Article

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Trust, Information and Pre-contractual Liability

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Abstract: This article explores on two 'strangers' for contract law – even though, at second sight, they both would seem truly seminal to contract law. This is, on the one hand, investment advice and more generally (pre-)contractual relationships on the giving of information in capital markets – arguably the largest market and contract segment in developed market economies, or at least one of the largest, but typically rather discussed only in specialised circles. This is, on the other hand, a broad pluralist interdisciplinary theory on trust in its relationship to information – largely underexplored and even missing in parts, even though absolutely core for all trust elements in contracts. There are not few of them. The core argument is that, if sociological, ethical and philosophical approaches are included, the outcome is grossly different from what ensues from the reference to the findings of institutional economics – so far dominant at least in financial services contracts. This is true namely for the desirable design of information, for the focus on specific groups of addressees and as well for the (traditionally rather high) prerequisites of pre-contractual liability.

Keywords: information, investment services, investor-specific advice, pre-contractual duties, pluralist legal theory, prospectus liability, trust

Résumé: Cet article s'intéresse à deux " inconnus " du droit des contrats – même si, à l'analyse, ils semblent tous deux véritablement essentiels au droit des contrats. Il s'agit, d'une part, du conseil en investissement et plus généralement des relations (pré-)contractuelles relatives à la communication d'informations sur les marchés de capitaux – sans doute le plus grand marché et le plus grand secteur contractuel dans les économies de marché développées, ou du moins l'un des plus grands, mais généralement plutôt discuté uniquement dans des cercles spécialisés. Il s'agit, d'autre part, d'une vaste théorie pluraliste interdisciplinaire

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sur la confiance dans sa relation avec l'information – largement sous-explorée voire en partie inexistante, alors même qu'elle est absolument essentielle pour tous les éléments liés à la confiance dans les contrats, qui sont nombreux. L'argument central est que, si on inclut les approches sociologiques, éthiques et philosophiques, le résultat est très différent de ce qui résulte de la référence aux conclusions de l'économie institutionnelle – jusqu'à présent dominante au moins dans les contrats de services financiers. Il en va ainsi notamment s'agissant de la conception qu'il conviendra de retenir de l'information, de l'accent mis sur des groupes spécifiques de destinataires, ainsi que de l'appréciation (traditionnellement très exigeante) des conditions de la responsabilité précontractuelle.

Zusammenfassung: Dieser Beitrag beschäftigt sich mit zwei Gegenständen, die eher am Rande des Vertragsrechts zu liegen scheinen – was freilich bei näherem Hinsehen geradezu ins Gegenteil umschlägt, dies in zwei Haupthinsichten. Auf der einen Seite bilden Kapitalmärkte und der dort zentrale Anlageberatungsvertrag – und damit auch allgemein Verträge zu vorvertraglichen Informationspflichten – eines der größten, vielleicht gar das größte Markt- und damit Vertragssegment in den klassischen westlichen Marktwirtschaften, auch wenn sie tendenziell fast nur in spezialisierten Kreisen diskutiert werden. Auf der anderen Seite erscheint eine breite (pluralistische) interdisziplinäre Theorie von Vertrauen als Flankenschutz oder gar Alternative zu Information kaum ausgebildet – trotz ihrer Wichtigkeit für alle Vertrauenskonzepte und -anforderungen im Vertragsrecht. Und davon gibt es zuhauf. Das Hauptargument geht dahin, dass, wenn soziologische, ethische und philosophische Ansätze prominent einbezogen werden, die Resultate deutlich divergieren zu denen, die bei Heranziehung des Instrumentariums der Institutionenökonomik naheliegen (das derzeit jedenfalls das Vertragsrecht der Finanzintermediäre beherrscht). Dies gilt namentlich für den wünschenswerten Zuschnitt von Information, für die Adressierung bestimmter Gruppen und vor allem auch für die (klassisch eher hohen) Anforderungen an eine Haftung für fehlerhafte vorvertragliche Information (namentlich Prospekthaftung).

1 Introduction: Low Trust in Investment Contracts as a Core Inroad to Justice

The markets for (capital) investments and disinvestments are among the largest market sectors. Even in countries with a rather low capitalization rate, such as

Germany, they amount to a share of 3.8% of the GDP.[1] Thus, even for value creation and even in Germany, capital markets almost reach the same level as an industry such as the motor-vehicle industry, which in Germany is particularly strong;[2] in the whole of Europe, they even surpass it. This is so despite the so-called household investment gap – the paradox that in virtually all market economies with a developed capital market investment structure, private or household investment volume is infinitely lower than the utility function of (rational and informed) private investors would suggest.[3] Without this gap, the distance to the motor-vehicle segment would be considerably larger. This finding would suggest that trust is developed in a suboptimal way in the household investment segment. This is despite the fact that, as will be explained, trust as a concept plays a seminal role in the justification of measures in European Capital Market Law and in some parts of it even as the prime and ultimate benchmark.

Two further remarks illustrate the immense importance of this little paradox and humble statement. On the one hand, this is the type of long-term investment that, together with investments in land and immovables, ranges far ahead of all other traditional investment types with respect to returns and prospects for growth in value, well above saving accounts and investments in bonds[4] (with, in addition, extraordinary ease and low costs of investment and disinvestment). This finding also shows a blatant gap in justice: household investments would *de facto* seem to

1 For Germany, some 3.7% of the public economy's value creation, see the statistics of Statistisches Bundesamt and scientific service of the German Parliament at https://www.destatis.de/DE/Themen/Wirtschaft/Volkswirtschaftliche-Gesamtrechnungen-Inlandsprodukt/_inhalt.html#sprg227266 and at https://de.statista.com/statistik/daten/studie/252498/umfrage/bilanzsumme-der-banken-in-deutschland-in-relation-zum-bip/ respectively (financial and insurance activities – 2021). For the EU27 3.9% (Financial and insurance activities – 2021), https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do. On the other hand, the balance sheet volume of the financial sector typically amounts to almost double of the GDP, for Germany: https://de.statista.com/statistik/daten/studie/252498/umfrage/bilanzsumme-der-banken-in-deutschland-in-relation-zum-bip/.

2 For Germany 4.7% https://www.destatis.de/DE/Presse/Pressemitteilungen/2019/04/PD19_139_811.html. For the EU27 1.9% https://appsso.eurostat.ec.europa.eu/nui/submitViewTableAction.do.

3 M. Haliassos/C. Beraut, 'Why do so few hold stocks?' 105 *Economic Journal* 1110–1129 (1995); J. Campbell 'Household Finance' 61 *The Journal of Finance* 1553–1604 (2006); J. Campbell, 'Restoring Rational Choice: The Challenge of Consumer Financial Regulation, Richard T Ely Lecture' *American Economic Association Annual Meeting* 2016; also E. Darriet/M. Guille/J.-C. Vergnaud/M. Shimizu, 'Money illusion, Financial literacy, and numeracy: experimental evidence' 76 *Journal of Economic Psychology* 102211 (2020). For statistical material, see N. Chater/S. Huck/R. Inderst, *Consumer Decision-Making in Retail Investment Services: A Behavioural Economics Perspective, Final report 1–480* (November 2010), for instance p 18 (statistics on countries) and 56 ('a large literature on household finance has documented the so-called stockholding [non-participation] puzzle').

4 See survey *Wirtschaftswoche* 31 March 2017 https://www.wiwo.de/finanzen/geldanlage/renditevergleich-das-jahrhundertduell-aktien-gegen-immobilien/19587708.html.

be deprived to a considerable extent of the chances of the most promising investment opening for their savings – with, for instance, a considerable impact on peoples' lives in old age. On the other hand, this comparison with other forms of household investment also makes clear that the law relating to investment and disinvestment on capital markets – while typically rather treated in conjunction with company law (the law of listed companies)[5] – rather obviously forms as well a part of contract law. The alternatives, saving accounts (as specific forms of loans to credit institutions) and contracts for the purchase (and selling) of land or other immovable assets, quite obviously form contracts. The question would seem to be why this should be different with the relationship underlying the investment and disinvestment in financial instruments. Indeed, while the character of the MiFID regulation on investment advice may be disputed,[6] both investment advice itself (the giving of information) and the purchase of financial instruments are seen as two contracts in any jurisdiction.[7] In this contract, information (on the financial

5 See, for instance M. Andenas/F. Wooldridge, *European Comparative Company Law* (Cambridge: Cambridge University Press, 2009) (at least take-overs); R. Kraakman/J. Armour/P. Davies/L. Enriques/H. Hansmann/G. Hertig/K. Hopt/H. Kanda/M. Pargendler/W.-G. Ringe/E. Rock, *The Anatomy of Corporate Law*: *A Comparative and Faunctional Approach* (3rd ed, Oxford: Oxford University Press, 2017); S. Grundmann, *European Company Law – Organization, Finance and Capital Markets* (2nd ed, Cambridge/Antwerp/Portland: Intersentia, 2012); K. Langenbucher, *Aktien- und Kapitalmarktrecht* (5th ed, Munich: CHBeck, 2022).

6 The ECJ seems undecided, leaves the choice of which private law rules to apply to the Member States in any case, but is not clear on whether there are private law remedies at all, see ECJ of 30 May 2013 – case C-604/11 Bankinter ECLI:EU:C:2013:344 = *OJ EU* 2013 C 225/16; broader interpretation in S. *Grundmann, European Review of Contract Law* 8 (2013) 267–280; confirmed by ECJ of 3 December 2015 case C-312/14 Banif ECLI:EU:C:2015:794 = *OJ EU* 2016 C 38/6. In Germany, the Supreme Court denies private law remedies in general, but sees them as being founded when the rule violated constitutes a foundational principle (probably the case in the standards discussed in this article), see BGH 3 June 2014 – XI ZR 147/12, *BGHZ (official reports)* 201, 310 = *Wertpapier-Mitteilungen* 2014 (on the general principle of transparency of disclosure, at paras 32 *et seq*); broader survey in S. Grundmann, *Bankvertragsrecht – Investmentbanking*, vol 2 (Berlin/Boston: de Gruyter, 2021) part 5 para 142 and part 8 para 223–225 and 274. In other Member States such as Spain private law remedies would seem to be available: Supremo Tribunal Roj: *STS* 354/2014 Id Cendoj: 28079119912014100002 and Roj: *STS* 2659/2014 Id Cendoj: 28079110012014100312 esp Roj: STS 2660/2014 Id Cendoj: 28079110012012100031 esp Roj: STS 2666/2014 Id Cendoj: 28079110012014100316. For Italy, see Corte di Cassazione of 17 February 2009, case 3773/2009, *Banca, Borsa, Titoli di Credito* 2012, 1, II, 38, Sections 3.1 and 3.2. For the UK, see Supreme Court (Lord Hope) of 29 February 2012, *In the matter of Lehman Brothers International (Europe) (In Administration) and In the matter of the Insolvency Act 1986 [2012] UKSC 6*. Broadly M. Wallinga, *EU Investor Protection Regulation and Liability for Investment Losses – Comparative Analysis of the Interplay between MiFID & MiFID II and Private Law* (Cham: Springer, 2020).

7 See, for instance, BGH 1 July 2014 – XI ZR 247/12, *Wertpapier-Mitteilungen* 2014, 1621; BGH 28 April 2015 – XI ZR 378/13, *Wertpapier-Mitteilungen* 2015, 1273; for abundant references, see Grundmann, n 6 above, part 8 para 124.

instrument and issuer and on a best investment strategy for the investor, given his circumstances) is paramount (tailor-shaped 'know your customer'). For this, at least when marketing such instruments for a first time purchaser, the investment advisers (intermediaries) typically refer to the prospectus for information on the instrument and on the issuer, with a view to fulfil their own disclosure duties.[8]

This very substantial piece of information is chosen as the object of analysis on which this essay is focussed.[9] The core question is how it should be arranged and to which addressees mainly. Moreover, the key question is how should pre-contractual liability be designed in order to increase trust, in particular the trust of private or household investors (Section 3). While these questions are, of course, the object of a plethora of papers and even treatises – though not so much for the contract law implications –, the novelty of this paper is the methodology. In fact, this paper is based on the view that an approach inspired by *all* relevant adjoining disciplines is heuristically and – above all – normatively superior to an approach only or almost exclusively inspired by institutional economics.[10] Therefore, the novelty of the paper resides mainly in that it strongly draws on sociological, ethical

8 See Grundmann, n 6 above, part 8 para 178, 183, 204, 224.

9 This choice is made notwithstanding the fact that trust as a concept is still more prominent in the EU legislation on market abuse (namely insider dealing). In fact, the European legislature justified the ban on insider dealing in its broad coverage not with (more or less concrete) harm done to issuers or market-makers (on which there are precise economic theories/calculations). Rather the legislature justified such ban with the reference to the rather vague concept of investor trust in integrity and well-functioning of capital markets that insider dealing would undermine in a particularly blatant way. See recitals 2, 23, 24, 32, 55, 58 and art 1 Market Abuse Regulation (EU) 596/2014 and recital 1 Market Abuse Directive 2014/57/EU (criminal sanctions). Similarly, when the ban was first enacted recitals 3–6 of Insider Dealing Directive 89/592/EEC; ECJ of 23 December 2009 – case C-45-08 *Spector Photo Group*, Slg 2009, I-12073 (1 tenet); H.-D. *Assmann,* 'Das künftige deutsche Insiderrecht' *Aktiengesellschaft (AG)* 1994, 196–206, 202; *and as well* D. Dedeyan, *Regulierung der Unternehmenskommunikation – Aktien und Kapitalmarktrecht auf kommunikationstheoretischer Grundlage*, (Baden-Baden: Nomos, 2015) 678 *et seq*; conversely, however, see as a mere facet of disclosure in G. Bachmann, *Das Europäische Insiderhandelsverbot* (Berlin/Boston: de Gruyter, 2015) 18 *et seq*. However, the contract dimensions are less direct than with respect to pre-contractual disclosure duties of investment advisers (intermediaries). A longer article (with stronger focus on the law of enterprises) is in preparation for this part of European Capital Market Law (forthcoming in *European Business Organization Law Review (EBOR)* 2023).

10 See, more in detail, S. Grundmann/H. Micklitz/M. Renner, *New Private Law Theory – A Pluralist Approach* (Cambridge: Cambridge University Press, 2020); M. Auer, *Zum Erkenntnisziel der Rechtstheorie – philosophische Grundlagen multidisziplinärer Rechtswissenschaft* (Baden-Baden: Nomos, 2018); S. Grundmann, 'Three Views on Negotiation – an Essay between disciplines', in *Festschrift for Hans Micklitz* 2014 (K. Purnhagen/P. Rott [eds], *Varieties of European Economic Law and Regulation* [Heidelberg: Springer, 2014]) 3–30; S. Grundmann, 'Pluralistische Privatrechtstheorie – Prolegomena zu einer pluralistisch-gesellschaftswissenschaftlichen Rechtstheorie als normativem Desiderat ("normativer Pluralismus")' *Rabels Zeitschrift für ausländisches und*

and philosophical approaches to trust – in part because trust is much more central to these disciplines' research than in economics. The novelty lies in sketching out their claims (see below Section 2), but mainly in applying them to the contract law questions named. Indeed, the outcome will prove to be grossly different from what ensues from the (so far largely dominant) reference to the findings of institutional economics. This is true namely for the desirable design of information, for the focus on specific groups of addressees and as well for the (traditionally rather high) prerequisites of pre-contractual liability (see below Section 3).

2 Trust – Core Ideas in a Plurality of Adjoining Disciplines[11]

2.1 Differences as Bliss for Knowledge and Normative Pluralism

The general tenet proposed here – trust is fundamentally different and independent from a quest for maximum information gathering and processing, maximum control (monitoring) and controllability[12] – forms the reverse of the approach taken almost unanimously in the economic and capital market law literature, according to which trust is understood *de facto* as *ancilla informationis*.[13] It starts out from the

internationales Privatrecht (RabelsZ) 86 (2022) 364–420 – in English forthcoming as 'Pluralism and Private Law Theory – a Pluralist Private Law Theory for a Pluralist Value Basis'.

11 Parts of Sections 2 and 3 retake or are largely related to two of my publications in German S. Grundmann, 'Vertrauen und (EU-)Kapitalmarkt – Theorie und Fallstudien zu einer neuen Mesotes im Wirtschaftsrecht', in *Festschrift for Windbichler* (Berlin/New York: de Gruyter, 2020) 67–96; S. Grundmann, 'Emissionspublizität und Vertrauen – Geburt von Alternativmärkten, –Instrumenten und –Haftung', in *Festschrift for Grunewald*, (Cologne: Verlag Dr Otto Schmidt, 2021) 227–251.

12 This has been emphasised time and again, especially in sociological trust research, in particular by A. Giddens, *Konsequenzen der Moderne* (Frankfurt am Main: Suhrkamp, 1995 (in English Oxford: Blackwell, 1990)) 48 'Key condition … lack of complete information'. According to this, modern societies build institutional frameworks for actions that are recognised as risky ('trust settings, rounding frameworks of trust', p 35). This is also summarised as a middle state between knowledge and (complete) ignorance see G. Simmel, *Soziologie – Untersuchungen über die Formen der Vergesellschaftung* – Gesamtausgabe vol 11 (Frankfurt am Main: Suhrkamp, 1992) (1st ed, Leipzig: Duncker & Humblot, 1908) 393; J.M. Barbalet, 'Social emotions – confidence, trust and loyalty' 16 *International Journal of Sociology and Social Policy* 75–96 (1996); on this, see as well H. Merkt, *Unternehmenspublizität – die Offenlegung von Unternehmensdaten als Korrelat der Marktteilnahme* (Tübingen: Mohr Siebeck, 2000) 347.

13 See, only P. Sapienza, 'Trust and Financial Markets', in D. Evanoff/P. Hartmann/G. Kaufmann (eds), *The First Credit Market Turmoil of the 21st Century* (Singapore: World Scientific Publishing,

example in which trust was perhaps most significantly brought to the fore (insider trading law). Then, however, it really focuses on the concept in an area (still today) more strongly influenced by the information paradigm, prospectus law – both at the same time the cornerstones of the development of EU capital market law in the late 1980[s] and early 1990[s]. This is in contrast to the traditionally prevailing approach in economics and economics and law literature, which tends to conceive trust only as an annex to an information model and not as an independent concept. Conversely, however, this is by no means intended as a rejection of an information model across the board. Rather, it is intended to demonstrate a pluralism of valuation concepts in capital market law and the law of economic contracts as well. Capital market law with its manifold contractual relationships – despite a very high degree of professionalisation and a strictly commercial law approach – is neither seen as a place for a solely dominant rationality paradigm nor as one for theoretical approaches fed exclusively or even primarily by economics. In this section on the foundations of trust – although the understandings in the relevant disciplines also show clear signs of methodological convergence and it therefore necessarily remains somewhat simplistic to speak of sociological, economic, philosophical theory, etc.[14] – the differences will be addressed above all in order

2009) 29 *et seq*; and P. Mülbert/A. Sajnovits, 'Vertrauen und Finanzmarktrecht' 1 *Zeitschrift für Privatrechtswissenschaft (ZfPW)* 1–51 (2016) *et passim*, but also p 23 (conceivable 'other consideration, like redistribution, investor protection [!] or general fairness considerations … [which] would challenge legislatures as well'. Since no examples follow, this remains a theoretical reservation. In the foreground are confidence-building through information and through institutions where settlement is practically completely assured. The opposite extreme with S. Kalss, 'Der Vertrauensgrundsatz im Gesellschafts- und Kapitalmarktrecht', in D. Aichberger-Beig/F. Aspöck/P. Leupold/J. Oelkers/S. Perner/M. Ramharter (eds), *Vertrauen und Kontrolle im Privatrecht* – Jahrbuch Junger Zivilrechtswissenschaftler 2010 (JJZ, Vienna: Borgber, 2011) 9–38, 31 *et seq*, where an across-the-board failure of the information model in capital market law is postulated.

14 Among the most famous examples J. Rawls, *A Theory of Justice* (Cambridge (MA): Belknap, 1971). In his theory of justice, Rawls adopts typical elements from the social sciences, namely economics, such as rationality as a basic assumption on the part of the rule-giver and individual incentive control, and to some extent total utility maximisation as well. Yet, he not only argues vehemently against utilitarian theories, but nevertheless arrives at results with his two principles of justice that deviate completely from those of economics and utilitarian theoretical approaches. Cf for example A. Sen, *The Idea of Justice* (Cambridge (MA): Belknap, 2009) 52 *et seq*; M. Fleurbaey *et al* (eds), *Justice, Political Liberalism, and Utilitarianism* (Cambridge: Cambridge University Press, 2008); S. Grundmann, in Grundmann/Micklitz/Renner, n 10 above, chapter 6. Similar convergence tendencies (again on the main elements mentioned), for example, in J. Coleman's work. The author develops (parallel to Bourdieu) the concept of 'social capital', which is central to trust research – as a range of values that does not follow market laws, but which is also important in markets and in part indispensable –, but at the same time wants to take rational actors maximising self-interest as a basis. Cf J. Coleman, *Foundations of Social Theory* (Cambridge (MA): Harvard University Press,

not to prematurely narrow the focus to one direction (below Section 2.2). In a different and more positive way, a '*mesotes* position' in the classical Aristotelian sense is examined – and sought – as it is found as both a (constitutionally) dogmatically fruitful legal idea and a normative legal concept of practical concordance[15] – as the golden mean between various opposites based on social science, but at the same time fed by them.

Central to almost all of these explanatory approaches is the starting point of the categorical difference between personalised trust and system trust – as well as possibly organisational trust as a further (possibly hybrid) category.[16] This contrast will be taken up in the most diverse contexts in the following discussion. This starting point already makes it clear that while economic and business law literature often only draws on sources from these disciplines for this fundamental distinction, it was founded by Max Weber and Simmel and worked through in depth above all in sociological and social theoretical literature.

Since different disciplines describe the same phenomenon, parallels in the concept and in the analysis are quite obvious. Thus, if in the behavioural sciences heuristics are recognised that make decisions – for example in the face of uncertainty or under time pressure – possible or at least easier in the first place (heuristics approach), in economic theory this can be explained in other terms. There, it is mostly argued that actors dispense with the creation of information, when costs would be higher than the expected profit and hence just trusting is

1990) esp chapter 1; and below 2 a); closer to 'social capital' as a concept, for example P. Bourdieu, 'Ökonomisches Kapital, kulturelles Kapital, soziales Kapital' special volume 2 *Soziale Welt* 183–198 (1983); J. Coleman, 'Social Capital in the Creation of Human Capital' 94 *American Journal of Sociology* 95–120 (1988); summarising S. Haug, 'Soziales Kapital – ein kritischer Überblick über den aktuellen Forschungsstand' MZES Arbeitspapiere, Ab II Nr 15 (1997); A. Portes, 'Social Capital – its origins and applications in modern sociology' 24 *Annual Review of Sociology* 1–24 (1998).

15 Fundamental on this K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: CFMüller, Reprint of the 20th ed 1999) para 72.

16 J. Evers, *Vertrauen und Wandel sozialer Dienstleistungsorganisationen – eine figurationssoziologische Analyse* (Berlin: Springer, 2017) *inter alia* chapter 2 (with discussion and review of the literature on the question of whether system and organisational trust promote or hinder evolutionary change); R. Hardin, 'Trusting persons, trusting institutions', in R. Zeckhauser (ed), *Strategy and Choice* (Cambridge (MA): MIT Press, 1991) 185–209; R. Kramer, 'Trust and distrust in organizations – emerging perspectives, enduring questions' 50 *Annual Review of Psychology* 569–598 (1999); C. Lane/R. Bachmann (eds), *Trust within and between organizations – conceptual issues and empirical applications* (Oxford: Oxford University Press, 1998); Mülbert/Sajnovits, n 13 above, 7–10, 12 *et seq*; M. Schweer/B. Thies, Vertrauen als Organisationsprinzip*: Perspektiven für komplexe soziale Systeme* (Göttingen: Hogrefe, 2003).

cheaper (transaction costs approach).[17] The finding that problem-related explanations may well converge should, however, not conceal the fact that, conversely, different disciplines also emphasise different mechanisms, which are central to a phenomenon, to different degrees, and record them in greater depth. Even for the example just mentioned, these and practical differences of both explanatory approaches could be shown. In the context of legal sciences, two things are obvious against this background: on the one hand, one should enquire into all approaches and, on the other hand, consult in depth at least those disciplines that have chosen the phenomenon in question as a central object of their analysis.[18] All this also applies with regard to the phenomenon of trust. In concrete terms, this means that, for example, an exclusively or even primarily economic analysis of trust (for example in the EU capital market and EU capital market law) seems even doubly misguided. There is by no means a very elaborate concept of trust in economics (or in the sense in which trust is understood by economists). Moreover, trust is not even a central concept for economics, whereas this is certainly the case for sociology and social theory.

2.2 Divergent Disciplinary and Explanatory Approaches to Trust

Trust has been the subject of sociological research since the founding fathers. Probably the most enduringly contribution to today's conceptualisation of the subject of research was developed by Max Weber. It remains the subject of sociological research permanently, but during the last three decades of the 20th century there was a renewed intensification of interest which was associated above

17 For the behavioural science view (heuristics), for example G. Gigerenzer/R. Hertwig/T. Pachur (eds), *Heuristics. The Foundations of Adaptive Behavior* (Oxford: Oxford University Press, 2011); F. Heukelom, *Behavioral Economics. A History* (Oxford: Oxford University Press, 2014) chapter 4. For the transaction perspective (with avoidance of information procurement costs that cannot be sufficiently amortised), for example M. Altmann, *Wirtschaftsprüfung und Internet, Der Wirtschaftsprüfer als Vertrauensintermediär in der Internet-Ökonomie* (Freiburg im Breisgau: Haufe, 2002) 112; C. Bosshardt, *Homo confidens – eine Untersuchung des Vertrauensphänomens aus soziologischer und ökonomischer Perspektive* (Bern: Peter Lang, 2001) 196; H. Nuissl, *Dimensionen des Vertrauens* (Frankfurt (Oder): FIT, 2000) 2 ('rational fool').

18 For more details on this kind of methodological pluralism and (still very open) question of suitable methodological filters, see S. Grundmann/P. Hacker, Theories of Choice and the Law – an Introduction, in S. Grundmann/P. Hacker (eds), *Theories of Choice. The Law and Social Science of Decision Making* (Oxford: Oxford University Press, 2020) 1–15 and Grundmann, n 10 above, 364–420 (forthcoming also in English). Against a purely (or even primarily) economic reading of trust explicitly also N. Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1994) 210 *et seq.*

all with the names of Luhmann (Bielefeld), Giddens (London) and Coleman (Chicago)[19] and then above all Beckert (MPI Cologne), Gambetta (EUI, Florence) and Sztompka (Krakow). In summary, trust as a phenomenon can be seen as an absolutely key object of research in sociology, and for many a leading sociologist of his time even their idiosyncratic object of research. And when, beyond sociology, in the early 2000[s] two of the leading, perhaps the leading, trust researchers in their respective disciplines published a broadly interdisciplinary anthology on trust, Hartmann and Offe, the three main lines are devoted to sociological, philosophical and political research on trust,[20] not, however, to economic theory or regulatory concepts. In fact, trust as a research object appears to be much less important in the formation of economic theory. In the 20th century, Kenneth Arrow formed the exception in the 1970[s], but shortly before the global financial crisis, some individuals, such as Rippeger and Sapienza, began to conduct more intensive research on trust (more on this in a moment), and after the crisis – the shaking of trust was now obvious – it was intensified considerably. If trust is analysed in economic and especially financial market law literature, then perspectives appear dominant that are primarily based in information economics. One of the central contents of the brief reflections in the following, and especially of the case studies, should be how the reflections of the sociological thinkers on trust mentioned above could be emphasised more strongly and made fruitful – in addition to the approaches in the other disciplines mentioned below (Section 2.2.2).

2.2.1 Sociology and Economics of Trust

The main characteristic of the long development of trust research in sociology seems to me to be that while, on the one hand, a rationalisation function of trust is emphasised as central, on the other hand, trust is understood as fundamentally

19 A concise overview up to this point can be found at M. Endreß, *Vertrauen* (Bielefeld: Transcript Verlag, 2002) (also on what follows). Further summaries or essays on the centrality of the concept in sociology can be found, for example, in P. Preisendörfer, 'Vertrauen als soziologische Kategorie' 24 *Zeitschrift für Sozialwissenschaft (ZfS)* 263–272 (1995); M. Funder, 'Vertrauen – die Wiederentdeckung eines soziologischen Begriffs' 24 *Österreichische Zeitschrift für Soziologie (ÖZS)* 1999, 76–97; J. Beckert, 'Vertrauen und die performative Konstruktion von Märkten' 31 *Zeitschrift für Sozialwissenschaft (ZfS)* 27–43 (2002); also J. Beckert, *Grenzen des Marktes – die sozialen Grundlagen wirtschaftlicher Effizienz* (Frankfurt am Main: Campus, 2003) 103–400 (*et passim*) (esp *Émile Durkheim*, *Talcott Parsons*, *Niklas Luhmann* und *Anthony Giddens*, but going far beyond 'trust'); D. Gambetta (ed), *Trust – Making and breaking cooperative relations* (New York: Blackwell, 1988); B. Misztal, *Trust in modern societies – the search für the bases of social order* (Cambridge: Polity, 1996) (2nd ed 1998).

20 M. Hartmann/C. Offe (eds), *Vertrauen – Die Grundlage des sozialen Zusammenhalts* (Frankfurt am Main: Campus, 2001).

different from rational calculation – the thinking of *homo oeconomicus*. Bosshardt even speaks of *homo confidens* in a treatise that leads from economic to sociological research on trust.[21] Max Weber – along with Simmel – had already taken the pioneering step of contrasting the two major categories of personalised trust and trust in a system (system trust). Of course, instead of system trust, he spoke of modern society as a 'community of consent', and with this juxtaposition, he made the comparison between these two alternative forms of trust, the comparabilities and the differences, a central object of his research.[22] The fact that hybrid forms such as so-called organisational trust – trust in organisations such as stock corporations (fn 16) – were also developed later, adds nothing categorically new to this. For Weber already had the idea that both main forms are basically types, with distinguishing features, but also central commonalities. In other words: from pure system trust without any personal element – as perhaps with algorithms – to purely personalised trust – as perhaps in a love relationship of absolute outsiders in society – there is a whole range of mixed forms. Weber had already emphasised that the division of labour and increasing (technically conceived) rationalisation led to a transition from a dominance of personalised trust to an increasingly important position of systemic trust. Without personalised trust being completely displaced, systemic trust increasingly takes the central position in markets and economic processes – whereby, however, the individual mix in each relationship must always be explored more closely. Just as the division of labour and the (exponentially increasing importance of) the market were mutually dependent in Adam Smith's view, Weber now notes the resulting change in the phenomenon of trust. For he characterises the market in general as the 'most impersonal practical life relationship into which people can enter with each other.' (Introduction to Chapter VI – The Socialisation of the Market) – which at the same time implies that system trust is particularly prominent here. This is certainly even more true for capital markets. At the same time, the emergence of system trust and the search for the elements on which it is based have thus moved to the centre of research interest. It is precisely this key question on which important, perhaps the central contributions followed in the second half of the century.

21 Bosshardt, n 17 above.

22 M. Weber, *Wirtschaft und Gesellschaft – Grundriß der verstehenden Soziologie* (Edition by J. Winckelmann, Tübingen: Mohr, 1976) 1920–1921, esp 382 *et seq*; closer to the concept of system trust, more precisely: modern society as a community of consent M. Weber, 'Über einige Kategorien der verstehenden Soziologie', in M. Weber, *Gesammelte Aufsätze zu Wissenschaftslehre* (7th ed, Tübingen: Mohr Siebeck, 1988) 442, 456, 470 *et seq*. Often, since the word 'trust' is not used by itself, for system trust (first) N. Luhmann as a primary source, who certainly did further central work here (cf below).

Weber's contemporaries, namely Durkheim and Simmel, admittedly emphasised other aspects. Durkheim, above all, highlighted that the formation of trust (with its value-forming power) also in markets depends centrally on a feeling of moral obligation. The will not to disappoint trust is therefore not to be justified solely (and perhaps not even primarily) with self-interest, but with social commitment (dependent therefore on the degree of social commitment).[23] Conversely, Simmel with the characterisation of personalised trust as a phenomenon of 'mystical faith', focused on that of system trust clearly and more openly, thereby generalising it as a phenomenon of social trust.[24] In addition to system trust, there is thus more generalised social trust alongside personalised trust. Although capital markets and capital market law certainly belong more to the category of 'system' – i.e. system trust in the true sense is at the centre here – Simmel's generalisation is not meaningless in the context of capital market financing either. This is the idea that trust in the community as such – whether systemically entrenched or not – also forms an important factor, for example, for the willingness to invest.[25]

Despite the importance of these first developments, the next epochal steps occurred only decades later and would seem to be connected with the names of Luhmann and Giddens, emerging most clearly after the Second World War.

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23 E. Durkheim, *Über soziale Arbeitsteilung* (Frankfurt am Main: Suhrkamp, 1992) (first publication 1893) 272 (using the example of the socially induced feeling of obligation by contracts) *et passim*; see today Beckert (2003), n 19 above, 110–113, 405; R. Ziegler, 'Interesse, Vernunft und Moral – zur sozialen Konstruktion von Vertrauen', in S. Hradil (ed), *Differenz und Integration – die Zukunft moderner Gesellschaften* (28. Kongress der Deutschen Gesellschaft für Soziologie, Frankfurt am Main: Campus, 1997) 241–254; on comparable considerations in philosophical trust research, see below section b), which emphasize the element of discourse even more strongly.

24 Simmel, n 12 above. More specifically on system trust G. Simmel, *Philosophie des Geldes* – Gesamtausgabe vol 6 (Frankfurt am Main: Suhrkamp, 1989) (first edition in 1900); on *Simmel*, especially also in questions of the construction of 'system trust'/social trust (in contrast to the 'mystical' faith of man in man) B. Accarin, 'Vertrauen und Versprechen – Kredit, Öffentlichkeit und individuelle Entscheidung bei Simmel', in H.-J. Dahme/O. Rammstedt (eds), *Georg Simmel und die Moderne – Neue Interpretationen und Materialien* (Frankfurt m Main: Suhrkamp, 1984) 116–146; Endreß, n 19 above, 13–16; G. Möllering, 'The nature of trust – from Georg Simmel to a theory of expectation, interpretation and suspension' 35 *Sociology* 403–420 (2001).

25 This raises the question of whether in societies that place more trust in society as such and its robustness than, for example, in states or institutions such as banks (with their respective stronger consolidation as a system), the readiness to invest, for example, of private investors differs. The question in this context is, more concretely, whether such readiness must also be generally higher or at least less negatively influenced by the absence or failure of capital market law that protects expectations well. See on this R. Olsen, 'Trust as risk and the foundation of investment value' 37 *Journal of Socio-Economics* 2189–2200 (2008); and as well R. Lunawat, 'An experimental investigation of reputation effects of disclosure in an investment/trust game' 94 *Journal of Economic Behavior & Organization* 130–144 (2013).

Luhmann not only presented a central monograph in 1968, which he dedicated solely to the phenomenon of trust – with probably the most famous core sentence on trust ever, which outlines trust as key instrument for the 'reduction of complexity' in society. From a multitude of possibilities of the future (time dimension) or an unknown (factual dimension), trust is placed in a concrete one, i.e. this is taken as the decisive basis for the decision to be made (or for a decision not to be made – 'letting it run').[26] This instrumental-functional character of trust in social systems, but especially in the economy as a core subsystem of society, was already present in Max Weber's work – and is then central in economic theory, in Arrow's and later work.[27] In Luhmann's work, however, it is framed more sharply and in terms of system theory, namely in relation to the concept of system trust. If trust means reducing complexity, it is also an advantage to be able to trust (albeit with the difficulty of having to offset losses from trust disappointment). Therefore, it makes sense in principle to promote this state. If systems are then seen – as in systems theory – as developing only auto-poetically (self-referentially) – out of their own laws of action and structures,[28] an increased stability is also claimed and the lack of openness to outside influences can be seen as an advantage for the affinity of system arrangements to trust. Indeed, central to Luhmann's understanding of trust is the so-called reflexivity (also 'procedural self-reference'), the mutual reference to granted and expected trust of others[29] – which, however,

26 N. Luhmann, *Vertrauen – ein Mechanismus der Reduktion von Komplexität* (1968) (5th ed, Stuttgart: utb, 2014) 5 *et passim*; on this e.g. Endreß, n 19 above, 30–34 ('Vertrauen "überwindet" … die Informationsunsicherheit.' – 'trust overcomes informational uncertainty'); D. Baecker, *Information und Risiko in der Marktwirtschaft* (Frankfurt am Main: Suhrkamp, 1988) 219; and Beckert (2003), n 19 above, 290–312.

27 On the value of trust as an enabling factor – recognised across disciplines –, cf besides Luhmann and Arrow (below n 37), for instance (also in political science and philosophy) F. Fukuyama, *Trust – the social virtues and the creation of prosperity* (New York: The Free Press, 1995); O. Geramanis, *Vertrauen, Die Entdeckung einer sozialen Ressource* (Stuttgart: Hirzel, 2002) 7 *et seq*; D. Morrison/J. Firmstone, 'The social function of trust and implications for e-commerce' 19 *International Journal of Advertising* 599–623 (2000) 602; Coleman (1990), n 14 above, 394 *et seq*; M. Hartmann, 'Einleitung', in Hartmann/Offe (eds), n 20 above, 7–36, 14.

28 N. Luhmann, *Soziale Systeme* (Frankfurt am Main: Suhrkamp, 1984) (4th ed 1991); in English *Law as a Social System* (Oxford: Oxford University Press, 2004); on this G. Teubner, R*echt als autopoietisches System* (Frankfurt am Main: Suhrkamp, 1989) (in English Oxford: Blackwell, 1993); A. Fischer-Lescano, 'Critical Systems Theory' 38 *Philosophy & Social Criticism* 3–23 (2012) 3; P. Hejl, 'Die Theorie autopoietischer Systeme: Perspektiven für die soziologische Systemtheorie' 13 *Rechtstheorie* 45–88 (1982); P. Kjaer, 'Systems in Context. On the Outcome of the Habermas/Luhmann-debate' *Ancilla Iuris* 66–77 (2006); M. Schulte, *Eine soziologische Theorie des Rechts* (Berlin: Duncker & Humblot, 2011); H. Willke, *Systemtheorie* (4th ed, Konstanz: UVK, 1993).

29 Luhmann, n 26 above, 90 *et seq*; Luhmann (1991), n 28 above, 90; N. Luhmann, *Das Recht der Gesellschaft*, (5th ed, Frankfurt am Main: Suhrkamp, 2010) 132, each with a foundation of trust that

unlike in economics, does not assume that trust is only rewarded if it serves one's own benefit, but because there is a general expectation of reflexivity and this is part of the system. This indirectly addresses the element of guaranteeing equal application and thus also equal treatment as the content of trust expectations, which appears to be absolutely central for philosophical trust theory (see Section 2.2.2) below), but largely irrelevant for economic trust theory. For Luhmann, the logic of trust lies in this kind of reflexivity expectation, and its stabiliser in the auto-poetic mechanisms of further development of systems. For all these reasons, Luhmann also emphasises the character of trust as – unprotected (or: only system-inherent) – advance performance.[30] What sociological and economic theory have in common is the recognition of risk that needs to be managed. In economics, the main focus is on information and control to limit risk, in Luhmann's case on (system-stabilised) trust (with an incomparably vaguer information base and poor control mechanisms in individual cases).

Giddens then focuses more on the preconditions for the emergence of trust. Two points from his rich work should be highlighted. For if, in the sense of an 'overlapping consensus' (Rawls), it makes sense to devote special attention to those aspects of trust (for example, in regulatory issues) that promote values that all (or the vast majority of) relevant disciplines consider worthy of support, two core insights of Giddens seem particularly important. Among these aspects with a particularly broad 'overlapping consensus' are two – which, at least in principle, have already been mentioned. The first is that trust should be promoted in the first place – for example, from the point of view of economics, because it allows creation of value; from the point of view of sociology, because it stabilises social contexts and relationships; and from the point of view of practical or moral philosophy, because it strengthens commitment to norms and ethics. On the other hand, trust should be prevented as far as possible from leading people astray. This is so, from the point of view of economics, because the informational basis of decisions would then be distorted (adverse selection), from the point of view of sociology, because of the disappointment that can then destabilise social contexts and relationships, and from a philosophical perspective, because the autonomy principle seems to argue vehemently for this. For Giddens, trust is arguably the

goes beyond the personal level; for example, for the particularly challenging context of e-commerce, which is becoming more and more prevalent Morrison/Firmstone, n 27 above, esp 602; as well as K. Beckemper, 'Das Rechtsgut "Vertrauen in die Funktionsfähigkeit der Märkte"' 6 *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)* 318–323 (2011) 321 *et seq*.

30 Luhmann, n 26 above, 27 *et seq*, 53 ('riskante Vorleistung' – 'risky advance payment'); Coleman (1990), n 14 above, 91 *et seq*; W. Güth/H. Kliemt, 'Menschliche Kooperation basierend auf Vorleistungen und Vertrauen – eine evolutionstheoretische Betrachtung' 12 *Jahrbuch für Neue Politische Ökonomie* 253–277 (1993).

litmus test for his image of modernity; and his understanding of modernity in particular established his position as the 'sociologist of the century' – at least for the Anglo-American world (and for New Labour). When he analyses modernity, he sees no other change on the way to modernity as so central to the texture of society as the changed understanding of trust, namely with the unequally increased importance of system trust (caused by 'the spatio-temporal increase in distance that accompanies modernity'). More concretely and absolutely central in this respect, Giddens recognises how system trust is usually not exhausted in an abstract trust in the institutional structures and the rule basis of these systems – for example, the protection of deposits up to 100,000 Euro by the deposit guarantee system supported by the entire banking system – but needs to be complemented. The complement is in most cases personal trust in exponents of this system – for example, Angela Merkel's *dictum* 'Your deposits are safe' – thus furthering overall trust in a significant way. Giddens thus recognises that system trust in most cases of real life reality is a hybrid trust – a conglomerate (with various degrees of the one and the other) of trust in rules, in an institutional practice, in exponents of the system. The weight of personal trust in the context of system trust, for example, which persons are trusted, why and to what extent, is becoming a central research question.[31] Moreover, it is obvious that this is of central importance when it comes to identifying actions that shake system trust in a particular way. The second central insight in Giddens' research – with perhaps some weak traces already in Luhmann – concerns the question of the relationship between trust on the one hand and information and decision-making on the other. In this respect, Giddens assumes that system trust is the normal case in modernity, which is learned as the usual case, the default solution, i.e. it is not conscious and primarily information-driven – blind system trust as an evolutionary advantage, as it were, because there is no longer any need to calculate.[32] It is important to note, however, that unlike in

31 A. Giddens, *The Constitution of Society. Outline of the Theory of Structuration* (Oxford: Blackwell, 1984) (Systems and actors in their interplay catalysts of the 'Structuration of Modernity'); included by Beckert (2003), n 19 above, 378 *et seq*; in contrast, earlier authors still quite largely assume irrelevance of personalised trust in this context M. Weber, *Wirtschaft und Gesellschaft* (5th ed, Tübingen: Mohr Siebeck, 1972) 382 *et seq*; on the role of these personal bearers of trust in systems, see as well S. Shapiro, 'The Social Control of Impersonal Trust' 83 *American Journal of Sociology* 623–658 (1987) (in essence, asking whether the all too strong attempt to discipline these bearers of trust is not likely to produce counter-intentional effects).

32 Giddens, n 12 above (7th ed, Frankfurt am Main: Suhrkamp, 1996) 33 *et seq*, 109; included as well and summarised by Beckert (2003), n 19 above, 377–380; Hartmann, n 27 above, 7–36, 25 (Vertrauen 'kommt erst dann zu sich, wenn es unbewusst ist.' – trust 'is returned mainly when it is in the subconscious'); and L. Zucker, 'Production of trust: institutional sources of economic structure, 1840–1920' 8 *Research in organizational behaviour* 53–111 (1986); beautiful summary given by Endreß, n 19 above, 48 *et seq* ('Vertrauen läßt sich bestimmen als Zutrauen zur

the case of personalised trust, ('blind') trust can be shaken by the realisation of the flawed nature of theories or empirical theorems and by the behaviour of unknown or arbitrary exponents. The importance of this second central insight of Giddens' is again obvious, for example when it comes to whether and in which cases trust can and should be promoted, influenced or channelled by information rules – for example, the system basis must also be made transparent.

Luhmann and Giddens are followed by Coleman and soon Beckert and Sztompka. While Coleman is of lesser importance for the considerations at hand,[33] a word on Beckert and Sztompka is indispensable for what follows. Beckert is not only one of the great modern sociologists who examined most directly the market system, but also he focuses his reflections to a particular extent on the differences with the economic theory of trust, namely the assumption of rationality. He sees the cardinal contrast not so much in self-interested thinking, but rather in the recognition or a non-recognition of the fundamental insuperability of information problems – in the fact that in broad areas of decision-making based on surrendered trust, an informed calculation, even just a probability calculation, simply appears illusory as an alternative.[34] Beckert is particularly radical in his rejection of an analytical framework in which calculation is set as the dominant premise in any form. Finally, central to Sztompka's work is the view – also fed by the experience of decades of communist planned economies – that ubiquity of control entails a

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Zuverlässigkeit einer Person oder eines Systems …, wobei dieses Zutrauen einen Glauben an die Redlichkeit oder Zuneigung einer anderen Person oder an die Richtigkeit abstrakter Prinzipien (technisches Wissens) zum Ausdruck bringt.' – 'trust implies believe in the honesty and philantropy of the other person.'); similar Luhmann, n 26 above, 56 *et seq*, 90 *et seq*. System trust is blind and comes to bear mainly when disappointed R. Pennington/H. Wilcox/V. Grover, 'The Role of System Trust in Business-to-Consumer Transactions' 20 *Journal of Management Information Systems* 197–226 (2003) 201; comparable (on the background of pedagogy) Schweer/Thies, n 16 above, 154.

33 The search for unity in the social science explanatory heuristics is key to him, namely the attempt to make the sociological theory of trust particularly compatible with the economic one (for instance by drawing on strict assumptions of rationality) cf Coleman (1990), n 14 above (German edition, Munich: Oldenbourg, 1991) *et passim*; on this e.g. K. Junge, 'Vertrauen und die Grundlagen der Sozialtheorie – ein Kommentar zu James S. Coleman', in H.-P. Müller/M. Schmid (eds), *Norm, Herrschaft und Vertrauen – Beiträge zu James S. Colemans Grundlagen der Sozialtheorie* (Wiesbaden: VS, 1998) 26–63; Endreß, n 19 above, 34 *et seq*.

34 Beckert (2003), n 19 above, esp 19–97, 403–415; see already the quote above n 12; and also Hartmann, n 27 above, 7–36, 11–14 and 16–18; on *J. Beckerts* concept of trust e.g. T. Strulik, *Nichtwissen und Vertrauen in der Wissensökonomie* (Frankfurt am Main: Campus, 2004) 74 *et seq*.

reduced capacity to trust.[35] These two insights are also of considerable importance for the design of regulatory approaches.

The history of trust research in economics is much slimmer. While the information model and information economics have long since left the 'slum dwelling' in which they were seen at the starting point of information economics,[36] trust as a phenomenon still remains there. This is so at least if one takes as a yardstick the disproportionately richer form it has taken in the wreath of many disciplines and as well the degree to which trust concepts are really anchored in capital market law. Arrow's reflections from the 1970[s] are widely seen as the starting point for considerations of the phenomenon of trust in economics, namely two contributions from 1972 to 1974.[37] In them he states three things. This is, first, the economic value of trust in that it enables beneficial transactions that could not otherwise take place, or at least facilitates them (allows them to take place more cheaply), an idea he shares above all with Luhmann (fn 26). This is, second, the far-reaching impossibility of sufficiently 'privatising' the benefits of trust-building measures (and their costs), i.e. making them available to those who undertake them ([positive] 'externalities'). Finally, third, all this results in the difficulty of designing markets for trust. These considerations – and the paradox of how to conceive a rational utility calculus in the case of 'blind' trust – are what an economic theory of trust is still struggling with today, already in the literature that emerged independently of the great financial crisis. Two main lines can be discerned.

On the one hand, it is emphasised that behaviour that establishes trust – for example, by sending out signals, for example, by making investments that would be useless if trust-damaging behaviour were to occur later – establishes reputation and thus creates the prerequisite for returns. In other words, there is a two-fold

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35 Quite decidedly so P. Sztompka, 'Vertrauen – die fehlende Ressource in der postkommunistischen Gesellschaft' special edition 35 *Kölner Zeitschrift für Soziologie und Sozialpsychologie (KZfSS)* 254–276 (1995); P. Sztompka, 'Trust and emerging democracy, lessons from Poland' 11 *International Sociology* 37–62 (1996). more generally P. Sztompka, *Trust – a sociological theory* (Cambridge: Cambridge University Press, 1999).

36 These are the opening words to the groundbreaking contribution by G. Stigler, 'The Economics of Information' 69 *Journal of Political Economy* 213–225 (1961); on this essay in context (and as well for further core stages of information economics) Grundmann, in Grundmann/Micklitz/Renner, n 10 above, chapter 12.

37 K. Arrow, 'Gifts and Exchanges' 1 *Philosophy and Public Affairs* 343–362 (1972) esp 356 *et seq*; K. Arrow, *The Limits of Organization* (New York: Norton, 1974) esp 15–29, specifically *26 et seq*; key is the starting point, but also the conclusion: 'Virtually every commercial transaction has within itself an element of trust, certainly any transaction conducted over a period of time.' p 357) und 'trust has a very important value …' (p 26). 'But they are not commodities for which trade on the open market is technically possible or even meaningful.' (p 26); early as well H. Albach, 'Vertrauen in der ökonomischen Theorie' 136 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 2–11 (1980).

prerequisite. On the one hand, the potential addressees of trust refrain from trust-damaging (opportunistic) actions in order to be (over-)compensated by returns on trust, or invest in trust-building measures with the same goal. At the same time and on the other hand, the potential investors of trust must as well be in the position to predict and reward these elements with sufficient reliability by.[38] In this line of reasoning, calculation (above all of future probabilities) continues to be assumed and the costs of trust-building measures (including the opportunity costs of not breaking trust) and the cost benefits of trust on the other side are entered as items in a virtual balance sheet.[39]

The antipode to this reasoning can be seen in the central economic monograph in the German literature before the financial crisis – by Ripperger – and especially in her review.[40] The work, which conceptualizes the central properties of trust consistently in terms of institutional economics, with many conceptual clarifications but no proposals for an operationalisation, arrives at a point where its 'Achilles' heel' becomes obvious – whether non-calculating trust may not be a contradiction in terms. Accordingly, the review elaborates on how Ripperger also neither postulates the calculus of utility as an empirically proven mode of behaviour, nor wants it to be understood as a normative guiding principle, but only as a 'methodological concept'. Rather the work shows (counter-intuitively) 'how precisely with increasing differentiation of this [stringent calculus of utility] … the cognitive-emotional preconditions for the release of trust in practice are impaired.' Indeed, the great paradox of an analytical method based on benefit calculation remains how it can be explained that the other side should actually place trust in a person who always seeks his own benefit for the future first.[41] The other side can

38 On this line of thought and namely on the concept of reputation L. Klöhn/K. Schmolke, 'Unternehmensreputation' 18 *Neue Zeitschrift für Gesellschaftsrecht (NZG)* 689–728 (2015); E. Sumser, *Evolution der Ethik – der menschliche Sinn für Moral im Licht der modernen Evolutionsbiologie* (Berlin/New York: de Gruyter, 2016) esp 139–144. For the criticism that this is entirely illusory, particularly vehement and profound Beckert and Bosshardt (n 34 and 17 above).

39 For attempts to calculate trust, see for instance O. Williamson, 'Calculativeness, Trust, and Economic Organization' 36 *Journal of Law & Economics* 453–486 (1993); and also Mülbert/Sajnovits, n 13 above, 14 *et seq*.

40 T. Ripperger, *Ökonomie des Vertrauens – Analyse eines Organisationsprinzips* (Tübingen: Mohr Siebeck, 1998); reviewed by D. Gebert, 18 *Zeitschrift für Politik (ZfP)* 494–496 (1998).

41 Eg Endreß, n 19 above, 49 (hier wird Vertrauen zu sehr 'systematisch auf Bilanzierung, Effizienz und Effektivität hin zu[ge]spitzt.', was 'die Intention dieses Schrittes zu konterkarieren droht.' 'Leben doch die besagten ersten Schritte gerade davon, dass sie als nicht berechnend verstanden werden.' [trust is 'reduced too narrowly to accounting, efficiency and effectiveness', which 'threatens to thwart the intention of this step.' 'After all, the said first steps are based precisely on the feeling that narrow calculation is not in the forefront.']); H. Kern, 'Vertrauensverlust und blindes Vertrauen – Integrationsprobleme im ökonomischen Handeln', in Hradil (ed), n 23 above,

build up trust emotionally above all if the benefit calculation and incentive system behind it are systematically concealed from him. For in such a world, trust is comparably stabilised and reliable for the other side as, for example, in Luhmann's system trust only in exceptional situations – for example, in the case of investments in reputation so high that they would be lost in the case of an 'efficient breach of trust'. This realisation leads authors such as Bosshardt or Beckert, when they analyse construction and protection of trust, to include institutional economic approaches only after having filtered them in the light of sociological trust research, as far as this is possible.

2.2.2 Philosophy, Political Science and Other Contributions to Trust

In addition to the contributions to a broad social-scientific theoretical panorama on trust outlined in cursory fashion so far, there are important other strands in philosophy and political science (fn 20), but also in psychology,[42] pedagogy[43] and anthropology or evolutionary biology.[44] As important as each strand may be, sociological and economic trust theory are nevertheless in the foreground for capital market law and financial services contracts – at least in a first overview. At least in the context of an outline, the focus is therefore on them. This results from the fact that, on the one hand, no discipline understands trust as a core subject of

271–282. In certain situations, one side may well know that the other side's balance of benefits is positive – and then their attitude/action may be quite predictable. However, this knowledge is often not solid. What is difficult as well is the potential fragility (in the event of a change in the assessment of benefits), and it is precisely here that an attitude grounded in ethical/social convictions differs considerably.

42 M. Koller, 'Psychologie interpersonalen Vertrauens – eine Einführung in theoretische Ansätze', in M. Schweer (ed), *Interpersonales Vertrauen – Theorien und empirische Befunde* (Wiesbaden: VS, 1997) 13–26; R. Mielke, *Differentielle Psychologie des Vertrauens* (Bielefeld, Bielefelder Arbeiten zur Sozialpsychologie, 1991); F. Petermann, *Psychologie des Vertrauens* (4th ed, Göttingen: Hogrefe, 2013); M. Schweer, *Vertrauen und soziales Handeln – eine differentialpsychologische Perspektive* (Wiesbaden: VS, 2008); and as well D. Enste/M. Ewers/C. Heldman/R. Schneider, *Verbraucherschutz und Verhaltensökonomik – zur Psychologie von Vertrauen und Kontrolle* (IW-Analysen 106, 2016); and for a socio-psychological perspective, e.g. C. Gennerich, *Vertrauen – ein beziehungsanalytisches Modell – untersucht am Beispiel der Beziehung von Gemeindemitgliedern zu ihren Pfarrern* (Bern: Huber, 2000).

43 M. Fabel-Lamla/N. Welter, 'Vertrauen als pädagogische Grundkategorie – Einführung in den Thementeil' 58 *Zeitschrift für Pädagogik* 769–771 (2012); R. Reichenbach, *Pädagogische Autorität – Macht und Vertrauen in der Erziehung* (Stuttgart: Kohlhammer, 2011); Schweer (ed) (1997), n 42 above; Schweer/Thies, n 16 above.

44 S. Centorrino/E. Djemai/A. Hopfensitz/M. Milinski/P. Seabright, 'Honest signaling in trust interactions: smiles rated as genuine induce trust and signal higher earnings opportunities' 36 *Evolution and Human Behaviour* 8–16 (2015); Sumser, n 38 above, esp 136–138.

the discipline as much as sociology – except perhaps psychology, though much less focused on social trust than in sociology. This also results from the fact that, on the other hand, in the interdisciplinary applications to capital markets and capital market law so far, the economic theory of trust has been in the foreground. In political science, trust research also primarily refers to a different object of trust, both the political decision-makers and the electorate as well as the constitutional legislator (*pouvoir constituant*),[45] while sociology and economics focus their attention primarily on society and, since the beginning, especially on the economy, thus on market and transaction issues and the actors in these. This implies that the classic criterion of relevance also determines which disciplines are worthy of consideration first and foremost.

However, one aspect of trust research that is particularly emphasised in the philosophical discussion and which ultimately has a tradition of several millennia is taken up in trust research only in a new context. It is about the aspect that trust is sensitive to equality. In other words, the feeling of being entitled to equal treatment is so strong that trust is formed particularly intensively to the effect that the relevant systems also guarantee this.[46] Trust in equal treatment in the system is particularly central, and its disappointment, conversely, is also particularly likely to impair or destroy trust in the institution as a whole. This is justified not least by the fact that the postulate of equality has been so centrally linked with the postulate of justice itself in ethics and the doctrine of justice. In other words, the

45 See J. Dunn, '*Trust*', in R. Goodin/P. Pettit (eds), *A Companion to contemporary political philosophy* (Oxford: Blackwell, 1993) 638–644; C. Offe, 'Democracy and Trust' 96 Theoria: A Journal of Social and Political Theory *1–13 (2000); M*. Warren (ed), *Democracy & Trust* (Cambridge: Cambridge University Press, 1999); *and the contributions to* Hartmann/Offe (eds), n 20 above, *241–369*.
46 Path breaking I. Kant, *Grundlegung zur Metaphysik der Sitten* (Riga: JFHartknoch, 1785) and I. Kant, *Metaphysik der Sitten* (Frankfurt am Main: works' edition Suhrkamp, 1985) with the first form of the categorical imperative (founded in the equality principle) and its second form (founded in the equality *and* in the human dignity principle), in this second work, for instance, p 562: 'A lie is the throwing away and, as it were, the destruction of his [the deceived person's] human dignity'; and the imperative itself: 'Act in such a way that you use humanity, both in your own person and in the person of everyone else, at all times as an end [in itself], never merely as a means.' (*Grundlegung*, edition by Reclam: Ditzingen, 1984, p 79); on this E. Drewermann, *Wege und Umwege der Liebe – Christliche Moral und Psychotherapie* (Düsseldorf: Patmos, 2005) 224, who, following Kant, understands breach of trust as a violation of the right to equal human dignity ('in reality, one uses one's person, with its confidence and its spiritual claim to truth, for an end [the human being thus as a mere means] which one does not believe one can achieve without the ruse of untruth']); included by M. Mersits, *Ethik, Konflikt, Situation – von der Situiertheit des Menschen zur situativen Ethik, exemplifiziert an Karl Jaspers* (Dissertation, University of Vienna, 2016) 303 *et seq*; particularly determined *Rawls*' disciple: Onara O'Neill, Reith Lectures 2002 a Question of Trust – Lecture 4: *Trust and Transparency*, p 19: 'Deceivers do not treat others as *moral equals*, they exempt themselves from obligations that they rely on others to live up to.' (Highlights added).

postulate of equality occupies such a central position normatively that a society-wide trust in its observance in social systems is also formed to a particularly large extent and with particularly emphasised significance.[47] This linking of normative postulate and actual spread of trust is not limited to this case. Rather it would seem that breach of trust relations is sanctioned more severely in several areas of the law, not least contract law, often typified as a breach of 'good faith'.[48] The equality aspect, in turn, is not only central to the philosophical discussion and, conversely, generally irrelevant to economics, but a decision on this is obviously relevant to capital market law. For it is precisely on the same side of the market – for example, on the investor side – that the interests of investor groups with different capabilities often clash – for example, in the questions of how to structure information obligations, such as prospectus obligations. In secondary markets – since the role can change from transaction to transaction – equal treatment aspects are also obvious between actors on both sides of the market, obviously for example in the case of insider bans (not dealt with in this paper).

3 Trust, Information and the Marketing via Prospectuses – A New Era?

3.1 Framework – Reference to Trust

The EU Prospectus Regulation is one of the latest fundamental reform steps in European capital market law (with financial services contract law), the latest of this size, directly applicable in the Member States (with the main body of law) since 21 July 2019.[49] A few first standard commentaries are already

47 In addition to those quoted in the previous footnote, cf again Hartmann, n 27 above, 7–36, 11–14; Ziegler, n 23 above; see, in more general terms P. Faulkner/T. Simpson (eds), *The philosophy of trust* (Oxford: Oxford University Press, 2017).

48 Comparative law survey of more stringent sanctions in case of violation of trust in H. Beale/B. Fauvarque-Cosson/J. Rutgers/D. Tallon/S. Vogenauer, *Cases, Materials and Texts on Contract Law* (3rd ed, Oxford: Hart, 2019) 423–479; and comparative criminal law in favour of greater parole: T. Rönnau, '(Rechts-)Vergleichende Überlegungen zum Tatbestand der Untreue' 122 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* 299–324 (2010).

49 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, *OJ EU* 2017 L 168/12; on the entry into force esp art 49 section 2. For more details on the institutional environment addressed in the following and the interplay, see the commentary references in the next fn.

available.[50] It is – beyond the rich literature of essays on developments in prospectus law (cf below) – almost uncharted territory, certainly with respect to more general lessons for contract law, disclosure duties and even more for a pluralist theoretical approach to these issues. Crucial for the following is the interaction with national law, in the present case exemplified by German law, which has two large areas of regulation. The first is (i) an area of exceptions, which Member States may make by exercising the option given to them in Article 3 (2) of the Prospectus Regulation up to the threshold of 8 million Euro (annual) total issuance volume to exempt from prospectus duties, which, for instance, the German legislator decided to make full use of – with a view to developing an alternative set of protection instruments for these smaller issues (Sections 3–7 of the new *Wertpapierprospektgesetz*). The second is (ii) the regulation of sanctions, namely liability for prospectuses (Sections 8–16 of the new *Wertpapierprospektgesetz*) and also fines (Section 24 of the new *Wertpapierprospektgesetz*). It should be noted that up to a threshold of 1 million Euro total issue volume, according to Article 1 (3) EU Prospectus Regulation, no prospectus may be required by virtue of European law already – but at most, the application of the alternative protection instruments on the part of the national regulator (without 'disproportionate or unnecessary burdens') – which indeed the German legislator followed as its path. Therefore, in the following, the segment of (annual) total issue volumes up to 8 million Euro is to be considered as a whole.

The EU Prospectus Regulation itself refers to the objective of protecting investor trust or confidence to a lesser extent than Article 7–11, 14 of the Market Abuse Regulation (MAR) with its prohibitions on insider dealing.[51] Recitals 5 and 83

50 First (dealing with the EU Regulation and the German Implementing Act [*Wertpapierprospektgesetz*, new version] separately, i.e. one after the other) W. Groß, *Kapitalmarktrecht: Kommentar zum Börsengesetz, zur Börsenzulassungs-Verordnung, zum Wertpapierprospektgesetz und zur Prospektverordnung* (7th ed, Munich: CHBeck, 2020); then (dealing with both legal acts in an integrated way) Grundmann, n 6 above, part 6 section 2.

51 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, *OJ* EU 2014 L 173/1; on the sanctions, and enacted in parallel: Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), *OJ* EU 2014 L 173/179 – to be transposed into national legislation, for instance §§ 119, 120 of the *Wertpapiergesetz* new version. For the references to investor confidence in EU insider law (with analysis), see in more detail the list already above n 9 and in Grundmann, n 11 above, 67, 85–93; also Mülbert/Sajnovits, n 13 above, 15, 26 and 34–38; and in more general terms P. Huang, 'Trust, guilt, and securities regulation' 151 *University of Pennsylvania Law Review* 1059–1095 (2003).

('confidence in transparency') as well as recital 53 ('confidence that … uniform disclosure rules') equate confidence and transparency, i.e. the information function of capital markets, with each other. Therefore, they do not assign trust its own – separate – sphere of action alongside that of information efficiency. In other words, trust in the information system – system trust – is addressed here. Conversely, recitals 7 and 83, which declare 'confidence in securities' (as a form of investment) and 'confidence in SMEs' (as a group of issuers) to be worthy of support, nevertheless point to such a broader understanding of investor trust and confidence.[52] And if recital 64 refers more generally to 'public confidence', this is nevertheless limited to questions of advertising by providers and issuers, i.e. a secondary aspect of the Regulation. In the end, 'confidence in securities' as an investment form (besides the special case of SMEs) appears to be the most general indication of an aim to promote investor confidence specifically (which also goes beyond an information model). And indeed, it is one of the great paradoxes of classical capital market information economics that and why the rate of investment, especially among private investors in many member states but also far beyond, is so significantly below the value that rational utility calculations would predict.[53]

In the following – based on the insights that emerged from the broader social theory survey –, it will be asked whether investor confidence should be promoted independently and in what way. The priority fields of application result from our explanations so far. It can be asked about the Member State exemption area, to what extent can such a modified paradigm of disclosure law be advocated and possibly even already has materialised in §§ 3–7 *Wertpapierprospektgesetz* (below Section 3.2). This question can be asked similarly for alternative protection instruments in the EU Prospectus Regulation, in particular insofar as they have SMEs as their object, i.e. namely for the EU growth prospectus according to Article 15 EU Prospectus Regulation (below Section 3.3). Furthermore, it can be asked whether in the EU prospectus rules – i.e. in the core area, not in (new) alternatives – there are already design specifications that can be understood as positively promoting trust – also beyond classical information efficiency (below Section 3.4). Finally, the question may as well be whether in the core area of prospectus liability, which still primarily is national law, such elements can be found or could be developed (below Section 3.5). In other words, it is also asked which forms of prospectus liability – or more generally liability for flawed information – would be better suited for a protection concept that would be oriented towards genuine investor confidence.

52 'Trust in SMEs' as a target is taken up again in art 15 section 2 subsection 4 litera b EU Prospectus Regulation, the only norm in the regulatory part of the Regulation that refers to 'trust' – here now as a guideline for the implementing legislation of the EU Commission.

53 See references above n 3.

If one assigns these individual questions to the two cases in which the EU Prospectus Regulation emphasises trust not only in a functioning information system, it is not difficult to identify them. The areas discussed under Sections 3.2 and 3.3 below touch on issues in which trust in SMEs and SME markets (recital 83) is important and should be promoted, whereas in the area under Section 3.2 specifically the national ('local') design of the market also comes into play. Conversely, the areas and issues discussed under Sections 3.4 and 3.5 relate more generally to confidence in securities (recital 7). Both areas thus divorced have one issue that was primarily answered by the national legislator (under Sections 3.2 and 3.5), and one where the EU legislator set the tone (Sections 3.3 and 3.4). In all these questions of application, the guiding principles will be the central independent mechanisms of action that have been worked out in the sociological–philosophical discussion for a conception of trust. Important in this respect are the implantation of personal trust in cases of system trust and the use of the entire range of shadings, furthermore the idea that unprotected advance performance conversely requires special protection if this option is to remain realistic. Finally, it is also a key consideration that trust is also promoted by ethical ties. Ethical ties actualise the idea that trust must also be consistently rewarded (intrinsic obligation bond), not only insofar as the (egoistic) benefit calculation suggests this. The general orientation will, however, be that the trust paradigm could also travel alongside the information model, not replace it entirely. Therefore, the following will (partly) be about combinations.

3.2 Alternative Markets – National Exemption Areas

3.2.1 Key Points of the Alternative Market

According to the above national exemption area, the national legislator decides on the structure of the segment of total annual issuance volumes up to 8 million Euro (in Germany in §§ 3–7 *Wertpapierprospektgesetz*) in terms of whether and to what extent it wants to permit an issuance without protective mechanisms. Alternatively, it can opt for more lenient protective mechanisms than those applicable to prospectuses, which (under Article 1 (3) EU Prospectus Regulation) then must be necessary and proportionate (proportionate with regard to the cost burden appropriate for the respective issue volume).[54] However, EU law defines this

54 Whereas, at least for the parallel provision in art 15 EU Prospectus Regulation ('proportionate disclosure'), the investor's interest would seem to be ultimately given priority: cf recital 22 of the EU Prospectus Regulation. Commission Delegated Regulation (EU) 2019/980 of 14 March 2019

market as national ('local'), not part of the internal market,[55] i.e. not guaranteeing cross-border recognition in other EU countries (which, however, autonomously may opt for individual openings of their markets).[56] A securities information sheet and comparable foreign protection instruments thus do not guarantee EU-wide recognition. Accordingly, the German legislator was able to create this local market and has indeed done so in §§ 3–7 *Wertpapierprospektgesetz*.

In this context, the scandals of the so-called grey capital markets in Germany (surrounding also investments in the Reunification process, for instance immovable property around Berlin) are certainly relevant to trust and confidence – in the German collective memory of investors.[57] Conversely, however, positive developments also appear to be relevant to trust and confidence, and here certainly the high prestige that the German *Mittelstand* enjoys as such ('personally'), but also a social tendency to 'go local',[58] both count positively. The regulation in §§ 3–7

supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004, *OJ EU* 2019 L 166/26; M. Möller/A. Ziegltrum, 'Der EU-Wachstumsprospekt – eine Alternative für kleine und mittelständische Unternehmen?' 20 *Bank- und Kapitalmarktrecht* 161–166 (2020); M. Geyer/J. Schelm, 'Das neue europäische Prospektrecht – ein Überblick aus Sicht der Praxis' 74 *Betriebs-Berater* 1731–1740 (2019) 1738 *et seq*.

55 In particular on this type of regionalisation in the promotion of SMEs promotion, see L. Klöhn, 'Die neue Prospektfreiheit "kleiner" Wertpapieremissionen unter 8 Mio. €' 39 *Zeitschrift für Wirtschaftsrecht* (*ZIP*) 1713–1722 (2018); and (with a list of the different arrangements in the various member states) ESMA, National thresholds below which the obligation to publish a prospectus does not apply, ESMA 31-62-1193 (23 October 2020) available at: https://bit.ly/ESMA_Prospektschwellen (last consulted on 23 May 2022); on the other hand, focusing primarily and almost exclusively on the aspect of SME promotion T. Preuße, in E. Schwark/D. Zimmer (eds), *Kapitalmarktrechtskommentar* (5th ed, Munich: CHBeck, 2020) § 3 WpPG para 23; for a targeted focus on the advantages of decentralized rule-making, especially in an area that is characterized by local preferences, local information and possibly also more local trust, already Grundmann, n11 above, 67, 93–95.

56 On the absence of the EU recognition regime ('European passport'), for example Preuße, n 55 above, § 3 WpPG para 8 *et seq*. On the nevertheless existing possibility of individual recognition between member states: N. Moloney, *EU Securities and Financial Markets Regulation* (3rd ed, Oxford: Oxford University Press, 2014) 111 *et seq* and 119 *et seq*.

57 See BaFin, *Grauer Kapitalmarkt: Rendite und Risiko – Marktabgrenzung, Regulierung und Verantwortung des Anlegers vom 4.3.2014*, available at www.bafin.de; Grundmann, n 6 above, part 5 para 77 *et seq* and (specific to prospectus law) part 5 para 120, part 6 para 79–81; S. Ueding, *Prospektpflicht und Prospekthaftung im Grauen Kapitalmarkt nach deutschem und italienischem Recht* (Berlin: Peter Lang, 2009).

58 See, for example, the study commissioned by the Federal Ministry for Economic Affairs and Energy in 2016, Innovativer Mittelstand 2025. For the tenor of the perception of the SME sector in Germany, see for example M. Vilain, '"Meine Firma, meine Mitarbeiter, meine Heimat" – Merkmale

Wertpapierprospektgesetz is separated from the aforementioned – formerly – 'grey capital market' by its clearer focus on SMEs and the type of investment, the fungible security (securities), more generally: listed financial instruments.[59] It is, of course, unclear, however, whether this is sufficient for the new SME capital market segment and, if applicable, for crowdfunding investment really to distinguish it clearly enough from the old public limited partnership – for example with its junk real estate funds – which also figure in the collective investor memory. Therefore, it is also unclear whether further efforts would have made sense, such as the formation of quality seals through protection of certification (as with the SME growth market) or as well consolidated actions to raise awareness involving the financial sector.

In any case, the design by the legislator itself is characterised by some cornerstones, two of which seem key. The emphasis on the securities information sheet as an alternative protection instrument in the literature distracts the attention from the fact that the German legislator actually introduced a three-tier protection regime in the segment of securities issues up to 8 million Euro. There is one tier of the segment without any alternative protection instrument at all. There is one tier with the obligation to provide a securities information sheet of three DIN-A4 pages (cf content in § 4 (3–7) *Wertpapierprospektgesetz*). Finally, there is one tier where the legislator returned to the prospectus obligation. What is decisive here – thinking in terms of trust-building – is on the one hand the view of the (trustworthiness of the) respective issuers as well as on the other hand the (horizons of expectation of the) respective investors. Besides these distinctions described with regard to the persons acting on both sides of the market, the exact prerequisites of the new protective instrument itself are also worth considering, including the securities information sheet, its scope, and its design.[60]

unternehmerischen Engagements im deutschen Mittelstand', in S. Braun (ed), *Gesellschaftliches Engagement von Unternehmen* (Wiesbaden: VS, 2010) 106–142; on the (re)localisation tendency on the basis of the electorial campaign (and the programmes of relevant parties) in 2017, see K. Vieweg, *Nachhaltige Marktwirtschaft* (2nd ed, Wiesbaden: Springer Gabler, 2018) 220–228.

59 See only Grundmann, n 6 above, Part 6 para 7, 85–88.

60 For more details on this design Groß, n 50 above, § 4 WpPG para 4–9; Grundmann, n 6 above, part 6 para 119–120. Questions arising from a more concentrated information and the repercussions of such a reduction in size on investor confidence are in any case similar to the (less far-reaching) reduction of information in the EU growth prospectus (see section 3 below). Therefore, these questions are dealt with in more detail there.

3.2.2 Calibrating Protection to Actors, Contents of the Instruments of Protection and Trust

Issues with a total annual volume of up to 8 million Euro are permissible without any protective instruments for the particularly trustworthy issuers listed in § 3 no. 1 *Wertpapierprospektgesetz*. For them, neither § 4 *Wertpapierprospektgesetz* stipulates an obligation to provide a securities information sheet (para 1 p 1 e contrario), nor does it provide for a revival of the prospectus obligation in § 6 *Wertpapierprospektgesetz* (which only is the case if the investor engagement exceeds the thresholds mentioned there, i.e. is rather onerous, see below). These thresholds are characterised by the fact that below them even a total loss is regularly 'annoying' for the investor, but not existential (1000 Euro or at most 1/10 of the free assets or 2 net monthly salaries). Conversely for the 'other' (less trustworthy) issuers mentioned in § 3 no 2, for issues up to the identical limit of 8 million Euro total annual volume, the obligation to provide a securities information sheet applies at a first stage according to § 4 *Wertpapierprospektgesetz* (para 1 p 1). Moreover and *a maiore* also for these (less trustworthy) issuers, the duty to issue prospectuses revives under § 6 *Wertpapierprospektgesetz* whenever the threshold of merely annoying losses (and investments) is crossed.

The key point for the evaluation of this scheme is the demarcation line between issuers of 'increased confidence' and normal issuers. If, in the case of an issue with a total annual volume of up to 8 million Euro, it can be assumed that the prospectus costs may be 'too oppressive' (in relation to the capital acquisition), this aspect is nevertheless declared irrelevant in the following case. Pure trust – no information at all – is only a laudable strategy if a double condition is met: this is the qualification as an issuer of 'increased confidence' *and* that the risk of total loss is relatively light. In this market segment, in which trust constellations co-determine the design of the regulation, both the lack of any protective instrument (for the issuers of 'high trust') *and* the recourse to a significantly simpler protection instrument for issuers 'without increased trust' is thus already made dependent on a substantive element. This element is that the 'unprotected advance performance' (Luhmann) must remain so low that its loss is at most 'annoying' for the respective investor (individual protection), and moreover, that this loss will also not cause investor insolvencies that discredit the entire market (system protection). Conversely – even more interesting for the present topic – a genuine area of trust is indeed created for issuers of 'increased trust'. In this case, reliance is placed solely on the establishment of a position of trust in the past (of course including a fulfilment of information obligations in the past, more generally speaking: regular

compliance with market rules),[61] but entirely without a duty to provide information for this specific issue. No securities information sheet is required, thereby waiving even the rudimentary information duties. The leap in trust reaches so far that the investor-related restriction is waived as well, i.e. even non-qualified (private) investors are not guaranteed protection by duties to provide information. In relation to persons – certain types of issuers –, an (alternative) regime of investor protection is established that is primarily based on trust. The decisive factor here (besides privileged treatment of credit institutions densely monitored, § 3 no 1 1st alternative *Wertpapierprospektgesetz*) is formalised good conduct on the part of the issuers in question (§ 3 no 1 2nd alternative *Wertpapierprospektgesetz*), formalised in that the issuer places itself under increased supervision under capital market law in the form of admission to a regulated market. In his case, a consolidated basis of trust (combined with information disclosure in the past) replaces information and control of information for the specific issue – at least for the maximum range for which the German legislator was allowed to provide this solution (up to a volume of 8 million Euro of total annual issue).

In the concert of national design proposals, this is a remarkable model.[62] It should, however, be emphasized that this is a regionally limited model of a trust environment, tailored to the champions of the German SME sector, including (tested) start-ups, with experience in regulated capital markets – possibly a new model for success in the medium term, especially for the private investor segment. This is the specifically personalised trust element within the framework of general system trust – focused on the German *Mittelstand*. It is not a single market model though. Admittedly, it could – with bilateral recognition – also be a cross-border model in some cases. One disadvantage of the local restriction may be that it creates only a benchmark for competition, but not a competition between legislators with access to other markets. Therefore, promising company segments in member states with weak investor bases can be cut off from deeper investor markets.[63] For example, a Greek SME developing dynamically after the financial

61 This was seen as sufficient protection. See *Bundestags-Drucksache* [*Parliamentary Reports*] 19/2700, p 4.

62 See already references above n 53; and P. Schammo, *EU Prospectus Law. New Perspectives on Regulatory Competition in Securities Markets* (Cambridge: Cambridge University Press, 2011) 126. For a comparative survey (thresholds, but also protection mechanisms introduced), see ESMA, National thresholds below which the obligation to publish a prospectus does not apply, ESMA31-62-1193 (23 October 2020) available at https://bit.ly/ESMA_Prospektschwellen (last access 5 June 2022). Among others, the three large Member States (and almost half of all Member States) used the option up to 8 million Euro, the medium-sized Member States often fixed the threshold at 5 million Euro, the Central and Eastern European Member States mostly renounced to the option.

63 See for example – rather implicitly – SWD (2015) 255 final, p 10.

crisis with possibly considerable trust potential might be cut off in practice from the deeper German (private) investor market.

3.3 Alternative Instruments of Protection (Replacement of Prospectuses)

The European counterpart to the exemption under §§ 3–7 *Wertpapierprospektgesetz* is above all the growth prospectus under Article 15 EU Prospectus Regulation. Unlike §§ 3–7 *Wertpapierprospektgesetz*, it is aimed not only indirectly (via concentration on small issue volumes), but very specifically targeting smaller issuers. In any case, reference can be made to recital 83, which postulates trust in SMEs as specific goal that is worthy of protection and promotion. In terms of content, however, the EU growth prospectus is a genuine EU prospectus – with all the contents of such a prospectus, with the seal of approval according to the EU Prospectus Regulation and with the EU-wide (recognition) effect (Article 6–10, 13, Article 20 *et seq* and Article 24–27 EU Prospectus Regulation). In principle, the obligation of completeness, correctness and clarity applies without restriction. What is different from the unabridged full prospectus, is mainly that the EU growth prospectus – as the most important form of abridged prospectus[64] provides for 'only' 'proportionate disclosure', i.e. somehow 'abridged content' (Article 15 para 1 subpara 2 and para 1 subpara 1 of the EU Prospectus Regulation). For the latter, however, reference was made to the Delegated Regulation (EU) 2019/980 of the EU Commission.[65] Despite the abridged content, the objective of fully informing the investor and – more generally – the interests of investor protection continue to be given priority over cost-saving interests or a genuine trust philosophy.[66]

Overall, the picture appears ambivalent, the design appears as a hybrid, at least from the perspective of a genuine 'trust in SMEs', as specified in recital 83. On the one hand, it is not a matter of local and personal trust, which reinforces systemic trust in such a way that a genuine second model approach is added to the information model. On the other hand, a prospectus is also required in its entirety and, above all, with comparably solid information as with the full prospectus (and

64 See detailed discussion on these issues, but also on other forms of a condensed prospectus design, namely for follow-on issues Groß, n 50 above, Art 14 and 15 of the EU Prospectus Regulation; Grundmann, n 6 above, art 6 para 159–164.

65 See n 54 above, namely chapter IV and annexes 23–27 as well as annexes 4 and 5 of the EU Prospectus Regulation.

66 See again n 54 above; see, however, as well, pointing into the opposite direction recital 53 of the EU Prospectus Regulation, according to which the investor may not rely on the same depth of information as in the case of a full prospectus.

the ability to circulate throughout the EU is also provided for in accordance with Article 24–27 EU Prospectus Regulation ['European passport']). This puts the EU growth prospectus primarily in the ranks of the classic EU prospectuses. Conversely, it is a lighthouse project of the European Capital Markets Union agenda – in the context of the EU Prospectus Regulation perhaps even the most important one – with its declared core objective of giving SMEs significantly easier access to capital markets.[67] The title of a 'growth prospectus' adds to all this. Admittedly, no significant compromises are made with regard to the information objective (and in German law also with regard to prospectus liability), only a reduction in the scope is permitted. Thus, the national model (above Section 3) may seem less prominent, without a particular name for the instruments created. In terms of content, however, a separate market segment is actually created for a clearly defined group of particularly trustworthy issuers in a nationally defined market, in which issues without any new disclosure are possible 'on a basis of trust'. This segment will potentially also be accepted by private investors because of this trust.

3.4 Alternative Forms of Design (in the Prospectus)

As well as the smaller securities issues and for the issuers of smaller size, the question arises as to the weight that can or should be given to the aspect of building and promotion of trust and confidence beyond a disclosure of information model. Indeed, recital 7 of the EU Prospectus Regulation also postulates 'confidence in securities' (as a form of investment) in general as relevant for prospectuses (and alternative information instruments). The starting point is that investors do not form a homogeneous group and that a different breadth of information can be processed differently by different investors. Two conclusions from this circumstance are obvious and are traditionally drawn.[68] On the one hand, all substantially value-relevant information on the company and the security is generally subject to the prospectus requirement, not only the scope that, for example, private investors typically (can) process. The scope of information must therefore be based on the needs of professional investors – which is why the postulate to replace the full prospectus by a short prospectus was rejected in Germany and almost unanimously across Europe. Insofar as professional investors process this amount of information (which is the rule), according to mainstream teaching, this also has a

67 See recital 51 of the EU Prospectus Regulation; and, for instance Möller/Ziegltrum, n 54 above.
68 See in more detail, also on the following: Grundmann, n 6 above, part 5 para 16–17 and part 6 para 68–70.

price-forming effect, because information then is public.[69] Insofar as – and this is the rule – the shares are then allocated proportionally, the buying behaviour of the professional investors indeed also benefits the private investors[70] (unlike in secondary markets, where the private investors can only follow suit after the price change has already been triggered and consumed by the professional investors). On the other hand, information overkill,[71] but also cognitive distortions as phenomena cannot be denied, certainly and increasingly among private investors. Even in the core market with a full prospectus, additional short information instruments such as the summary are certainly to be advocated – even if, as is shown by the ambivalent prospectus liability regime (Article 11 para 2 subpara 2 EU Prospectus Regulation), their contents can only constitute a 'short-cut', with some element of 'distortion'. Short, comprehensible information, as long as it is at least not misleading (cf Article 7 and 11 para 2 subpara 2 EU Prospectus Regulation), also has a stronger confidence-building effect than leaving it with (solely) over-complex information.

Despite this clear focus on providing exhaustive information tailored above all to the needs of professional investors, the EU Prospectus Regulation also contains at least two core rules for this core area, which can be understood as being geared towards confidence-building. In this respect, 'confidence in securities' – potentially also beyond the classic information model – does indeed appear to be a core concern. Admittedly, they appear still weak and therefore a segment based purely on trust can in fact not be seen. On the one hand, this refers to the principle that

69 In this sense, the so-called Efficient Capital Market Hypothesis (ECHM); path breaking E. Fama, 'Efficient Capital Markets: A Review of Theory and Empirical Work' 25 *Journal of Finance* 383–417 (1970); and in the literature on capital market law R. Gilson/R. Kraakman, 'The Mechanisms of Market Efficiency' 70 *Virginia Law Review* 549–644, esp 553 *et seq* (1984); concise summary (also with criticism and certain limitations) in Grundmann, n 6 above, part 5 para 16–17.

70 On this mechanism, namely on the idea that prices on capital markets are already efficiently changed by well-informed (professional) investors alone and other investors can 'just free-ride' on their decisions, see for example I. Welch, 'Sequential Sales, Learning and Cascades' 47 *Journal of Finance* 695–732 (1992); M. Brunnermeier, *Asset Pricing under Asymmetric Information. Bubbles, Crashes, Technical Analysis, and Herding* (Oxford: Oxford University Press, 2011) 165 *et seq*; S. Parker, 'Crowdfunding, cascades and informed investors' 125 *Economics Letters* 432–435 (2014).

71 See A. Edmunds/A. Morris, 'The problem of information overload in business organizations: a review of literature' 20 *International Journal of Information Management* 17–28 (2000); M. Eppler/J. Mengis, 'The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines' 20 *Information Society* 325–344 (2004); T. Jackson/P. Farzaneh, 'Theory-based model of factors affecting information overload' 32 *International Journal of Information Management* 523–532 (2012); T. Paredes, 'Blinded by the Light: Information Overload and Its Consequences for Securities Regulation' 2 *Washington University Law Quarterly* 417–486 (2003); A. Baddeley, 'Working Memory: Theories, Models, and Controversies' 63 *Annual Review of Psychology* 1–29 (2012).

information must not only be provided in a comprehensive and comprehensible manner, but that, according to Article 6 (2) of the EU Prospectus Regulation, issuers are obliged to proactively seek the best possible brevity and comprehensibility.[72] In this respect, prospectus law – and European capital market law – has a certain pioneering role in information law, for instance pre-contractual information duties, which traditionally only emphasises the aspect of completeness, not brevity and comprehensibility, and sufficient clarity (comparable standards are probably most likely to be found in the EC Unfair Contract Terms Directive). This second aspect of the clarity requirement is important in view of the multitude of prospectus offers, the aforementioned dangers of information overload or even cognitive distortions. This second aspect is likely to play a role as well when, for example, it is argued that an aspect was overlooked in a prospectus that was clear in itself because the drafters of the prospectus (obviously) did not make an effort to specifically facilitate an analysis. Overall, a principle of clarity and comprehensibility is even more generally pronounced in European capital market law (see for example Article 17 in the Market Abuse Regulation and Article 18 and the entire section 3 of MiFID II, also Article 12 EC Transparency Directive 2004/109/EC, particularly important in this respect).[73]

Since total loss and also significant loss deviate particularly far from the horizon of expectation (in the sense of confidence models), i.e. have a stronger confidence-shaking effect than – even a comparably large – loss of profit,[74] the particularly prominent rules on risk warnings (Article 16 EU Prospectus Regulation) are also important in the present context. They are particularly prominent

72 On the principle of clarity or transparency thus outlined in prospectus law, in more detail C. Just/T. Voß/C. Ritz/M. Zeising, *Wertpapierprospektgesetz (WpPG) und EU-Prospektverordnung* (1st ed, Munich: CHBeck, 2009); § 5 para 19–21; T. Holzborn/C. Mayston, in T. Holzborn (eds), *Wertpapierprospektgesetz mit EU-Prospektverordnung und weiterführenden Vorschriften* (2nd ed, Berlin: ESV, 2014) § 5 para 15–16.

73 In more detail on the principle of clarity or transparency more generally in European capital market law R. Veil, in R. Veil (ed), *Europäisches Kapitalmarktrecht* (2nd ed, Tübingen: Mohr Siebeck, 2014) § 2 para 12, § 16 para 4; M. Otto, 'Modernes Kapitalmarktrecht als Beitrag zur Bewältigung der Finanzkrise' 68 *Wertpapier-Mitteilungen* 2013–2023 (2010) 2014; see also (but rather as a means to the goal of allocative functioning) H. Merkt/O. Rossbach, 'Zur Einführung: Kapitalmarktrecht' 43 *Juristische Schulung* 217–224 (2003) 220; M. Oulds, in S. Kümpel/P. Mülbert/A. Früh/T. Seyfried, *Bank- und Kapitalmarktrecht* (5th ed, Cologne: Dr Otto Schmidt, 2019) para 14.169.

74 Path breaking D. Kahneman/J. Knetsch/R. Thaler, 'Experimental Tests of the Endowment Effect and the Coase Theorem' 98 *Journal of Political Economy* 1325–1348 (1990) 1342; see as well P. Hacker, *Verhaltensökonomik und Normativität* (Tübingen: Mohr Siebeck, 2017) 96 *et seq*, 532 *et seq*; more generally on warnings especially in the case of cognitive biases L. Klöhn, 'Preventing Excessive Retail Investor Trading under MiFID: A Behavioral Law and Economics Perspective'10 *European Business Organization Law Review (EBOR)* 437–454 (2009); Hacker, *loc cit*, 771–776 and as well 898–902.

because they are the only substantive aspect with its own explicit standard and regulation. In terms of content this is reflected above all in the requirements for limiting the number of risk warnings (no 'alarm drowning', no de-sensitisation), for dressing up of a hierarchy according to weight and importance, for the obligation to make worst-case scenarios clear, and more generally also for clarity. For reasons of space, only so much about this:[75] These rules have an information side, but also a trust side. For trust can also arise in a structure (without precise knowledge of the structure itself) for which it can be assumed that all actors (such as those obliged to publish a prospectus) are required to reassure themselves again and again – at important junctures such as an issuance – of their business strategies – which also protect investors – and of the resulting risks.

3.5 Prospectus Liability – Structuring the Prerequisites for the Promotion of Trust

3.5.1 Status Quo: Reimbursement of Equivalent Interest Solely in the Case of Gross Negligence

If in the following section, a concept of prospectus liability is outlined. This would apply to the core area, not only for alternative markets and instruments (above Sections 3.2 and 3.3) This concept proactively promotes trust. A duty to proactively design prospectuses in a (particularly) clear and comprehensible manner should also be kept in mind and should already be understood as a measure to build trust (above Section 4). If such a – confidence-building – concept of prospectus liability is then outlined, the main objection to an expected increase in liability will probably be that this liability would go too far and have a prohibitive effect.

Therefore, first a few words of clarification on the scope of prospectus liability in Germany (though it is similar in many other countries as well). By law, liability is limited to new shares only, i.e. to those shares that were sold on the basis of this prospectus (§ 9 para 1 sentence 1 *Wertpapierprospektgesetz*) – if the drafter of the prospectus fulfils his obligation to clarify and identifies shares as new or old (by virtue of serial number) (cf counter-exception § 9 para 1 sentence 3 *Wertpapierprospektgesetz*).[76] In addition, only the capital inflow received is to be paid out

75 My view on this Grundmann, n 6 above, part 6 para 165–166.

76 See more in detail on this issue and as well on the issue that this does not impose an unreasonable burden on investors, since they can distinguish between new and old pieces (better hedged or more speculative pieces) and invest in a differentiated manner accordingly Grundmann, n 6 above, part 6 para 210 *et seq*, 244 (with an obligation on the part of the respective intermediary to draw attention to this aspect when providing investment advice).

(with the exception of acquisition costs) (§ 9 (1) sentence 1 *Wertpapierprospektgesetz*, as amended); consequential damages, such as lost profits, are not to be reimbursed because the investment would have been made differently if the statements in the prospectus had been correct.[77] The summary is simple. In the event of prospectus errors, the issuer/offeror (if new shares are distinguished from old ones) has received the capital that she has to refund whenever liable for the prospectus – to exactly the same extent she has received funds, without consequential damages.[78]

If one analyses the case law, the standard applied for liability under § 12 (1) *Wertpapierprospektgesetz* is best interpreted as including also breaches of duty based on slight negligence.[79] Based on the above, the following comments are partly of a legal policy nature (*de lege ferenda*), insofar as they advocate guarantee liability, and partly concern interpretation (*de lege lata*), insofar as they welcome this case law practice (and not, as in the letter of the law, a liability only in case of gross negligence).

3.5.2 A Compensation of Equivalence Interest Scheme Promoting Trust

Assuming that any capital raised is used efficiently and that this is the responsibility of the issuer, the first conclusion to be drawn is simple. Even in the case of prospectus errors – at least from a normative point of view – an issuer who has to reimburse capital raised should only be seen as if he had not received the (incorrectly raised) capital. This is because the issuer is not deprived of value in the case of such efficient use, but only has to replace the faulty fundraising with alternative fundraising – now in a lawful procedure. An argument to the effect that the damage often does not occur with the issuer, but with the provider – such as a financial intermediary – hardly supports a different assessment. The question of

77 See survey in Grundmann, n 6 above, part 6 para 210 *et seq*, 227–229. According to the prevailing opinion, consequential damages are only to be compensated on the basis of a contractual guarantee (rare exceptional case) or on the basis of § 826 *BGB*, i.e. in the case of intent or even willful intent to cause damage (*loc cit* paras 264–266). This will be the framework analyzed in the following.

78 In addition to the fact that this constitutes the most restrictive claim structure in an international comparison and that there are many more far-reaching alternatives (including indirect damages, consequential damages, but also triple damages) Grundmann, n 6 above, part 6 para 209 *et seq*.

79 See on all these questions Grundmann, n 6 above, part 6 para 206, 238–243. The German Supreme Court would seem to apply a standard of simple negligence. Two Supreme court decisions in which, for example, it can hardly be assumed that there was gross negligence ('obvious and immediately obvious' to any expert): BGH, 6 July 1993 – XI ZR 12/93 (*BGHZ* 123, 126, 129 *et seq*) (also foreign business press had to be observed); BGH, 14 July 1998 – XI ZR 173–97 (19 *Zeitschrift für Wirtschaftsrecht [ZIP]* 1528–1531 (1998)) (obligation to continuously monitor and update).

how damages are shared in case of a division of labour on the provider side should – according to all relevant regulatory and burden-sharing considerations in private and commercial law – be settled on the provider side. This is between professional and initiated actors – if necessary by means of a corresponding risk premium on the part of the financial intermediary vis-à-vis future issuers.

If, therefore, the core issue is the return of unlawfully received capital to the deceived investor – with proven causality and only to the amount of the capital directly raised on the basis of the prospectus – only one solution seems compatible with the ethical foundations of a sociological–philosophical concept of trust: the return of capital without a fault requirement. This, of course, is the solution, which, for sales law, was praised as the great progress made by CISG and the Sales Directive 1999/44/EC – as one of the most important legal–ethical advances of the reform. The reimbursement of what was received/retained in breach of duty must not be made dependent on subjective reproachability.[80] Otherwise, the breach of duty or illegality is perpetuated in a certain section of cases and trust, insofar as it is based on a sense of justice and ethics, is shaken. Moreover, since the risk of litigation appears to be disproportionately greater if a fault requirement exists than if liability depends only on incorrect or missing information, any system even asking only for slight negligence appears to be one that makes claims considerably more difficult for investors and does not systematically sanction unlawful capital raising.

A prospectus liability regulation that makes even the simple distribution of unlawfully raised capital dependent on an accusation of gross or even slight negligence is thus a major case of shattering a sociological–philosophical concept of trust that is also founded in ethics. Of course, this also applies for a second reason, now oriented towards market competition. In a comparison of investment offers, a regulation that does not sanction every solicitation of capital based on a violation of prospectus law (requiring namely full and correct statement of the relevant facts), but only those that are (grossly/slightly) negligent, puts providers and offers that are designed in full compliance with prospectus law at a disadvantage. This is because the demand side can no longer compare promised qualities with each other if it sometimes receives compensation in the case of negative

80 For the modernisation of German law of obligations, this is the dominant view: *Abschlussbericht der Kommission zur Überarbeitung des Schuldrechts*, 1992 ('Vorschläge der Kommission zur Überarbeitung des Schuldrechts', der sogenannten Schuldrechtskommission ['Proposals of the Commission on the Revision of the Law of Obligations', the so-called Law of Obligations Commission]) p 31; intensively justifying this new approach in terms of promise content, therefore particularly relevant for the present context H. Ehmann, 'Garantie- oder Verschuldenshaftung bei Nichterfüllung und Schlechtleistung', in A. Heldrich *et al* (eds), *Festschrift for Canaris* (Munich: CHBeck, 2007) 165–218, 168–178.

deviations, while other times it does not, depending on (possibly) subjective elements on the part of the provider.[81]

These considerations are further reinforced by the fact that investment activity is inevitably – in Luhmann's words – advance performance, i.e. advance performance in trust, thus creating a structural vulnerability, if at the same time the personal trust relationships are rather weak or not developed at all. In this case, such trust appears sustainable only if the counter-performance that is to follow is absolutely – not only relatively – guaranteed by the system. This implies that in any case the legal requirements should guarantee absolute enforcement. Through the comprehensive involvement of credit institutions or investment firms, this guarantee would also be secured in a comparable way to the deposit guarantee system: if the prospectus is faulty, the correlate is the absolute liability of a usually solvent debtor.

Conversely, a restriction – reminiscent of the insignificance exception in European Sales Law – seems convincing. The prospectus liability as guarantee liability advocated here could be limited to cases in which the overall impression of the prospectus is 'misleading' (cf Articles 7 para 2, 9 para 9 and 11 para 2 EU Prospectus Regulation). For only in these cases does the confidence-shattering argument have a central effect. This is different in the case of individual, selective omissions and errors – even those that are certainly relevant for investors. Then there would be a two-track regime: with limited liability only in cases of slight/gross negligence for simple omissions and errors and a guarantee liability if the overall impression appears misleading – and thus shakes confidence to a particular extent.

4 Final and Overall Considerations

Two conclusions are obvious if trust – especially in sociological, partly philosophical trust research – is thought to be much more independent of information than is classically assumed in the law of commercial contracts and in capital market research, as a genuine alternative. In such an alternative world, role models are key and trust is particularly placed in persons, not only in systems,

81 On the consideration that guarantee liability in contract law promotes comparability S. Grundmann, 'The Fault Principle as the Chameleon of Contract Law – A Market Function Approach' 35 *Michigan Law Review* 1583–1599 (2009); cf other advantages of a guarantee liability S. Shavell, 'Strict Liability versus Negligence' 9 *Journal of Legal Studies* 1–25 (1980); H.-B. Schäfer/C. Ott, *Lehrbuch der ökonomischen Analyse des Zivilrechts* (6th ed, Berlin/New York: de Gruyter, 2020) 219 *et seq*, 227–232, 251–256; and as well O. Ben Shahar/A. Porat (eds), *Fault in American Contract Law* (Cambridge: Cambridge University Press, 2010).

namely functioning information systems. The first obvious conclusion is that such a paradigm of trust is of even greater importance for actions that severely shake trust, such as insider trading. It is therefore not surprising that the European insider law and its almost excessive harshness can better be explained, as it were, through this 'sociological-philosophical' image of trust in its basic principles and individual norms. This does not mean, however, that this image of trust does not also carry weight in less 'blatant' cases, in normative cases such as disclosure rules that were at the centre of interest in this contribution. It is true that in this area the guiding principle of information efficiency continues to be central for broad investor circles and situations, and rightly so. In the sense of a functional differentiation, however, areas that are characterised by closer investment relationships and contexts and by investors who have a low information processing capacity should be thought through more strongly under the guiding principle of a genuine trust paradigm. The nationally designed exemption area for (annual) total issue volumes below 8 million Euro (in Germany §§ 3–7 *Wertpapierprospektgesetz*) stands paradigmatically for this, the EU growth prospectus (Article 15 EU Prospectus Regulation) less clearly. However, even in the core area of the classic prospectus, the question arises whether strong socio-political and above all ethical aspects do not also speak for a design of the law that could promote trust more strongly than conventionally. Bringing trust – in the sense of a sociologically and philosophically based concept of trust – to bear also in the 'normal case' of disclosure duties (not only in extremely trust-shattering scenarios such as insider trading) is the challenge of this contribution. This is the question of a contract and capital market law more adapted to private investors,[82] with enormous repercussions more generally on the whole law of commercial contracts.

82 See on this (forthcoming) M. Yiatrou, *Behaviourally Informed Retail Financial Regulation – Turning Bias into Bliss*, EUI-Dissertation 2020.