Self-commitments and the Binding Force of Self-regulation with Respect to Third Parties in Germany

Law Working Paper N° 379/2017
December 2017

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ECGI Working Paper Series in Law

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Abstract

Codes of conduct are a well-accepted feature of European corporate governance. Listed corporations are obliged to annually state their compliance with a corporate governance code or to explain their non-compliance. Whilst it is agreed that self-commitments to non-statutory rules or standards of good conduct are an important component of self-regulation, it is widely unexplored how and to what extent they influence legal duties. The main purpose of this article is to show that a typology of binding mechanisms helps to narrow this uncertainty. In section II, a brief look at the theory and practice of self-commitments will explain where the discussion stands and which challenges need to be addressed. Section III presents the typology of binding mechanisms, these including norms, contracts, charters, and disclosure. Section IV looks at the consequences of non-compliance with a self-commitment in respect of third parties. Section V concludes with a summary of the main findings regarding the binding effects of self-commitments towards third parties.

Keywords: Bathurst, burden of proof, Caparo, comply or explain, corporate disclosure, corporate governance code, corporate social responsibility, Hedley Byrne, lex mercatoria, negligent misrepresentation, professional liability, pure economic loss, rules versus standards, third-party liability

JEL Classifications: K12, K20, K22, K41

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Forthcoming in: Harald Baum, Moritz Bälz, Marc Dernauer (eds.), Self-regulation in Private Law in Japan and Germany, Cologne (Carl Heymanns) 2018.

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I. INTRODUCTION[1]

Self-commitments to non-statutory rules or standards of good conduct serve to generate trust. Generating trust can be indispensable for business where legislation does not yet exist, when compliance with the legal minimum does not satisfy customers, or where maintaining such a minimum will not suffice to organize exchange within an industry. Arguably, self-commitments as a form of self-regulation are often made in the shadow of the law, i.e. to avoid legal intervention into an industry that has come into

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1 The following article is based on P. C. LEYENS, Selbstbindungen an untergesetzliche Verhaltensregeln: Gesetz, Vertrag, Verband, Publizität und Aufsichtsrecht, Archiv für die civilistische Praxis 215 (2015) 611–654.

the focus of the legislature.[2] Ideally, self-regulation leads to a better allocation and use of rule-making resources. Private rule-making and standard setting can serve to fill gaps where legislators lack the relevant knowledge.[3] Moreover, self-commitments to such rules and standards can trigger innovation by helping the market to distinguish between offers and, hence, by increasing competition within one industry.

Uncertainty about the legal consequences can lead to unfavourable risk aversion and hamper the positive effects of self-regulation. Whilst it is agreed that self-commitments are an important component of self-regulation, it is widely unexplored how and to what extent they influence legal duties. When one party commits herself towards the other party, legal doctrine will normally provide the relevant categories for determining the consequences of non-compliance. The position is much less clear when self-commitments are used to secure a third party's trust. The term 'third' is used here to describe constellations where a person is either not a party to the agreement to which the self-commitment is tied or where such agreement does not exist from the outset.

The main purpose of this article is to show that a typology of binding mechanisms helps to narrow this uncertainty. The article is written from a German legal perspective and includes selected comparative remarks. Described phenomena mainly relate to self-commitments made by business professionals. In section II, a brief look at the theory and practice of self-commitments will explain where the discussion stands and which challenges need to be addressed. Section III presents the typology of binding mechanisms, these including norms, contracts, charters, and disclosure. Section IV looks at the consequences of non-compliance with a self-commitment in respect of third parties. Section V concludes with a summary of the main findings regarding the binding effects of self-commitments towards third parties.

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2 The term was coined by R. H. MNOOKIN/L. KORNHAUSER, Bargaining in the Shadow of the Law: The Case of Divorce, Yale Law Journal 88 (1979) 950, 968. It was taken up, for instance, by T.M.J. MÖLLERS/B. FEKONJA, Private Rechtsetzung im Schatten des Gesetzes: Ein Beitrag zur Bindungswirkung privaten Rechts am Beispiel des Deutschen Corporate Governance Kodex und der Deutschen Rechnungslegungs Standards, 2012, 777, 779.

3 J. BASEDOW, Komplexität der Wirtschaft, Allokation des Wissens und privates Privatrecht, in: Callies (ed.), Transnationales Recht: Stand und Perspektiven (Tubingen 2014) 141, 142.

II. Self-Commitments in Theory and Practice

Self-commitments to non-legal standards have most probably always been used by professional suppliers of goods or services. Their practical relevance is rarely questioned. Especially technical standards are often perceived as a binding legal source by producers as well as by their customers. The logic is simple: Producers will often not be able to sell a product that does not conform to the relevant industry standards. Similarly, service providers depend on their clients' trust in proper execution, and corporations need to convince investors of sound corporate governance or socially responsible behaviour. Where this simple logic applies and where compliance is safeguarded through mutual trust and reputation, legal scrutiny is of small importance. From a legal perspective, the pivotal question concerns the consequences of non-compliance in cases when such mechanisms fail.

1. Legal Approaches

The approaches to self-commitments in German legal theory look back on an array of schools of thought. *Max Weber* introduced the distinction between the legal order and the societal order.[4] Within his bifocal taxonomy, self-commitments without legislative backing would be subject to moral suasion and outside the law. Leading scholars of the 19th century like *Otto von Gierke* and *Andreas von Thur* had already laid the foundations for classifying private sets of rules or standards either as norms or contracts.[5] Setting norms requires a degree of group empowerment whilst, for a contractual obligation, a sufficient consensus between the parties is needed. Self-commitments reveal elements of both categories: They often refer to a set of rules or standards set by someone else, e.g. by an industry association. At the same time they are made to induce or facilitate contractual consensus.

Consensus as a binding mechanism requires indicia of seriousness, be that consideration in common law or causa in civil law.[6] Two developments in the German legal discourse of the 20th century outline the difficult task of determining the requirements of consensus: The first concerns the attempt to create extra-legal binding mechanisms. At the time, the require-

4 M. Weber, Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie (5. ed., Tubingen 1972) 187.

5 O. von Gierke, Deutsches Privatrecht, vol. 1: Allgemeiner Teil und Personenrecht (Leipzig 1895) 120, 142 ff.; A. von Tuhr, Der Allgemeine Teil des Deutschen Bürgerlichen Rechts, vol. 1: Allgemeine Lehren und Bedeutung (Leipzig 1910) 503.

6 K. Zweigert/H. Kötz, An Introduction to Comparative Law (3. ed., Oxford 1998) 388.

ments for consensus by a matching of offer and acceptance under the German Civil Code were arguably interpreted too narrowly. This led to the idea of a de facto contract *(faktischer Vertrag),* i.e. attaching binding force to (mere) social behaviour.[7] Classic examples relate to unpaid train journeys or the use of electricity without a service agreement. The legal construct of a de facto contract, concluded absent consensus, found support in German courts as well as from leading scholars like *Karl Larenz*.[8] Before the turn of the century, however, the idea had to give way to the stricter, albeit more generously interpreted concept of tacit consensus. Following up on these developments, a mere social consensus on non-statutory rules or standards does not provide a basis for legal consequences.

The second area of intense discussion relates to the alleged normative nature of standard terms ('small print'), which came into focus in the course of industrialization and an increasing number of mass transactions. In his inaugural lecture at the University of Freiburg in 1933 *Hans Grossmann-Doerth* explained the increasing presence of non-negotiated contracts as an attempt of business to create its own legal order *("Selbstgeschaffenes Recht der Wirtschaft").*[9] Later *Friedrich Kessler* coined the term 'contracts of adhesion' and reinforced the view that judicial review of standard terms is needed to correct failures of contracting that are due to unequal negotiation power.[10] Market power as a reason for contracting failures has been challenged in interdisciplinary literature.[11] It is true though that the ability of one party to dictate the terms of a transaction challenges the assumption that contractual consensus serves as a warranty for complete promises in the sense of *Walter Schmidt-Rimpler.*[12]

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7 G. HAUPT, Über faktische Vertragsverhältnisse (Leipzig 1941) 9, 16, 21 distinguishing between legal relationships arising from social contacts (culpa in contrahendo), from affiliating with other persons (de facto corporate charters or de facto labour contracts), and from social obligations (e.g. a train journey). According to his view, in all the mentioned examples a legal obligation is created without a matching of offer and acceptance (*ibid.* 27).

8 K. LARENZ, Allgemeiner Teil des deutschen bürgerlichen Rechts (6. ed., Munich 1983) § 28 II. He gave up the idea of the de facto contract only in the following edition of 1989.

9 H. GROSSMANN-DOERTH, Selbstgeschaffenes Recht der Wirtschaft und Staatliches Recht (Freiburg 1933).

10 F. KESSLER, Contracts of Adhesion – Some Thoughts about Freedom of Contract, Columbia Law Review 43 (1943) 662.

11 P. C. LEYENS/H.-B. SCHÄFER, Inhaltskontrolle allgemeiner Geschäftsbedingungen. Rechtsökonomische Überlegungen zu einer einheitlichen Konzeption von BGB und DCFR, Archiv für die civilistische Praxis 210 (2010) 771, 779, 782.

12 W. SCHMIDT-RIMPLER, Grundfragen einer Erneuerung des Vertragsrechts, Archiv für die civilistische Praxis 147 (1941) 130, 149.

The most visible outcome is the consumer protection movement, today an area of genuine European Union legislation. This movement, however, did not lead to a new understanding of the legal nature of standard terms nor to other attempts of business to draw up its own law. It rather brought forth a specific set of rules regarding judicial review of the inclusion of standard terms into a contract as well as specific fairness tests regarding the contents of such terms.

The struggle to build up a thorough understanding of the binding mechanisms that form the so-called 'private legal order', including self-regulation and self-commitments, continues until today in the civil law as well as in the public law discussion.[13] Leading works like the monographs by *Johannes Köndgen, Gregor Bachmann*, and the one jointly written by *Petra Buck-Heeb* and *Andreas Dieckmann* argue, of course with qualifications, that legal effects are subject to the legitimacy of the set of private rules.[14] Legitimacy has many facets. The possible criteria for narrowing what amounts to legitimacy include lateral consent, group utility, and involvement in the standard-setting process. These criteria are well-fitted to assess the legal relationship between rule-maker and rule-taker in a context of subordination. For example, a lack of involvement in the process of setting the rule or standard can justify more far-reaching judicial review. Self-commitments, however, do not necessarily involve elements of subordination. They might also serve co-ordination at arm's length.

This short survey has shown that privately set specifications of behaviour, without legislative backing, do not assume normative force simply by the fact that they are used by many. Another outcome is that contractual obligations that might derive from such specifications can be (and often should be) subject to more intense court review than freely negotiated terms. The open question concerns the legal significance towards third parties who are ultimately affected by non-compliance with a self-commitment.

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13 S. AUGSBERG, Rechtsetzung zwischen Staat und Gesellschaft: Möglichkeiten differenzierter Steuerung des Kapitalmarktes (Berlin 2003); C. BUMKE/A. RÖTHEL (eds.), Privates Recht (Tübingen 2012); T.J.M. MÖLLERS (ed.), Internationalisierung von Standards (Baden-Baden 2011); T.J.M. MÖLLERS (ed.), Geltung und Faktizität von Standards (Baden-Baden 2009); F. KIRCHHOF, Private Rechtsetzung (Berlin 1987) 138 ff.

14 J. KÖNDGEN, Selbstbindung ohne Vertrag (Tubingen 1981) 97 ff., 233; G. BACHMANN, Private Ordnung: Grundlagen ziviler Regelsetzung (Tubingen 2006) 206; P. BUCK-HEEB/A. DIECKMANN, Selbstregulierung im Privatrecht (Tubingen 2010) 276.

2. Interdisciplinary Assessments

In interdisciplinary literature, the binding effects of self-commitments are often explained by network gains.[15] Since the article published by *Lisa Bernstein* in 1992, the perhaps best-known example is the New York Diamond Dealers Association.[16] The New York Diamond Dealers created a more or less comprehensive private legal order, including mechanisms for dispute resolution tailored to their business needs. Another well-researched example is the City of London and its 'Square Mile' which, at least historically, has comprised all industries relevant for pursuing a corporate or financial transaction. Within this geographically confined area, 'The London City Code of Takeovers and Mergers' of 1968 gained high acceptance levels amongst corporate actors and also their advisors.[17]

The explaining force of network effects is generally accepted for so-called micro-societies. The examples mentioned so far concern geographically concentrated groups which come close to what one might call a micro-society. The pitfall of explanations that rest on network effects seems to be the definition of what a network is and what its benefits are. The parties (also third parties) might generally benefit from enhanced trust. While this explains collective benefits it does not necessarily explain the individual decision to adopt standards of good conduct.

The explaining force is less strong outside micro-societies, e.g. as in the more regionally organized market of finance and ancillary financial services found in Germany.[18] Still, we see self-commitments. The general levels of acceptance for the self-regulatory Code on Takeovers published by the Stock Exchange Expert Commission in 1995,[19] however, were consid-

15 For a recent account see A. ENGERT, Private Normsetzungsmacht: Die Standardisierung von Regelungen im Markt als Form der Fremdbestimmung, Rechtswissenschaft – Zeitschrift für rechtswissenschaftliche Forschung 2014, 301, 309 ff.

16 L. BERNSTEIN, Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, Journal of Legal Studies 21 (1992) 115.

17 B. R. CHEFFINS, Company Law (Oxford 1997) 364 ff.; H. BAUM, Funktionale Elemente und Komplementaritäten des britischen Übernahmerechts, Recht der Internationalen Wirtschaft 2003, 421.

18 For a comparative account see K. J. HOPT, Self-Regulation in Banking and Finance – Practice and Theory in Germany, in: La Déontologie bancaire et financière / The Ethical Standards in Banking & Finance (Bruxelles 1998) 53.

19 Übernahmekodex der Börsensachverständigenkommission beim Bundesministerium der Finanzen. The last revised version of 14 July 1995 is printed with short comments by K. J. HOPT, in: Baumbach / Hopt (founder / ed.), Handelsgesetzbuch (30. ed., München 2000) Übernahmekodex (18).

erably lower than those for its British counterpart. [20] Other attempts like the Guidelines on Insider Trading of the 1970s failed to attract a sufficient number of subscriptions.[21] At least in hindsight, the low levels of acceptance are not surprising in either area. They can be explained by individual incentives that, at the time, were constrained neither by sanctions for neglecting reciprocity within a micro-society nor by sanctions of a fully developed capital market. Regarding takeovers, positional conflicts of interest of the managers of possible target companies will have played a role. Regarding insider dealing, the expectation of profits from successful deals could explain the unwillingness to subscribe.

It seems that the reasons for compliance with non-statutory rules and standards rests in an individual calculus rather than in a collective bargaining mechanism. Where compliance is de facto compulsory for doing business within the relevant business community, the role of self-commitments is strong. The opposite is true where business relations can be built up without self-commitments.

3. Regulatory Embedding

The relevance of self-commitments to non-statutory rules or standards has gained considerable momentum from the fact that they are increasingly embedded into statutory reporting duties through the regulatory technique of 'comply or explain'.[22] Since 2002, companies listed in Germany have been obliged to annually state their compliance with the recommendations of the German Corporate Governance Code.[23] The code is administered by a commission that largely acts outside governmental or parliamentary control. In a next step, European Union law fostered disclosure through the amendment of the Accounting Directive in 2006, whereby listed companies

20 T. HOEREN, Selbstregulierung im Banken- und Versicherungsrecht (Karlsruhe 1995) 199; K. J. HOPT, Europäisches Übernahmerecht (Tubingen 2013) 21, 26; G. ROSSKOPF, Selbstregulierung von Übernahmeangeboten in Großbritannien: Der City Code on Takeovers and Mergers und die dreizehnte gesellschaftsrechtliche EG-Richtlinie (Baden-Baden 2000) 86.

21 Insiderhandels-Richtlinien. The last revised version of June 1988 is printed with short comments by K. J. HOPT, in: Baumbach/Hopt (founder/ed.), Handelsgesetzbuch (29. ed., Munich 1995) Insiderhandels-RL (16).

22 P. C. LEYENS, Comply or Explain im Europäischen Privatrecht: Erfahrungen im Europäischen Gesellschaftsrecht und Entwicklungschancen des Regelungsansatzes, Zeitschrift für Europäisches Privatrecht 2016, 388, 390, 417.

23 For details see P. C. LEYENS, in: Hopt/Wiedemann (eds.), Großkommentar zum Aktiengesetz (4. ed., Berlin 2012) § 161 paras. 8, 73.

are obliged not only to disclose their compliance but also to give reasons for possible non-compliance with a national corporate governance code.[24]

The German Supreme Court in Civil Matters addressed the legal effects of the annual compliance statement in two 2009 decisions.[25] The court held that shareholders may void their ratification of management activities *(Entlastung)* if necessary corrections of a false or incomplete annual statement of compliance with the non-statutory corporate governance code were not made prior to their assembly at the general meeting.[26]

In a 2014 recommendation the European Commission envisages a further tightening of 'comply or explain' by requiring companies not only to explain their non-compliance but also to state how alternative measures will accord to the general goals of the applicable national corporate governance code.[27] This advance could sooner or later be expanded to other areas where comply or explain is used. For example, from 2017 on the European Union Directive on Corporate Social Responsibility obliges not only listed but also large companies, e.g. companies with more than 500 employees, to annually disclose their policies in regard to, inter alia, environmental, social, and employee matters.[28] The compliance statement may be formulated along the lines of principles or standards issued by international organizations, e.g. the United Nations Global Compact. If a company does not pursue policies in relation to one or more of the relevant matters, it must provide a clear and reasoned explanation for not doing so. The reformed European Union Shareholder Rights Directive 2017 will expand the scope of legally embedded self-commitments by using the regulatory technique of

24 Directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending Council Directives 78/660/EEC on the annual accounts (and other directives), Official Journal L 224, 16 August 2006, 1 (title abbreviated by the author).

25 BGH, judgment of 16 February 2009 – II ZR 185/07 *(Kirch/Deutsche Bank),* BGHZ 180, 9 para. 18; BGH, judgment of 21 September 2009 – 2085 II ZR 174/08 *(Umschreibungsstopp),* BGHZ 182, 272 para. 16.

26 S. MUTTER, Überlegungen zur Justiziabilität von Entsprechenserklärungen nach § 161 AktG, Zeitschrift für Unternehmens- und Gesellschaftsrecht 2009, 788, 794; LEYENS, *supra* note 23, paras. 468, 484 for further discussion.

27 Commission Recommendation of 9 April 2014 on the quality of corporate governance reporting ('comply or explain'), Official Journal L 109, 12 April 2014, 43, para. 8(e).

28 Art. 19a Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Official Journal L 330, 15 November 2014, 1.

comply or explain also for institutional investors, asset managers, and proxy advisors.[29]

No doubt, statutory reporting requirements and their fostering will change the incentives of corporate actors, professional investors and their advisors. Empirical assessments might not be unanimous, but it can hardly be argued that professional actors will ignore reputational capital and public standing when choosing their mode of behaviour. It should be noted that none of the legislative advances has seriously investigated the binding effects of self-commitments in general and the liabilities for non-compliance in respect of third parties in particular.

III. Binding Force of Self-commitments

It is widely agreed that a self-commitment can have a certain binding effect. The legal basis, scope, and consequences are less clear. Particularly in light of the increased use of 'comply or explain' in European Union legislation, it seems advisable to chart self-commitments more precisely within the legal landscape. Positioning seems advisable, especially with a view to the increased use of 'comply or explain' in European Union legislation. The following typology can help to organize the debate and narrow uncertainties regarding, for example, subsequent changes in private rules or standards and possibilities to escape future obligations. In essence, it will be suggested to group the binding effects along the lines of norms, contracts, charters, and disclosure.

1. Norms

Non-statutory rules or standards do not qualify as laws (§ 2 Introductory Law to the German Civil Code). Accordingly, they rarely give rise to normative effect but rather restate duties that are implicit in the relevant activity. The skiing rules that are published by the Fédération Internationale de Ski (FIS) might serve as an example. One could argue that the act of skiing qualifies as a *tacit* self-commitment to generally accepted rules, although, of course, not all skiers will have ever read the relevant catalogue of duties. Courts have used the duties set out by the FIS to resolve tort law cases.[30]

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29 Arts. 3g (institutional investors), 3i (asset managers) 3j (proxy advisors) Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement, Official Journal L 132, 20 May 2017, 1.

30 BGH, judgment of 11 January 1972 – VI ZR 187/70, BGHZ 58, 40, 42 ff., Juris para. 14. For details see Buck-Heeb/Dieckmann, *supra* note 14, 87.

The test applied, however, asked whether the rules were generally accepted in the sense of customary law.

Drawing the line between customary law and mere custom can be difficult. Customs only inform the interpretation of duties existing under a contract. This is of particular relevance in commercial law (§ 346 German Commercial Code). Customs do not, by themselves, create new duties. German courts have been reluctant to categorize accepted commercial practice as customary law. Points of discussion have concerned the *lex mercatoria* as such, generally agreed sets of rules on terms used in international contracts (INCOTERMS), and uniform customs and practice governing documentary credits (UCP).[31] It seems, however, that judges are well aware of the practical needs in commerce. For example, established trade terms like 'free on board' (FOB) have informed the interpretation of carriage contracts.[32] Where arbitration is common in the relevant industry, courts have assumed a tacit arbitration agreement.[33]

In sum, the first binding mechanism of 'norms' does not appear to be an area where self-commitments play a genuine role. Within this category self-commitments are rather of a declaratory nature, either because they merely declare compliance with obligations already existing under (customary) law or because they inform the interpretation of duties that are created by contract.

2. Contracts

The next type of a binding mechanism is termed a 'contract'. In practice, offerors of a product or service often agree to include a non-statutory standard in the performance description. The standard then becomes part of the bargain and determines proper performance as any other description does. The legal basis of the binding effect, including possible contractual rights of a third party, is then the contract itself. Accordingly, the self-

31 J. BASEDOW, Die Incoterms und der Container oder wie man kodifizierte Usancen reformiert, Rabels Zeitschrift für ausländisches und internationales Privatrecht 43 (1979) 116, 125 distinguishing between core provisions (customary law) and ancillary provisions (customs). More recently on stock exchange usages A. FLECKNER, Die Börsengeschäftsbedingungen, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 180 (2016) 458, 506.

32 No. 9 Incoterms 2010. For details see A. MAURER, Lex Maritima: Grundzüge eines transnationalen Seehandelsrechts (Tubingen 2012) 48.

33 BGH, judgment of 3 December 1992 – III ZR 30/91, Neue Juristische Wochenschrift 1993, 1798; OLG München, judgment of 3 July 1996 – 7 U 2162/96, Wertpapier-Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht 1996, 2335, 2336. For details see BUCK-HEEB/DIECKMANN, *supra* note 14, 155.

commitment merely serves to incorporate a set of duties that otherwise could have been included in the agreement by means of copy and paste.

It follows that general rules of contractual interpretation inform the scope of the binding effect (§§ 133, 157 German Civil Code). Interpretation must be based on the promise as given at the time of contract conclusion. Generally, changes in the relevant non-statutory rule or standard do not alter the promise in the future. Unless changes are agreed to by the party who subscribed to the standard, the scope of the obligation stays where it is upon contract conclusion (static duty).

Not surprisingly, courts have faced the task of deciding cases of omitted reference to a generally accepted standard as well as cases that concerned changes in the relevant standard subsequent to contract conclusion. The relevant legal questions are intertwined: To start with, an omitted reference to the relevant standard can be cured by applying general principles of gap-filling. Concepts of judicial gap-filling differ between jurisdictions. The smallest common denominator is that a court may not rewrite the contract. The German concept of gap-filling is tied to contractual interpretation, with an emphasis on good faith (§ 242 German Civil Code).

This link implies that a court might use a non-statutory rule or standard only when there are sufficient indicia of a will to include that standard (implicit term). A common use of a certain professional standard within the relevant industry might, but does not necessarily pass this legal test. The historic debate about the classification of non-statutory rules or standards as either contracts or norms appears to be reflected in scholarly attempts to give greater weight to objective methods of interpretation. Scholars like *Werner Flume* and *Otto Sandrock* proposed to include duties into the agreement if those duties are characteristic of a transaction of the type in question.[34] These proposals have been criticized for neglecting the subjective will of the parties, and it seems they are today generally disfavoured.[35]

The prevailing rejection of placing exclusive weight on objective circumstances when interpreting a contract is convincing, especially concerning self-commitments to non-statutory rules or standards: For example, the parties might have voluntarily opted for the legally minimum duties with a view to saving costs, i.e. they might have excluded the applicability of

34 W. FLUME, Allgemeiner Teil des bürgerlichen Rechts, vol. 2: Das Rechtsgeschäft (Berlin 1965) 322 ff., 327; O. SANDROCK, Zur ergänzenden Vertragsauslegung im materiellen und internationalen Schuldvertragsrecht (Cologne 1966) 87 ff.

35 R. BORK, Allgemeiner Teil des Bürgerlichen Gesetzbuchs (4. ed., Tubingen 2016) para. 537; M. WOLF/J. NEUNER, Allgemeiner Teil des deutschen Bürgerlichen Rechts (11. ed., Munich 2016) § 35 Rn. 59.

commonly used standards.[36] It follows that deviations from the market price – if there is one – can carry some persuasive power for determining whether the parties, in their agreement, envisaged extra duties or whether they wished to restrict their duties to the legal minimum. Only if there are sufficient indicia of a subjective will does it seem justified to hold the offeror to extra duties derived from the non-statutory set of behaviours.

Still, the problem of a subsequent change in the standard might arise. Non-statutory codes of conduct are mostly administered by professional bodies or, more generally, by commissions that represent the interests of offerors or offerees or, ideally, both sides. Commissions normally review the contents of the codes of conduct they administer from time to time. It follows that there might be a change between the time of contract conclusion and performance. In fact, this constellation will often present a challenge in determining the duties in long-term contracts. It can also be of relevance when, for example, a service provider declares herself to be a member of an association of professionals. The binding mechanism in the latter cases is a 'charter', which will be treated in the next section.

Regarding the binding mechanism of a 'contract', a court holding from 1998 that is based on the following facts serves as illustration:[37] The producer agreed to comply with a certain technical standard. A change in the relevant standard had already been publicly announced when the agreement was made. Before the time of performance the requirements under that standard changed. Resolving the dispute according to general principles of interpretation, the court had to take the view of a recipient of the offer (objective component) in the shoes of the individual addressee (subjective component). The outcome of this assessment can either be a promise that incorporates the standard in its wording at the time of contract conclusion or one that incorporates the wording at the time of performance. The case was decided in favour of the latter interpretation; hence the court assumed a duty to apply the standard in its current version (dynamic duty). It is unclear to what extent this holding can be generalized. Had the forthcoming change of the standard not been known at the time of contract conclusion, the opposite finding might have been more expectable.[38]

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36 W. SCHÖN, Der Zweck der Aktiengesellschaft – geprägt durch europäisches Gesellschaftsrecht? (editorial), Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 180 (2016) 279, 286 on corporate social responsibility.

37 BGH, judgment of 14 May 1998 – VII ZR 184/97, BGHZ 139, 16, 19, Juris para. 16.

38 J. KÖNDGEN, Privatisierung des Rechts – Private Governance zwischen Deregulierung und Rekonstitutionalisierung, Archiv für die civilistische Praxis 206 (2006) 477, 484, however, argues for a normative effect from accepted technical standards.

In sum, self-commitments of the type 'contract' are firmly tied to the terms of the given promise. Gap-filling according to principles of contractual interpretation does not allow courts to insert non-statutory duties unless there is sufficient evidence that the parties would have done so had they thought of the matter at the time of contract conclusion. A contractual promise generates a static duty that, absent mutual consent ex ante or ex post, does not by itself change over time. Future changes in a non-statutory rule or standard accordingly determine the performance description only where the parties so wished at the time of making their agreement. These findings demonstrate the considerable scope of 'contract' as a binding mechanism, but at the same time they reveal the limits of the binding effects that result.

3. Charters

Self-commitments to a 'charter', e.g. of an industry association, can lead to farther reaching effects than a contract, precisely in regard to a change in the duty set subsequent to the time of making the agreement. Professional service providers tend to make their clients aware of any membership in reputable business associations. By doing so they send an extra signal of trust to existing or prospective clients. Extra trust signals are needed especially when the object of performance has characteristics of a credence good, i.e. when the suitability of the good cannot be determined ex ante and when ex post experience will come too late. Financial advice in regard to private pensions is a prominent example because negative outcomes resulting from following the advice can usually no longer be corrected when they become observable.

There are many possible modes of letting clients know of a membership in a reputable association prescribing adherence to high standards of conduct. One might think of oral declarations, letterhead insignias, printed certifications on the office wall, website announcements, or the like. It is a characteristic feature of the binding mechanism of 'charters' that the duties as a member of an association inform the client at the time of contract conclusion. As opposed to the mechanism of 'contracts' discussed above, non-statutory charter provisions are not embodied in the promise in a way that equals a simple copy and paste. As opposed to the mechanism of 'disclosure', which will be discussed in the next section, the trust signal must necessarily be sent to the client before or at the time of contract conclusion to unfold legal effects.

To give an example: In the past, many believed that credit rating agencies were essentially free in determining the methods of their assessment.[39] Binding regulation was widely absent in the European Union before the Regulation on Credit Rating Agencies of 2009.[40] But what if an agency signed the rating contract as a member of the German Association for Financial Analysis and Asset Management (DVFA)? The standards of the DVFA reach or reached beyond statutory obligations for solicited ratings in that they, inter alia, require rating agencies to undertake a plausibility check of the data basis provided by the rated corporation and impose an obligation to gather information from inside the corporation rather than relying exclusively on market data.[41] The duty to produce the rating stems from a contract but, at the same time, the scope of that duty is widened by the non-statutory charter provisions of an association of professionals. The membership in an association creates a continuing obligation. It obliges adherence to the *currently* applicable rules and standards.

The binding mechanism of 'charter' unfolds genuine effects in two ways: Firstly, including membership in an industry association into the contractual promise obliges adherence to not only the current standard but also its updates over time (dynamic duty). Secondly, the possibilities of one-sided changes play a greater role than under the contract-type binding mechanism. This second matter is most important with a view to the possibilities of escaping the effects of non-statutory rules or standards based on membership and a corporative charter. Under German constitutional law no one can be bound to perpetual membership (Art. 9 German Constitution). Future termination of membership hence must be permissible. This can lead to a clash between the customer's expectations – which would be justified under a contract-type binding mechanism – and the provider's constitutional freedom to terminate membership in an association.

Courts will need to find a way to balance contractual expectations and constitutional rights in a manner that satisfies both positions without neglecting one of them completely *(praktische Konkordanz).*[42] In the afore-

39 U. G. SCHROETER, Ratings – Bonitätsbeurteilungen durch Dritte im System des Finanzmarkt-, Gesellschafts- und Vertragsrechts (Tubingen 2014) 745.

40 Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies, Official Journal L 302, 17 November 2009, 1.

41 DVFA-Rating Standards und DVFA-Validierungsstandards, DVFA-Finanzschriften 4/2006, no. 1.1.4.3. Compare to Regulation 1060/2009, *supra* note 40, Art. 8 para. 2.

42 On the scope and limits of these expectations and rights see J. A. KÄMMERER, Privatisierung: Typologie – Determinanten – Rechtspraxis – Folgen (Tubingen

mentioned example this could lead to the following solution: If the rating agency wishes to terminate its membership in the DVFA, it is free to do so but it must notify its customers. Upon such notification a customer should have the right to terminate the contract. Legal support for this conclusion can be found in several provisions under general civil law that grant special termination rights in long-term legal relationships (§ 626 para. 1 and, more generally, §§ 314 para. 1, 324 German Civil Code).

4. Disclosure

A number of self-commitments to non-statutory rules or standards are made to the public and can be treated here under a binding mechanism called 'disclosure'. No doubt, a statement of compliance with non-legal standards included in a listing prospectus which is directed to anonymous investors can evoke reliance and, if the information is false or misleading, it can lead to liability. Today, liability for false or misleading primary market information, especially prospectus liability, is mainly a subject of specialized legislation.[43] The legal treatment is far less clear in regard to continuing disclosure, i.e. information provided with a view to enable exchange in secondary markets.

The increasingly used technique of 'comply or explain' can serve as an example illustrating one of the pressing questions regarding the legal treatment of self-commitments for enhancing continuing disclosure: Assume, a corporation publicly explains that it complies with best practice recommendations set out by a national Corporate Governance Code. An investor buys a share of that corporation. The issuer corporation then publishes a statement that it will abstain from compliance with the code in the future, i.e. it revokes its statement of future compliance.

Revisiting the binding mechanisms we have seen so far, we can exclude 'norms' (best practice recommendations do not have normative effect in a technical sense), 'contract' (regularly, there is no contract with the issuer but with the holder of the share who sells it to the acquirer) and 'charter' (non-compliance with codes of conduct is permitted if correctly explained to the investor public). 'Disclosure', accordingly, is of a category of its own.

The distinctions made regarding earlier-discussed binding mechanisms are important in at least in two respects: Firstly, absent a legal obligation or contractual agreement, any public disclosure of an intention to follow best

2001) 463; W. ZÖLLNER, Regelungsspielräume im Schuldvertragsrecht, Archiv für die civilistische Praxis 196 (1996) 1, 11.

43 See § 21 German Statute on Security Prospectus (Wertpapierprospektgesetz, WpPG).

practice *in the future* can be binding only until it is recalled (revocable commitment).[44] In other words, the binding effects of disclosure expire when the disclosed facts or intentions are retracted from the public information repository.

Secondly, the requirements of disclosure about *past* behaviour are subject to the standards applicable to the relevant context. In regard to statements that address shareholders and the investor public, a true and fair view must be given. It is only if the statement does not adhere to these reporting principles that there will be a basis for civil sanctions.[45] As already mentioned, the German Federal Supreme Court in Civil Matters endorsed this understanding in two 2009 decisions by holding that a shareholder resolution regarding the ratification of management activities can be voided in the event of false or incomplete disclosures.[46]

To sum up, public disclosure of compliance with non-statutory codes of conduct is a form of revocable self-commitment. Revocation is possible in the future. As long as such a revocation is made properly, any binding effect that might have existed previously ceases to exist.

One might argue that the examination of possible binding effects presented here could be further expanded. For example, one could investigate self-commitments that are addressed to supervisory authorities as required in some regulated industries like banking and insurance.[47] Where such self-commitments are published, they might be grouped in the category 'disclosure'. When the self-commitment is not published it will, however, hardly serve to back-up the third party civil claims that are discussed in the following section.

IV. Third Party Effects of Self-commitments

The preceding sections have shown that the binding force of self-commitments differs depending on how the commitment is introduced into a legal relationship. Determining the effects towards third parties adds another layer to the discussion. Third parties do not participate in setting the terms of the agreement that might cause a binding effect. Their position is rather comparable to the victim of a tort. As we will see in the following section, the disjunction between contracts and torts is of less relevance than it might seem at first sight.

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44 G. Spindler, in: Schmidt/Lutter (eds.), Aktiengesetz (3. ed., Cologne 2015) § 161 paras. 9, 16.

45 Leyens, *supra* note 23, para. 297, 307.

46 See previously provided references *supra* note 26.

47 For details see Leyens, *supra* note 1, 634.

1. Professional Liability

Self-commitments play a pivotal role for market participants who depend on signalling good conduct as a means of attracting customers. The examples used mainly relate to professions that make self-commitments to underline the quality of their products or services. In many of the cases the signal is ultimately directed to a third party: Expert opinions are contracted by sellers with a view to attracting buyers, disclosure of compliance with corporate governance codes serves to attract shareholders, and promising a high standard of credit assessment increases the possibilities of selling a rating to a corporate client.

Under German law third parties might benefit from a contractual agreement when they are foreseeably affected by the consequences of that agreement *(Vertrag mit Schutzwirkung zugunsten Dritter).* The most important advantages of contractual liabilities are that an entitled third party can claim compensation for negligent misstatements and that the burden of proof in regards to fault is shifted to the defendant (§ 280 German Civil Code). Common law courts are said to be rather reluctant about accepting contractual duties that are owed towards third parties. English courts, however, have accepted duties of banks towards third parties since the famous 1963 decision in Hedley-Byrne vs. Heller.[48] In the *Caparo* Case of 1990,[49] it was acknowledged – similar to a 1978 decision of the German Supreme Court in Civil Matters concerning a provider of financial news *(Börsendienst)*[50] – that those who provide information to the public can limit the scope of possible reliance by attaching qualifications to their statements. The most obvious technique concerns liability exclusions, which will be discussed below.[51]

The reason why courts are reluctant towards accepting liability for negligence towards third parties is that it will, in most cases, lead to a compensation of pure economic loss. The German Civil Code, at least generally, reflects the insight that compensation of negligently caused pure economic loss is not advisable because it merely shifts resources from one party to another. The insight of economic theory, however, loses power when a loss of confidence in the market and its intermediaries might go hand in hand

48 *Hedley Byrne & Co Ltd. v. Heller & Partners Ltd* (1963) 2 All England Law Reports 575.

49 *Caparo Industries v. Dickman* (1990) 1 All England Law Reports 568.

50 BGH, judgment of 8 February 1978 – VIII ZR 20/77 *(Börsendienst),* BGHZ 70, 356, Juris para. 13.

51 *Infra* section 3.

with a suboptimal use of resources and hence produce losses in societal welfare.[52]

Regarding professional liability, crisis often induces at least a furtherance of legal concepts, if not paradigm shifts. The recent financial crisis and the role of credit rating agencies is one example. Already in 2013, the European Union included third party liability for negligent misstatements in its new Art. 35a in the Regulation on Credit Rating Agencies.[53] And the Australian Supreme Court held in its Bathurst judgment of 2015[54] that a rating agency can be liable towards investors for negligent misrepresentation.[55]

Court decisions on professional liability towards third parties in Germany seem to have always oscillated between contract and tort. Depending on the facts of the case, courts either accept a third party right under a contract or they lower the requirements of the test for intentional behaviour under tort law (§ 826 German Civil Code).[56] If we consider the ongoing discussions in Germany and elsewhere from a certain distance, we get the impression that pragmatism rules. The distinction between contractual and tortious duties towards third parties has long given way to a general standard of

52 W. BISHOP, Economic Loss in Tort, 2 Oxford Journal of Legal Studies 1, 28 f. (1982) on the example of a deficient legal opinion: "[…] the action *does induce real social cost and not merely a transfer*. […] In fact failure to award damages in such cases normally would induce *inefficiency because of its effects on the market for information*" (italicized by the author).

53 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, Official Journal L 176, 27 June 2013, 1.

54 ABN AMRO Bank v Bathurst Regional Council (2014) Federal Court of Australia Full Court (collection of judgments) 65, 6 June 2014, paras. 1608, 1611.

55 The judgment is discussed by H. EDWARDS, Liability for the rating and sale of structured credit products: Australian cases and their (much) wider implications, 7 Law and Financial Markets Review 88 (2013); H. EDWARDS, CRA 3 and the liability of rating agencies: inconsistent messages from the regulation on credit rating agencies in Europe, Law and Financial Markets Review 7 (2013) 186. For an account from the German perspective see S. SEIBOLD, Die Haftung von Ratingagenturen nach deutschem, französischem, englischem und europäischem Recht (Tubingen 2016) 103.

56 BGH, judgment of 2 April 1998 – III ZR 245/96, BGHZ 138, 257, Juris para. 9 (contractual liability of statutory auditor for false report); BGH, judgment of 19 November 2013 – VI ZR 336/12, Wertpapier-Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht 2014, 17, Juris para. 11 (tortious liability of statutory auditor for inducing investments by reference to his forthcoming auditor report).

professional liabilities towards third parties *(Haftungsstandard)*.[57] This general standard applies to the determination of liabilities and occasionally generates contractual *or* tortious responsibilities, depending *inter alia* on the statutory recognition of the profession and the embedding of its activities into statutory contexts. The scope of the relevant duties can be informed, at least to a certain extent, by self-commitments.

2. Scope of Duties

To determine the scope of duties and to interpret general provisions on fault like negligence (§ 276 German Civil Code) or intentional harm causation (§ 826 German Civil Code), courts look at common practice and at what is commonly expected from a producer or service provider. By committing to non-statutory rules or standards the agent makes a self-selection and classes herself into a sub-group of professionals, in most cases into the group that follows the industry-wide highest demands. The German scholars *Erich Schanze* and *Johannes Köndgen* use the term 'inclusion' to describe the persuasive force of existing practices in determining legal effects.[58]

Applying this line of argument to the third party effects of a self-commitment to non-statutory rules or standards is in line with the conventional approach regarding the determination of duties applicable to the relevant sub-group of a particular industry: If a rule or standard of behaviour is generally accepted, or if it is accepted by the benchmark group, the standard will have persuasive force.

At closer look, however, this is a consequence not of the rule or standard itself but rather of the voluntary statement regarding the performance in conformity with a set of duties applicable to a certain group. That is to say, it is the result of a self-commitment by the defendant.

3. Liability Limitations

Tortious liability for economic loss generally requires intent and cannot be limited ex ante. By contrast, an agent is free to exclude contractual liabilities towards the principal for negligence. If the liability exclusion is individually negotiated, it will be effective in respect of third party claims as

57 K. J. HOPT, Nichtvertragliche Haftung außerhalb von Schadens- und Bereicherungsrecht: Zur Theorie und Dogmatik des Berufsrechts und der Berufshaftung, Archiv für die civilistische Praxis 183 (1983) 608, 657. For analysis and discussion see H. HIRTE, Berufshaftung (Munich 1996) 386, 412.

58 E. SCHANZE, International Standards – Functions and Links to Law, in: Nobel (ed.), International Standards and the Law (Bern 2005) 83, 84, 90; KÖNDGEN, *supra* note 38, 518.

the terms of the underlying contract also determine the rights of third parties (§ 334 German Civil Code). Limiting liability is essential when the number of potentially injured persons cannot be determined ex ante. Certain limitations appear well justified, last not least, because insurance cover for unlimited losses cannot be contracted at a reasonable cost.

With a view to upholding protection of third parties, courts have assumed a tacit waiver of defences that stem from the main contract.[59] This has been criticized heavily, especially by *Claus-Wilhelm Canaris*, for constellations in which the interests of the principal and the third party are opposed.[60] And in fact, these interests are often opposed. For example, a seller will mandate an expert opinion on the value of the good to be sold in order to increase the price, whilst the buyer will naturally have an interest in keeping the price low. Against this background it appears more convincing to many to grant liability only if the injurer induced special reliance (§ 311 para. 3 German Civil Code).[61] This inducement requirement is not easily met. Where it is met, the injured has a genuine claim that is not subject to liability limitations set out in a possible contract with a principal.

Liability exclusions are often included in a set of standard terms that are not negotiated between the parties. Under German law, even in business to business contracts standard terms are void when they conflict with the essential purpose of the contract (§ 307 German Civil Code).

A recently much debated example again concerns credit ratings.[62] It is clear that a rating will be sold to an issuer only if that issuer can make use of the assessment to send a trust signal to third party investors or lenders. Some authors convincingly argue that a liability exclusion achieved by means of standard terms should not be given effect as it would contradict the essential purpose of the rating agreement. However, the important distinction we need to make in regard to self-commitments is the following: The additional duties will rarely, if ever, qualify as essential terms of the contract.

To avoid a complete failure of third party protection, tortious liability appears to be the only option. This is one of the reasons why the require-

59 BGH, judgment of 17 January 1985 – VII ZR 63/84, BGHZ 93, 271, 275.

60 C.-W. CANARIS, Die Reichweite der Expertenhaftung gegenüber Dritten, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 163 (1999) 206, 213.

61 For details see B. BÜTTNER, Umfang und Grenzen der Dritthaftung von Experten (Tubingen 2006) 136.

62 E. VETTER, Rechtsprobleme des externen Ratings, Wertpapier-Mitteilungen – Zeitschrift für Wirtschafts- und Bankrecht 2004, 1701, 1710. For further discussion see U. BLAUROCK, Verantwortlichkeit von Ratingagenturen – Steuerung durch Privat- oder Aufsichtsrecht?, Zeitschrift für Unternehmens- und Gesellschaftsrecht 2007, 603, 627 f. *(protestatio facto contraria).*

ments for pleading intentional harm causation have often been lowered in cases of professional liability.[63]

4. Burden of Proof

The above findings on the possible effects of self-commitments to non-statutory rules or standards do not lead far in court unless a breach of duty can be proven. For physical products a simple comparison with the quality requirements under the relevant rule or standard might do. In regard to services the task is more difficult. A completed expert opinion, like a credit rating, does not manifest from the outside whether it was produced in line with high standards or whether it has been issued in disregard of best practice. It hence appears that the burden of proof will often be a peremptory gate shutting out any possible legal effects for self-commitments in cases where compliance is non-observable from the outside.

German courts have shifted the burden to the defendant only under exceptional circumstances, for example, when financial products are sold in overheated markets. In those cases it appears justified to assume that advice on price-relevant information formed the basis of the purchase decision *(Anlagestimmung)*.[64] Absent such exceptional circumstances, shifting the burden would go too far. This is all the more true for non-statutory rules or standards as in most cases they have not yet been transformed into statutory law since non-compliance does not carry a particular danger of causing losses to others.

The result is unsatisfactory for the following reason: Self-commitments are used to overcome uncertainties which would otherwise preclude or reduce possibilities to conduct business. Producers, issuers of financial instruments, and professional information intermediaries are free to signal to the public their compliance with non-statutory rules or standards. If they do, they must be ready to prove their compliance. The perhaps most convincing option is to treat the self-commitment as an obligation to demonstrate compliance with the relevant decision-making standard. In terms of civil procedure this does not lead to a shift of the burden of proof but to a shift of the pleading burden from the claimant to the defendant.

On the one hand, one might think that reversing the pleading burden could open the floodgates to innumerable third party claims. This fear is not necessarily justified because the injured will still have to provide a plausible argument as to why non-compliance with the non-statutory duties could

63 *Supra* section IV.1 (p. 16).

64 BGH, judgment of 13 December 2011 – XI ZR 51/10 (IKB), BGHZ 192, 90 paras. 61, 63 on the state of the discussion.

have caused a loss. Plausible loss causation is by no means given, especially not in regard to a lack of compliance with non-statutory rules or standards. Under German law the plaintiff has to shoulder the costs of a claim that is not sufficiently substantiated. Under these conditions, the danger of opening the floodgates correspondingly appears to be rather low.

On the other hand, a shift of the pleading burden might already create incentives for defendants to carefully consider whether they should make a self-commitment that generates trust in the public if in fact they actually do not plan to follow the relevant non-statutory rules or standards.

It has been argued that obliging a defendant to provide facts that relieve her from otherwise assumed liability amounts to a breach with general principles of civil and criminal procedure *(nemo tenetur)*.[65] Yet this argument does not hold. It has long been accepted in general producer liability that adequate production processes must be proven in the courtroom.[66] The principle of *nemo tenetur* might be compelling for non-voluntary obligations, but its strict application does not seem to be adequate for self-committed duties. It might be helpful to summarize the above findings: Voluntarily self-commitments follow an individual calculus. The commitments are made to send trust signals. Requiring a party to demonstrate that this trust was deserved is nothing more than holding one to the given word.

Around 200 years ago *Sir William Blackstone,* the great commentator of English common law, used the metaphor of a shingle.[67] Professionals who place a shingle above their office door to attract customers must be ready to fulfil the expectations that are commonly evoked in those who take notice of the shingle. This thought fits the present discussion well: Self-commitments to non-statutory rules or standards should be given effect in courtrooms. Plaintiffs will often fail to make their claim due to a lack of information on the necessary elements of compliance. This problem can be overcome if courts oblige the defendant to provide plausible information on the steps taken to safeguard compliance. The burden of proof would remain untouched. This means that plaintiffs might still have to provide evidence that the defendant, in fact, did not follow the compliance process laid out by her.

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65 BUCK-HEEB/DIECKMANN, *supra* note 14, 61 try to find a balanced approach.

66 G. WAGNER, in: Habersack (ed.), Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6: Schuldrecht – Besonderer Teil (7. ed., Munich 2017), § 823 para. 858.

67 W. BLACKSTONE, Blackstone's commentaries, vol. 3 (Philadelphia 1803) 164. See also K. J. HOPT, Der Kapitalanlegerschutz im Recht der Banken (Munich 1975) 353; KÖNDGEN, *supra* note 14,, 37, 42.

Based on the approach to self-commitments that is advocated here, those who claim that they adhere to high standards but in fact do not make sufficient compliance efforts will have difficulties in avoiding the finding of a duty breach. The liability test, of course, encompasses further elements. Proving causality between non-compliance and loss will often be the most difficult hurdle.

V. CONCLUSIONS

1. Self-commitments to non-statutory rules or standards serve an enabling function for businesses in that they signal trust especially where performance quality is unobservable. As a component of self-regulation they contribute to improving the allocation of regulatory resources in areas where legislators lack relevant knowledge and in instances when statutory duties do not suffice to fulfil the needs of market participants.

2. A fostered discussion of the binding effects is advisable, since self-commitments are increasingly embedded in the law through use of the regulatory technique of 'comply or explain'. Within the European Union, the duty to state compliance with a non-statutory set of best practice and to explain possible deviations has been expanded from the area of corporate governance into corporate social responsibility, and it also attaches to professional market participants like institutional investors, asset managers, and proxy advisors.

3. The legal effects of self-commitments can be grouped according to a typology of mechanisms, these including norms, contracts, charter provisions and public disclosures: Self-commitments do not create normative effects, but they might restate applicable law or customary law (restatement). They can be a component of a contractual agreement, but that does not lead to an evolving set of duties unless agreed at the time of making the agreement (static duty). Conversely, a self-commitment to a charter of a business association provisions obliges adherence to the current state of best practice as set out by the charter until membership is withdrawn (dynamic duty). Disclosure of future compliance to a set of non-statutory rules or standards is binding until publication of a statement of future non-compliance (revocable commitment).

4. Third party effects must be determined according to the aforementioned binding mechanisms: Professional liability can be of a contractual or a tortious nature. Self-commitments to non-statutory sets of duties can be used to determine the scope of professional liabilities. Liability exclusions that are included in a contract to which the self-commitment is tied will often preclude rights of third parties, but they might be subject to judicial review if securing a third party's trust is the essential purpose of the con-

tract. For self-commitments to be viable, courts should not shift the burden of proof to the defendant. Instead, the defendant should be obliged to provide plausible information on the steps she has taken to comply with the self-commitment. This is nothing more than holding one to the given word.

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