forfeit as soon as this period elapses. (43) This, however, as mentioned above, doesn't mean that there is no risk of total loss. This may well materialise in the case of default of the issuer. The fluctuation of bond prices and the risk of default of the company whose shares are the underlying of the reverse convertible bond are additional risks. Should these risks materialise, a total loss of the investment is only limited by the coupon or, by the difference between the coupon and the market interest rate. Yet, the risk of default of the issuer, the fluctuation of bond prices, and the risk of default of the respective company are not higher than when buying "straight" bonds or "straight" shares. The latter mentioned securities undoubtedly do not constitute stock exchange futures.

[22] Finally, according to the FCJ, the economic purpose of reverse convertible bonds differs from the one of stock exchange futures because futures are used primarily to speculate and hedge. (44) In contrast to that purpose the FCJ states that the issuers of reverse convertible bonds raise capital and earn fees by selling them. It is true that futures are bought and sold for the purposes of hedging and speculation. However, futures can have any function which other financial instruments fulfill, namely (non-speculative) investment and financing. (45) Therefore, the economic purpose doesn't necessarily constitute a useful criterion of definition and differentiation. However, taking the above mentioned futures-related risks into consideration reverse convertible bonds cannot be treated as stock exchange futures. Thus, no written information is required. Insofar as the content of the information is concerned, sadly, the judges remain silent. A breach of duty by the defendant bank by chosing the wrong form of information does not come into consideration. But what exactly is it that banks have to tell the customers and potential investors in order to adhere to the rulings of the STA? Banks and legal practitioners might be relieved and thankful for the meticulous examination of the "true" nature of reverse convertible bonds by the FCJ. Yet, the plaintiff and other (potential) investors are surely disappointed.

F. Conclusion

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[23] The duties of care applied to investment services enterprises affect both content and form of the information with which the consumer has to be furnished before the execution of his order.

[24] With regard to the content of "all pertinent information with which the consumers have to be furnished by the investment services enterprises, in so far as this is necessary to protect their customers' interests and with regard to the type and scope of the intended transactions" (Sec. 31 Sub. 2 STA), one unavailingly looks for clear standards in the FCJ's decision. The question of intensity and accurateness of the information provided and the question of liability doesn't depend on whether or not a reverse convertible bond is a financial future. (46) A court of lower instance specified the requirements to be met by investment services enterprises in a separate case. (47) According to the judges, the enterprises have to explain to the investor the issuer's (put) option and the risk which they "buy" by being given a relatively high coupon. Furthermore, the banks have to point out that, at maturity, the bond might be redeemed through a conversion into a fixed number of the underlying shares which, in their sum, might be worth less than the nominal value. The investor has to understand at which share price the issuer will exercise his option, and that in this case he will make a loss, despite the high coupon. (48) Should the enterprise violate these information duties it can be held liable for any damages resulting from this violation. (49)

[24] Insofar as the (written) form of the information is concerned, this requirement solely depends on the type of transaction. Written information is only required in connection with financial futures transactions, Sec. 37 d Sub. 1 STA. The FCJ convincingly and conceptually correctly explained why reverse convertible bonds are not to be treated as stock exchange futures (financial futures). Even under the newly modified law there can be no different decision.

[25] Against this background, the question still remains open, whether or not the FCJ's ruling can be read as clearly marking the Court's dedication to greater investor protection in light of a drastically growing number of financial instruments. Our impression is that the Court has not effectively furthered investor protection in this context. The Court's treatment of definition issues in relation to the financial instrument at hand is telling of its own (and justified, we might add) awareness as to their complexity, in particular to ordinary, smaller investors. The Court takes almost a page to explain why it thinks that a reverse convertible bond is not a stock exchange future (financial future). This already is a strong indication that this financial product is not self-explanatory and not easily comprehensible by the "average" investor. Interestingly, two of the leading German issuers of reverse convertible bonds, namely ING BHF-Bank and Sal. Oppenheim, demanded an investor's legal compentence to engage in stock exchange futures transactions. (50)

[26] In order to avoid asymmetries deriving from ever varying ways of giving financial advice to private investors, it could be argued that there should be standardized duties regarding information about the positive and negative aspects of securities and financial futures investments rather than arguable categorizations of the various financial products. (51) Being self-dependent and autonomous implies being free to make one's own informed choices. It is up to the legislator to provide a framework of rules which allows for such choices. The legislative experiences made, for example, in the field of prospect liability can provide a richly developed source of information. (52) The challenge for legislators, judges and lawyers continues to further refine their conceptual assessments of new financial instruments in light of a historically grown legal culture of consumer and investor protection. (53)

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(1) Comments on the *Aktienanleihe*-Decision by the Federal Court of Justice (BGH) of 12 March 2002, published in: BB 2002, p. 850.

(2) See e.g. Lenenbach, Kapitalmarkt- und Börsenrecht (2002), preface; Mülbert, Empfiehlt es sich, im Interesse des Anlegerschutzes und zur Förderung des Finanzplatzes Deutschland das Kapitalmarkt- und Börsenrecht neu zu regeln?, JZ 2002, p. 826; cf. the expert opinions on this topic prepared by Hanno Merkt and Holger Fleischer for the 64th Session of the German Jurists Convention in Berlin (2002).

(3) See, recently, the comprehensive treatment by Reiner, Derivative Finanzinstrumente im Recht (2002).

(4) See Lenenbach, supra note 2, p. 481; for a concise treatment of new financial instruments see Reiner, supra note 3; Raeschke/Kessler, Bankenhaftung bei Anlageberatung über neue Finanzprodukte, WM 1993, p. 1830.

(5) Gesetz über den Wertpapierhandel (Wertpapierhandelsgesetz - WpHG) in its version of 9 September 1998 (Official Bulletin (*BGBl.*) I p. 2708), last amended by Art. 4 of the law of 23 July 2002 (Official Bulletin (*BGBl.*) I p. 2778): http://www.bafin.de/gesetze/wphg.htm; Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG) of 27 April 1998 (Official Bulletin (*BGBl.*) I p. 786):

http://www.ecgi.org/codes/country_documents/germany/gkontrag.pdf; German Corporate Governance Code in its version of 7 November 2002: http://www.ebundesanzeiger.de/download/kodex2.pdf; Gesetz über Kapitalanlagegesellschaften (KAGG) of 16 April 1957 (Official Bulletin (*BGBl.*) I p. 378), last amended by Art. 3 of the law of 21 June 2002 (Official Bulletin (*BGBl.*) I p. 2010): http://bundesrecht.juris.de/bundesrecht/kagg/htmltree.html; Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz - TraPuG) of 19 July 2002 (Official Bulletin (*BGBl.*) I p. 2681): http://217.160.60.235/BGBL/bgbl1f/bgbl102s2681.pdf; Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland (Viertes Finanzmarktförderungsgesetz) of 21 June 2002 (Official Bulletin (*BGBl.*) I p. 2010): http://www.boersenaufsicht.de/4_fmfg.pdf; see hereto the comprehensive treatment by Lenenbach, supra note 2; Zumbansen, The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-regulation, Juridikum 3 (2002), pp. 32-40, also in: 1 ANNUAL OF GERMAN & EUROPEAN LAW 2003 (Russell Miller/Peer Zumbansen eds.), Berghahn Books (Oxford/New York), *forthcoming* 2003.

(6) See Federal Court of Justice, Decision of 12 March 2002, supra note 1.

(7) Regional Court (*Landgericht* – LG) Frankfurt, WM 2000, p. 1293.

(8) Regional Appeals Court (*Kammergericht* – KG) Berlin, ZIP 2001, p. 1194.

(9) FCJ BB 2002, p. 850 (Leitsätze 1 und 2).

(10) See Kilgus, Anleihen mit Tilgungswahlrecht des Emittenten (Reverse Convertibles), WM 2001, p. 1325; Köndgen, Comment on the Decision by the Regional Appeals Court Berlin, supra note 8, ZIP 2001, p. 1197.

(11) Brealey/Myers, Principles of Corporate Finance (2000), 6th ed., p. 153.

(12) Ibid.

(13) *‚Anlagengerechte Beratung* and *objektgerechte Beratung‘* as guiding principles in investment advice, see FCJ 123, p. 126.

(14) See infra.

(15) See supra note 5.

(16) Ibid.

(17) Börsengesetz (BörsG) in its version of 21 June 2002 (Official Bulletin (*BGBl.*) I p. 2010).

(18) See definition in Sec. 2 Sub. 4 STA.

(19) Sec. B.2.2. of the Directive of 23 August 2001 under Sec. 31, 32 Securities Trading Act (Richtlinie gemäß § 35 Abs. 6 des Gesetzes über den Wertpapierhandel (WpHG) zur Konkretisierung der §§ 31 und 32 WpHG für das Kommissionsgeschäft, den Eigenhandel für andere und das Vermittlungsgeschäft der Wertpapierdienstleistungsunternehmen of 23 August 2001 („Wohlverhaltensrichtlinie"), Federal Gazette (*Bundesanzeiger*) No. 165 of 4 September 2001, p. 19 217).

(20) Ibid.

(21) FCJ WM 1998, p. 1391; Kienle in Schimansky/Bunte/Lwowski, Bankrechtshandbuch Vol. III (2001), § 110 Para. 19; Kümpel, WM 1995, Die allgemeinen Verhaltesregeln des Wertpapierhandelsgesetzes, p. 689.

(22) See - the recently adopted - definition in Sec. 13 of the German Civil Law Code (*Bürgerliches Gesetzbuch*).

(23) See definition in Sec. 2 Sub. 2a STA.

(24) Comprehensive illustration Reiner, supra note 3, p. 86 et seq.

(25) FCJ 133, p. 86 with a comment by Allmendinger, EwiR 1996, p. 699.

(26) FCJ WM 1998, p. 1391; this ruling came about still under the old Sec. 53 Sub. 2 SEA. The duties of adequate information regarding futures transactions are now regulated by the Securities Trading Act. The term

Börsentermingeschäfte (formerly Sec. 53 SEA) has been replaced with the term *Finanztermingeschäfte* by the Fourth Financial Markets Promotion Act (now Sec. 2 Sub. 2a and Sec. 37 d et seq. STA).

(27) Cf. Ellenberger, Die neuere Rechtsprechung des Bundesgerichtshofes zum Börsenterminhandel, WM 1999, Supplement No. 2, p. 5; Nieding, 4. Finanzmarktförderungsgesetz (3) – Kein großer Wurf für den Anlegerschutz, Börsen-Zeitung, 17.10.2001, http://www.boersenzeitung.de/online/redaktion/fimafoeg/BZ200066.HTM.

(28) Braun, Pflicht der Bank zur schriftlichen Risikoaufklärung bei Erwerb von Aktienanleihen, BKR 2001, p. 53; Köndgen, supra note 10, p. 1198; Lenenbach, Aktienanleihen - Ihre Behandlung im Zivil- und Börsenterminrecht und nach dem AGBG, NZG 2001, p. 483, 489; Luttermann, Aktienverkaufsoptionsanleihen ("reverse convertible notes"), standardisierte Information und Kapitalmarktdemokratie, ZIP 2001, p. 1901, 1903.

(29) Higher Regional Court (LG)Frankfurt, WM 2000, p. 1293; Higher Regional Court (LG) Wuppertal BKR 2002, p. 190; Assmann, Irrungen und Wirrungen im Recht der Termingeschäfte, ZIP 2001, p. 2078; Clouth, Pflicht der Bank zur schriftlichen Risikoaufklärung bei Erwerb von Aktienanleihen, BKR 2001, p. 47; Dötsch/Kellner, Aufklärungs- und Beratungspflichten der Kreditinstitute beim Vertrieb von Aktienanleihen, WM 2001, p. 1998; Kilgus, supra note 10; Müller, Aktienanleihen: Einordnung als Termingeschäft und Erfordernis schriftlicher Aufklärung?, ZBB 2001, p. 371; Rümker, Anleihen mit Tilgungswahlrechten des Emittenten unter besonderer Berücksichtigung der Tilgung durch Lieferung von Aktien, in Beisse/Lutter/Närger (eds.), Festschrift für Karl Beusch (1993), p. 743; Zietsch, Keine Pflicht zur schriftlichen Information bei Aktienanleihen, NJW 2002, p. 1925.

(30) Cf. Reiner, supra note 3, 90; Müller, supra note 29, p. 363.

(31) FCJ 92, p. 317; 114, p. 177; BB 2002, 283 and 850.

(32) FCJ BB 2002, p. 850; see also Clouth, supra note 29, p. 45; Dötsch/Kellner, supra note 29, p. 1996.

(33) Dötsch/Kellner, supra note 29, p. 1997.

(34) Cf. Reiner, supra note 3, p. 38 et seq.; Zietsch, supra note 29, p. 1926.

(35) See also FCJ WM 1988, p. 323; Regional Appeals Court (KG) Berlin BKR 2002, p. 399.

(36) Müller, supra note 29, p. 368; but see Braun, supra note 28, p. 50; Lenenbach, supra note 28, p. 484.

(37) FCJ BB 2002, p. 851.

(38) Mostly within two days, see FCJ 103, p. 84; Rümker, supra note 29, p. 743.

(39) Ibid.; Dötsch/Kellner, supra note 29, p. 1997; Zietsch, supra note 29, p. 1927.

(40) Dötsch/Kellner, supra note 29, p. 1996.

(41) FCJ BB 2002, p. 851; see also Assmann, supra note 29, p. 2071.

(42) FCJ BB 2002, p. 851; Zietsch, supra note 29, p. 1927; Reiner is stating that this "deadline pressure" (Termindruck) isn't a characteristic feature determining whether or not a financial instrument is a future (or more generally speaking a derivative), supra note 3, p. 43 et seq.

(43) Assmann, supra note 29, p. 2078.

(44) FCJ BB 2002, 851; 114, p. 117.

(45) Reiner, supra note 3, p. 5.

(46) See also Köndgen, supra note 10, p. 1198.

(47) Regional Appeals Court (*KG*) Berlin BKR 2002, p. 402.

(48) Ibid.

(49) There will, of course, be procedural difficulties for the investor to prove that the information duties have been

violated by the enterprise. It will regularly name the respective employee who will tell the court, as a witness, that all the required information has been given or simply told, which is sufficient, to the investor.

(50) Banken sehen Klagen gegen Aktienanleihen gelassen entgegen, F.A.Z., 16.6.2001, p. 26.

(51) Cf. Luttermann, Comment on FCJ BB 2002, p. 850, JZ 2002, p. 781, who suggests the introduction of a « Risk Passport » which, in a standardized way, contains information about the specific risks of the investments.

(52) Cf. Assmann, Prospekthaftung, in Assmann/Schütze (eds.), Handbuch des Kapitalanlagerechts (2001, suppl. vol.), 2nd ed., § 7; Grundmann in Schimansky/Bunte/Lwowski, supra note 21, § 112 Para. 31 et seq.; Hüffer, Das Wertpapier-Verkaufsprospektgesetz – Prospektpflicht und Anlegerschutz (1996), § 7 et seq.; Assmann, Prospekthaftung als Haftung für die Verletzung kapitalmarktbezogener Informationsverkehrspflichten nach deutschem und US-amerikanischem Recht (1985).

(53) See, hereto, the brillant essay by Kübler, Wirtschaftsrecht in der Bundesrepublik. Versuch einer wissenschaftshistorischen Bestandsaufnahme, in Simon (ed.), Rechtswissenschaft in der Bonner Republik (1994), p. 364.