The Implementation of the MiFID into the WpHG

By Sebastian Barry and Hannes Bracht[*]

A. Introduction

On 1 November 2007 the *Finanzmarktrichtlinie-Umsetzungsgesetz* (FRUG) came into effect. The FRUG is supplemented by two directives, the *Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung* (WpDVerOV)[1] (as amended by the *Erste Verordnung zur Änderung der Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung*[2]) and the *Erste Änderungsverordnung zur Finanzanalyseverordnung*[3]. Together with the aforementioned directives the FRUG implements the *Markets in Financial Instruments Directive* (MiFID)[4] into German law, which is itself supplemented by a *MiFID Implementing Directive*[5] and a *Commission Regulation*[6]. Altogether this legislation is part of the *Financial Services Action Plan* of the European Commission aiming at the formation of a single market for financial services. The new legislation leads to material changes in the *Wertpapierhandelsgesetz* (WpHG)[7]. On the one hand numerous new regulations have been added, on the other hand already existing regulations have become much

[*] Sebastian Barry is a former research fellow at the Westfälische Wilhelms-Universität Münster, Institut für Arbeits-, Sozial- und Wirtschaftsrecht Abt. I (Gesellschafts-, Bank- und Kapitalmarktrecht), Universitätsstr. 14-16, 48143 Münster and trainee lawyer (*Referendar*) at *Landgericht Münster*. Email: sebastian.barry@googlemail.com. Hannes Bracht is a research assistant at the Westfälische Wilhelms-Universität Münster, Institut für Arbeits-, Sozial- und Wirtschaftsrecht Abt. I (Gesellschafts-, Bank- und Kapitalmarktrecht), Universitätsstr. 14-16, 48143 Münster. Email: hbracht@uni-muenster.de.

[1] Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung [WpDVerOV] July 20, 2007, BGBl. 2007 I at 1432.

[2] Erste Verordnung zur Änderung der Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung, Nov. 21, 2007, BGBl. 2007 I at 2602.

[3] Änderungsverordnung zur Finanzanalyseverordnung, July 20, 2007, BGBl. 2007 I at 1430.

[4] Commission Directive 2004/34/EC, 2004 O. J. (L145) 1.

[5] Commission Directive 2006/73/EC, 2006 O. J. (L241) 26.

[6] Commission Regulation (EC) 1287/2006, 2006 O. J. (L241) 1.

[7] Wertpapierhandelsgesetz, Sept. 9, 1998, BGBl. 1998 I at 2708.

https://doi.org/10.1017/S2071832200000389 Published online by Cambridge University Press

more detailed.[8] Thus the WpHG has finally become "the constitution" of German capital market law.[9]

The present article is based on a symposium of the *Zeitschrift für Bankrecht und Bankwirtschaft* under the title "*Die Umsetzung der Richtlinie über Märkte für Finanzinstrumente*" ("the implementation of the markets in financial instruments directive") in Frankfurt a.M. on 29.11.2007.[10] In the following the main subject matters of this symposium are presented and elaborated on. At the same time the article shall provide a general overview of the implementation of the MiFID in the WpHG. Firstly, the article discusses changes in the scope of application of the WpHG and gives an overview of the concept of client classification, an instrument previously unknown in German capital market law. Subsequently the article focuses on some of the main regulations of the WpHG. These are the regulations on the so-called "best execution" in § 33a WpHG, the treatment of inducements in § 31d WpHG and finally the duties of client information in § 31 WpHG.

B. Basic Regulations

I. Scope of Application

The regulations of the WpHG as amended by the MiFID, apply to investment firms. According to § 2 sec. 4 WpHG investment firms are primarily businesses which render investment services on a commercial basis. Thus the provision of investment services in the meaning of § 2 sec. 3 WpHG is the central requirement. In this respect some changes have been made, which go back to Annex I Section A, B MiFID. To name one example, according to § 2 sec. 3 sent. 1 No. 9 WpHG investment advice is now an investment service in the meaning of § 2 sec. 3 WpHG and not an ancillary service in the meaning of § 2 sec. 3a WpHG as before. This will have consequences especially for those businesses which only provide investment advice, for family offices in particular.[11] Besides the necessary licence to conduct

---

[8] *See* Holger Fleischer, *Die Richtlinie über Märkte für Finanzinstrumente und das Finanzmarkt-Richtlinie-Umsetzungsgesetz*, ZEITSCHRIFT FÜR BANK UND KAPITALMARKTRECHT (BKR) 389 (2006); Gerald Spindler & Roman A. Kasten, *Änderungen des WpHG durch das Finanzmarktrichtlinie-Umsetzungsgesetz (FRUG)*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1245 (2007).

[9] *Compare* Herbert Jütten, *Neues 'Grundgesetz' für das Wertpapiergeschäft*, 3 ZEITSCHRIFT FÜR BANKPOLITIK UND PRAXIS (Die Bank) 12 (2006).

[10] *Compare* ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 1 et seq. (2008).

[11] *Compare* Erich Waclawik, *Erlaubnispflicht privater Family Offices nach Umsetzung der MiFID?*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1341, 1342 et seq. (2007).

banking transactions according to § 32 *Kreditwesengesetz* (KWG)[12] the rules of conduct according to §§ 31 et seqq. WpHG also apply to these businesses now. §§ 31 et seqq. WpHG still do not apply to professional classes, etc. lawyers and accountants, as far as they only give investment advice on an occasional basis.

A much-discussed matter in the course of the implementation of the MiFID in Germany was the question if closed funds fall within the scope of the MiFID.[13] Starting point for this discussion is § 2 sec. 2 sent. 1 No. 2 WpHG according to which stakes in legal entities and partnerships are securities provided that they are comparable to shares. This could also apply to stakes in closed funds in the form of *Kommanditgesellschaften* (limited partnerships) and *Gesellschaften bürgerlichen Rechts* (civil-law partnerships). On the contrary, the German legislator has expressly ruled that stakes in closed funds do not qualify as securities arguing with the lack of comparability with securities as well as the fact that an acquisition in good faith is not possible. [14]

This line of argument has been much criticized as Art. 4 (1) No. 18 a) MiFID does not set up any such requirements. Some critics regarded this as a false implementation of the MiFID allowing the commencement of infringement procedures. But finally the exclusion of closed funds from the scope of application of the MiFID is the right approach. In the absence of any other criteria the decision can only be based on the manageability of closed funds on capital markets according to Art. 4 (1) No. 18 MiFID. As stakes in partnerships are generally marketable the question if there is a market for shares in closed funds, which is sufficiently worthy of protection, is the decisive criterion.

In this respect it is often said that trading with closed funds on the so-called grey market has reached a certain level of organisation in the last few years, often referring to the Hamburg funds stock. However, on closer inspection of this institution it becomes apparent that it is not comparable with conventional capital markets governed by the WpHG, neither with regard to the organisation of the

---

[12] *Kreditwesengesetz* Sept. 9, 1998, BGBl. 1998 I at 2776; regarding the licence to conduct banking services according to § 32 KWG *see* Fleischer, *supra*, note 8 at 392; Andreas Otto Kühne, *Ausgewählte Auswirkungen der Wertpapierdienstleistungsrichtlinie – MiFID*, ZEITSCHRIFT FÜR BANK UND KAPITALMARKTRECHT (BKR) 275 et seq. (2005); Waclawik, *supra*, note 11 at 1341.

[13] Patricia Vollhard & Sarah Wilkens, *Auswirkungen der Richtlinie über Märkte für Finanzinstrumente (MiFID) auf geschlossene Fonds in Deutschland*, WOCHENSCHRIFT FÜR BETRIEBSWIRTSCHAFT, STEUERRECHT, WIRTSCHAFTSRECHT, ARBEITSRECHT (Der Betrieb) 2051 (2006); Thorsten Voß, *Geschlossene Fonds in Deutschland unter dem Rechtsregime der Finanzmarkt-Richtlinie (MiFID)?*, ZEITSCHRIFT FÜR BANK- UND KAPITALRECHT (BKR) 45 (2007).

[14] BT-Drucks. 16/4028, 54.

market nor with regard to transaction volume. At the fund stock intermediaries are only involved in a very limited number of transactions. Furthermore, the most closed funds listed on the funds stock do not have any transaction volume at all. Due to practical reasons the question if a closed fund is a fungible security cannot be answered on a case by cases basis but only uniformly. Keeping this in mind it is preferable to exclude closed funds from the scope of the WpHG altogether.

II. Client Classification

A basic innovation in German law is the classification of clients into different categories.[15] The so-far uniform degree of protection of the WpHG is thereby replaced by a gradual approach, which is meant to take better into account the interests of the different classes of clients. The legislator has created three main categories of clients, *eligible counterparties*, *professional clients* and *retail clients*, with the peculiarity that *eligible counterparties* are a sub-category of *professional clients*. The least protection is provided to *eligible counterparties* in the meaning of § 31 a sec. 4 WpHG. According to § 31b sec. 1 WpHG the essential protective regulations of §§ 31 et seqq. WpHG do not apply to these clients. This especially applies for the duties of information according to § 31 sec. 2, 3 and 5 to 7 WpHG, the provisions on inducements in § 31d WpHG and the principles of best execution according to § 33a WpHG. The legislator takes the view that *eligible counterparties* are such strong and professional market participants that they are able to safeguard their interests against investment firms themselves and therefore do not require protection by financial service authorities. A medium level of protection is provided to *professional clients* according to § 31a sec. 2 WpHG. To these clients all protective regulations of §§ 31 et seqq. WpHG are generally applicable, though partly modified. Especially § 31 sec. 9 WpHG ought to be mentioned in this context, which narrowly confines the suitability test according to § 31 sec. 4 WpHG. The highest level of protection is finally provided to *retail clients* according to § 31a sec. 3 WpHG. All provisions of §§ 31 et seqq. WpHG apply to them without any restrictions. This concept of gradual protection along with the idea to apply the protective regulations of the WpHG only to those market participants who are actually in need of such protection whereas facilitating individual contractual agreements on other respects ought to be welcomed. Yet, problems occur on closer

[15] *Compare* PETER CLOUTH & THORSTEN SEYFRIED, MIFID PRAKTIKERHANDBUCH 27 et seq. (2007); Christian Duve & Moritz Keller, *MiFID: Die neue Welt des Wertpapiergeschäfts*, ZEITSCHRIFT FÜR RECHT, STEUERN UND WIRTSCHAFT (Betriebs-Berater) 2425, 2427 et seq. (2006); Roman A. Kasten, *Das neue Kundenbild des § 31a WpHG – Umsetzungsprobleme nach MiFID & FRUG*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 261 et seq. (2007); Thorsten Seyfried, *Die Richtlinie über Märkte für Finanzinstrumente (MiFID) – Neuordnung der Wohlverhaltensregeln*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1375 (2006).

inspection of individual provisions of the WpHG. The scope of the different classes of clients raises some questions. According to the legislator local authorities are *professional clients* in the meaning of § 31a sec. 2 sent. 2 No. 3 WpHG.[16] It appears questionable if local authorities are really comprised by *national and regional governments* in the meaning of Annex II (1) No. 3 MiFID or if they rather qualify as *public sector bodies* in the meaning of Annex II (2) No. 1 MiFID and therefore as *private clients*. Furthermore according to § 31a sec. 4 sent. 1 WpHG local authorities would then even be categorized as *eligible counterparties,* although according to Art. 24 (2) sec. 1 MiFID this does not even apply for regional but only for national governments and their corresponding offices. Thus the categorization of local authorities as *professional clients* and *eligible counterparties* is a violation of EC-law and is not in compliance with the approach in other member states either.[17] Consequently, in the case of local authorities the German legislator provides a level of protection, which is too low.[18]

In other cases one might ask if the level of protection is not artificially high, e.g. in the case of a private individual, who is engaged in the management of its own considerable assets in a professional manner. The classification of such a person as professional client in the meaning of § 31a sec. 2 sent. 2 WpHG appears to be difficult, as only companies fall into this category. In any case the classification of private individuals as professional clients founders on the fact that § 31a sec. 2 sent. 2 WpHG relates to balance sheet ratios, which a private individual cannot provide as he does not have to draw up a balance sheet in compliance with §§ 242 et seqq. *Handelsgesetzbuch* (HGB). Therefore the only possibility is the opt-up of the private individual to an elective professional client according to § 31a sec. 7 WpHG. The above-mentioned kind of clients will meet the respective criteria in most cases. However, an opt-up to an elective eligible counterparty is practically impossible as § 31a sec. 4 sent. 2 No. 1 WpHG only refers to § 31a sec. 2 sent. 2 No. 2 WpHG and not to § 31a sec. 7 WpHG. On the contrary, Art. 24 (3), Annex II (2) MiFID, Art. 50 (1) sent. 2 of the MiFID implementing directive 2006/73/EG allows for such a further opt-up of private clients to eligible counterparties. If § 2 sec. 2 No. 1 WpDVerOV has to be understood as a hint for the legitimacy of such a further opt-up contrary to the wording of the WpHG remains to be seen. However, it shows that the client classification has not yet been perfectly balanced in terms of the provision of the right level of protection for the variety of market participants.

---

[16] BT-Drucks. 16/4028, 66.

[17] *Compare* § 58, sec. 2, no. 3 Wertpapieraufsichtsgesetz [WAG] BGBl. 2007 I, 60 (Austria) or New Conduct of Business Sourcebook (COBS) rule 3.5.2 A (Great Britain).

[18] *Compare* Hannes Bracht, *Kommunen als geeignete Gegenparteien im Handel mit Derivaten nach dem Finanzmarktrichtlinie-Umsetzungsgesetz*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1386, 1387 et seq. (2008).

C. Best Execution

According to § 33a sec. 1 WpHG an investment firm must take all reasonable steps to obtain, when executing orders, the best possible result for its clients.[19] This especially implies the obligation to establish a policy for the best execution of orders and to implement effective arrangements for complying with this policy. According to § 33a sec. 2 WpHG this execution policy must take into account the factors of price, costs, speed, likelihood of execution and settlement as well as the size and the nature of the order. Within these criteria the investment firm has to determine the relative importance of the execution factors. If the client is a retail client the price of the financial instrument and the costs related to the execution are decisive according to § 33a sec. 3 WpHG. From a private law perspective these rules do not contain any innovations as the duty of best execution already follows from § 384 sec. 1 HGB. Nonetheless two consequences can be expected from the new definition of the duty of best execution as a supervisory duty of organisation. On the one hand the competition between the different execution venues for a consideration in the execution policies is meant to improve their business conditions, whereas besides the regulated markets multilateral trading facilities (MTF) as well as systematic internalizers also take part in this competition.[20] If alternative providers can indeed take root or whether the established providers, e.g. Xetra for shares, will keep their dominant position remains to be seen. On the other hand § 33a WpHG is also meant to lead to a strengthening of the protection of investors in the relationship between investment firms and clients. It ought to be noted that according to § 31b WpHG the duty of best execution does not apply to transactions with eligible counterparties. If, on the other hand, professional clients or retail clients are involved the execution policies provide first evidence for the control of the execution of orders, which would otherwise be very difficult to retrace. Though § 33a WpHG does not aim at the best execution in individual cases

---

[19] Peter Gomber, Michael Chlistalla & Sven S. Groth, *Neue Börsenlandschaft in Europa? Die Umsetzung der MiFID aus Sicht europäischer Marktplatzbetreiber*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 2, 3 et seq. (2008); Thomas Dirkes, *Best Execution in der deutschen Börsenlandschaft*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 11 (2008); *compare* Duve & Keller, *supra*, note 15 at 2480 et seq.; Peter Gomber & Holger Hirschberg, *Ende oder Stärkung der konventionellen Börsen?*, ZEITSCHRIFT FÜR DAS GESAMTE AKTIENWESEN UND FÜR DEUTSCHES, EUROPÄISCHES UND INTERNATIONALES UNTERNEHMENS- UND KAPITALMARKTRECHT (AG) 777, 781 et seq. (2006); Cornelia Schmitt & Sven Schielke, *Best Execution under MiFID*, ZEITSCHRIFT FÜR BANKPOLITIK UND PRAXIS (Die Bank) 32 (2006); Frank Zingel, *Die Verpflichtung zur bestmöglichen Ausführung von Kundenaufträgen nach dem Finanzmarkt-Richtlinie-Umsetzungsgesetz*, ZEITSCHRIFT FÜR BANK- UND KAPTIALMARKTRECHT (BKR) 173 (2007).

[20] Holger Hirschberg, *MiFID – Ein neuer Rechtsrahmen für die Wertpapierhandelsplätze in Deutschland*, ZEITSCHRIFT FÜR DAS GESAMTE AKTIENWESEN UND FÜR DEUTSCHES, EUROPÄISCHES UND INTERNATIONALES UNTERNEHMENS- UND KAPITALMARKTRECHT (AG) 398 (2006).

but only sets up a supervisory duty of organisation thus only demanding the investment firm to set up a suitable concept of best execution.[21] A further starting point for questioning the effectiveness of the protection of investors by § 33a WpHG is the possibility to carry out an order in compliance with the specific instruction of a client according to § 33a sec. 4 WpHG. If the investment firm follows such an instruction it complies with its duty of best execution. This enables the investment firm to ask the client for an instruction for each transaction. However, it does not absolve the investment firm from its duty to set up an execution policy.[22] Nonetheless, in the case that the investment firm only follows the specific instruction of its client, the choice of the execution venue is left to the party who has typically the least knowledge of the market mechanisms. Correctly the consequences of such a business practice on the duties of the investment firm needs some discussion, whereas the execution policies can only serve as a starting for determination of the duties of the client information in such cases.

D. Inducements

§ 31d WpHG deals with the problem of inducements to investment firms in the course of the provision of investment services.[23] Regularly, this applies to situations in which the client buys a financial instrument of a third party via the investment firm and this third party then hands part of the remuneration it has received from the client back to the investment firm (kick-back). The provisions in the MiFID on this problem (§ 31d WpHG is based on Art. 19 (1) MiFID, Art. 26 MiFID implementing directive) coincide with a basic ruling of the German Federal Court of Justice (BGH).[24] According to the BGH the duty of investment firms to disclose such inducements already followed from § 31 sec. 1 No. 2 WpHG in its former version. If the investment firm violates this duty the client can demand the unwinding of the contract (compensation for damage in kind). § 31d sec. 1 WpHG

---

[21] *Compare* BT-Drucks. 16/4028, 53.

[22] BT-Drucks. 16/4028, 73.

[23] Heinz-Dieter Assmann, *Interessenkonflikte aufgrund von Zuwendungen*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 21 (2008); *compare* Till Brocker, *Aufklärungspflichten der Bank bei Innenprovisionsgestaltungen*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 365 (2007); Matthias Rozok, *Tod der Vertriebsprovisionen oder Alles wie gehabt? – Die Neuregelungen über Zuwendungen bei der Umsetzung der Finanzmarktrichtlinie*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 217 (2007); Florian Schumacher, *Rückvergütungszahlungen von Investmentgesellschaften an Kreditinstitute – Keine Umgehung des § 31d Abs. 1 Satz 1 WpHG mittels eines Zahlungs-'Auftrags' des Kunden*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 447 (2007).

[24] BGHZ 170, 226; *compare* Max Nikolaus & Stefan d´Oleire, *Aufklärung über "Kick-backs" in der Anlageberatung: Anmerkungen zum BGH-Urteil vom 19.12.2006 = WM 2007, 487*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 2129 (2007).

now expressly prohibits any inducements to (and from) third parties in the course of the provision of investment services. Though it also contains several exceptions. Also the question who is a third party in the meaning of the provision appears to be problematic. § 31d sec. 1 WpHG does probably not apply to in-house inducements. Yet this exception becomes difficult when thinking of inducements within a group of companies. One might argue that a disclosure of inducements is not mandatory in these cases as long as only products of the own group are marketed. On the other hand even the inducement structures within a group can be important for the client. Besides that such a general exemption would unduly privilege those investment firms, which are organized in a group.

Ground for more discussion is provided by the three codified exceptions from the ban of inducements. According to § 31d sec. 1 sent. 1 No. 1, 2 WpHG kick-backs are allowed if they enhance the quality of the relevant service and are clearly disclosed to the client. Similar to this is the exception in § 31d sec. 5 WpHG, which excludes those inducements, which enable or are necessary for the provision of investment services. The scope of application of these exceptions appears to be small, as at first sight it is not conceivable in which way an inducement to a third party is capable of enabling or improving the provision of investment services. But one might come to different conclusion when focusing on the investment advice provided by investment firms. Regularly the consulting of the client in the course of the provision of an investment service does not lead to extra costs. However, it might be possible to argue that the investment advice provided to the client is financed precisely by means of the inducements received by the third party. This is even more apparent, when the inducement is not a fee or commission but a non-monetary benefit, also covered by § 31d sec. 2 WpHG, e.g. a training course for the employees of the investment firm. § 31d sec. 4 WpHG also appears to point into this direction, containing an assumption that the quality of investment services improves when the inducement is provided in connection with the investment advice of the client as defined in § 2 sec. 3 sent. 1 No. 9 WpHG. Nonetheless, there are doubts, if this interpretation leads to satisfying results, since the provision of investment advice is especially prone to conflicts of interests. The final exception from the ban on inducements is contained in § 31d sec. 1 sent. 2 WpHG, according to which no inducement is made, when the third party provides it to the investment firm on behalf of the customer. This provision bears the danger of a circumvention of the ban of inducements in § 31d WpHG, which has to be averted by an accordingly strict control of the general terms and conditions of investment firms.

E. Duties of Client Information

The duties of information are now codified in § 31 WpHG. The legislator has chosen a very detailed level of codification.[25] The present article can only provide a very short overview of this topic. According to § 31 sec. 3 WpHG an investment firm must provide its clients with information about the financial instruments and investment services on offer. According to § 31b sec. 2 sent. 1 WpHG this does not apply to dealings with eligible counterparties. The provided information is meant to enable the client to make a self-dependent investment decision. The duties of the investment firm are not only confined to the provision of information though. In fact the investment firm has to investigate whether the specific financial instrument or the investment service fits the respective client. When providing investment advice or portfolio management this takes place in the form of a "suitability test". For that purpose the investment firm has to obtain the necessary information about the client and scrutinize whether the specific type of product or service fits the client's investment objectives, whether the financial risks can be borne by the client and whether the client has the necessary knowledge and experience to understand these risks. If the investment firm comes to a negative result the financial instrument must not be recommended and the investment service must not be provided respectively. If the client is a professional client the investment firm can, according to § 31 sec. 9 WpHG, assume that the client is aware of the risks of the financial instrument or the investment service and that these risks can be borne by him. If another financial service than investment advice or portfolio management is provided the "appropriateness test" according to § 31 sec. 5 WpHG applies. In this case the investment firm only has to gather information about the client, in order to scrutinize whether the financial instruments or investment services are appropriate for the client, that is, whether the client has the necessary knowledge and experience on the field of investment. If this test leads to a negative result the investment firm has to warn the client. According to § 31b sec. 1 WpHG this provision does again not apply to eligible counterparties.

---

[25] Rüdiger Veil, *Vermögensverwaltung und Anlageberatung im neuen Wertpapierhandelsrecht – eine behutsame Reform der Wohlverhaltensregeln?*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 34 (2008); Hans Ulrich Buhl & Marcus Kaiser, *Herausforderungen und Gestaltungschancen aufgrund von MiFID und EU-Vermittlerrichtlinie in der Kundenberatung*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 43 (2008); *compare* Peter Balzer, *Umsetzung der MiFID: Ein neuer Rechtsrahmen für die Anlageberatung*, ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT (ZBB) 333 (2007); Duve & Keller, *supra* note 15, at 2477 et seq.; Hanno Teuber, *Finanzmarkt-Richtlinie (MiFID) – Auswirkungen auf Anlageberatung und Vermögensverwaltung im Überblick*, ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT (BKR) 429 (2006); Tilman Weichert & Thomas Wenninger, *Die Neuregelung der Erkundigungs- und Aufklärungspflichten von Wertpapierdienstleistungsunternehmen gem. Art. 19 RiL 2004/39/EG (MiFID) und Finanzmarkt-Richtlinie-Umsetzungsgesetz*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 627 (2007).

It is an extensively discussed question how these duties correlate with the *Bond*-ruling of the BGH. In this decision the BGH derived the duty of client information from an implied consultancy agreement and not from any supervisory regulations. Thus the answer to the aforementioned question depends on the effects of supervisory regulations on private law. This is a difficult question of principle beyond the scope of this article. It may only be referred to the discussion on the legal nature of supervisory regulations as being either public or private law as well as the unclear terms of the "*Ausstrahlungs*-" or "*Konkretisierungswirkung*" (radiating or concretizing effects) of supervisory regulations on private law.[26] In this context the present article can only deal with the controversy if the *Bond*-ruling of the BGH has been outdated by the implementation of the MiFID into German law[27] or if the principles of the ruling persist[28]. We take the view that the *Bond*-ruling is not outdated but rather needs some adaptation. In the future a much more restrictive approach should be taken concerning the assumption of an implied consultancy agreement in the course of the provision of investment services. § 31 WpHG as well as the concept of client classification in § 31a WpHG show that the legislator aimed at a gradual level of protection depending on the provided investment service as well as the need of protection of the different types of clients. This concept would be undermined if each provision of investment services would entail an implied consultancy agreement triggering extensive duties of information. However, if a consultancy agreement is actually concluded, its content has to be determined by using the ordinary means of interpretation. In this respect § 31 sec. 3 WpHG does not set any limits. As a consequence, contrary to § 31 sec. 3 WpHG the parties can not only agree on duties of information regarding the relevant type of investment service but also with regard to the specific investment service as provided in the individual case. Arguably this result can be best brought in line with the assumption that the supervisory regulations are only of radiating effect on private law.

F. Conclusion

It has been shown that the implementation of the MiFID has brought many new detailed regulations into the WpHG. In some cases the German legislator has not met the self-set goal[29] of a one-to-one implementation of the MiFID into national

[26] *Recently* Rüdiger Veil, *Anlageberatung im Zeitalter der MiFID*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1821, 1825 et seq. (2007); Weichert & Wenninger, *supra* note 25, at 635.

[27] Peter O. Mülbert, *Anlegerschutz bei Zertifikaten*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND BANKRECHT (WM) 1149, 1157 (2007).

[28] Veil, *supra* note 26, at 1826.

[29] BT-Drucks. 16/4028, 52.

https://doi.org/10.1017/S2071832200000389 Published online by Cambridge University Press

law. This might cause profound difficulties in the interpretation and application of the new regulations. The controversial discussed classification of local authorities as either *retail clients* or *professional clients* or even *eligible counterparties* may serve as only one example. Thereby the vivid controversies in this area of the law have not come to an end but have rather received new input. Inevitably many of these new questions are awaiting profound research and remain unanswered for the time being.