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Paul M. Dudek, Chief
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United States Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 25049

Study on Extraterritorial Private Rights of Action

SEC Release No. 34-63174; File No. 4-617

Dear Paul,

In the context of the SEC request for public comment on the extent to which private rights of action under U.S. antifraud provisions should be extended to cover cases involving transnational securities fraud, I wish to provide you with the accompanying recent article.

Due to various constraints, it unfortunately was not possible to submit this article within the public deadline for the SEC inquiry. However, I think the article will provide the Staff with valuable insight in connection with preparing the report to Congress mandated under Section 929Y of the Dodd-Frank Act.

Best regards,

Lee D. Neumann

cc: Ms. Elizabeth Murphy
The Secretary
Securities and Exchange Commission

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Private Rights of Action in Cases Involving Transnational Securities Fraud: the View from England, France and Germany*

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On October 25, 2010, the U.S. Securities and Exchange Commission (the "SEC") published a request for public comment on the extent to which private rights of action under the antifraud provisions of the Securities Exchange Act of 1934, as amended, should be extended to cover cases involving transnational securities fraud[1]. The SEC was mandated by the United States Congress[2] to study this issue as part of Congress's efforts to limit the effect of the U.S. Supreme Court decision in *Morrison et al. v. National Australia Bank Ltd et al*[3] *("Morrison")*.

One question specifically raised in Congress's mandate to the SEC concerned "what implications such a private right of action would have on international comity". In its request for public comment, the SEC therefore included the following inquiry:

> *"What would be the implications on international comity and international relations of allowing private plaintiffs to pursue claims under the antifraud provisions of the Exchange Act in cases of transnational securities fraud? Identify any studies that purport to show the effect that the extraterritorial application of domestic laws have on international comity or international relations."*

The following article addresses this question by considering the judicial principles applicable in cases involving transnational securities fraud in three countries: the United Kingdom, France and Germany. Specifically, the following hypothetical situation is posed:

> Company "LTD" is organized under the laws of "Home Country" (which is outside the European Union) and is publicly traded on the main securities exchange of Home Country. LTD seeks to develop its shareholder base in "Target Country" (the U.K., France or Germany) by encouraging investors in Target Country to purchase publicly traded shares of LTD. LTD's CEO and CFO therefore travel to Target Country and meet with local investors to discuss LTD as an attractive investment opportunity. It turns out that the information provided by LTD's CEO and CFO to Target Country investors, which was consistent with LTD's Home Country disclosure, was in fact materially incorrect and misleading. When LTD's share price falls on Home Country exchange following the disclosure of accurate information, Target Country investors suffer losses.
>
> Target Country investors bring suit against LTD and its CEO and CFO in a Home Country court alleging securities fraud under Home Country law.

The following inquiries are then made:

Scenario (i): Would a Target Country court accept the case described above and apply Target Country securities law in judgment of LTD and its CEO and CFO in such circumstances?

Scenario (ii): Would it make a difference if, instead of the CEO and CFO having physically traveled to Target Country, the faulty information had been communicated through LTD's corporate web site on a page targeting Target Country investors (for example, using a web page translated into Target Country language)?

Scenario (iii): Would it make a difference if LTD had not specifically targeted Target Country investors (as in Scenario (ii)), but that its information was globally disseminated, including in Target Country?

Scenario (iv): If the Target Country court accepts the suit, could investors from Home Country, or from a third jurisdiction (neither Home Country nor Target Country) join the Target Country investors as co-plaintiffs in the same action in connection with losses incurred as a result of the same faulty information?

The discussion below considers how the hypothetical scenarios above, each of which raises specific issues, would be treated under UK, French and German law. Based on this discussion, the analysis and conclusion which follow provide a response to the SEC's inquiry regarding the impact on international comity of allowing private plaintiffs to pursue claims under U.S. law in cases of transnational securities fraud.

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* The following article reflects the contributions of Dr. Carsten Gerner-Beuerle (for the U.K. section), Prof. Alain Pietrancosta (for the France section), Prof. Dr. Peter Mankowski (for the Germany section) and Lee D. Neumann (analysis and conclusions).

1 Securities and Exchange Commission Release No. 34-63174; File No. 4-617: Study on Extraterritorial Private Rights of Action.

2 Section 929Y of the Dodd-Frank Act of July 15, 2010 (also known as the "Wall Street Reform and Consumer Protection Act"), calls for the SEC to render a report to the U.S. Congress by January 21, 2012.

3 *Morrison v. National Australia Bank*, 130 S. Ct. 2869 (2010).

The United Kingdom

1. Introduction

The centrepiece of the regulatory regime in the UK is the Financial Services and Markets Act 2000 (FSMA),[4] which is complemented by statutory instruments promulgated by HM Treasury and rules made by the UK public regulator, the Financial Services Authority (FSA). In exercising its delegated law-making powers under the FSMA, the FSA has adopted *Listing Rules* and *Prospectus Rules*, dealing with public offers and the admission of securities to the official list, and *Disclosure Rules and Transparency Rules*, which regulate ongoing obligations of issuers.[5] Thus, issuers whose securities are listed in the United Kingdom[6] or offered to the public or admitted to trading on a regulated market in the United Kingdom[7] are subject to comprehensive disclosure obligations, both at the time of the offer to the public and during trading in the secondary market.

In case of non-compliance with these obligations, issuers face, in addition to criminal liability and various sanctions that can be imposed by the FSA,[8] civil liability toward investors who suffer loss as a result of incorrect disclosure. The FSMA contains two liability provisions, s 90 FSMA for untrue or misleading statements in the listing particulars or public offer prospectus, and s 90A FSMA for incorrect secondary market disclosure. Additional private causes of action derive from common law, notably the law of tort. Investor lawsuits have been brought based on the tort of deceit[9] and the tort of negligent misrepresentation, after the latter was recognised as a cause of action in 1964.[10]

In spite of this multifaceted regime and the size of the capital markets in the UK, the level of enforcement by the public regulator was, until recently, low, and private enforcement rare.[11] The reasons for the marked difference in the intensity of enforcement compared to the United States are not easy to identify. It is suggested that they relate both to deficiencies in the structure of the UK causes of action[12] and procedural law that is less conducive to private securities litigation than in the US.[13] For the same reasons, there is no significant case law or other jurisprudence determining the international reach of the UK liability provisions in connection with international securities fraud.

With respect to the hypothetical scenarios addressed in this article, the issuer LTD is not incorporated in the UK and its securities are not admitted to trading on a regulated market. Hence, the disclosure regime of the FSMA would, according to its express provisions, not apply. Below, we will discuss whether the same holds for the liability provisions under the FSMA and the torts of deceit and negligent misrepresentation according to general principles of conflict of laws.

2. Jurisdiction

English courts have jurisdiction in claims *in personam*, including claims for damages of defrauded investors in the capital markets, if the defendant is served with process in England or abroad.[14] If the defendant is not present in England for the service of process, English courts are careful not to encroach upon the sovereignty of other countries by exercising jurisdiction over foreign nationals.[15] In fact, the traditional common law rule was that English courts had no jurisdiction to entertain a claim *in personam* against defendants that were not present in England.[16] This has now changed, and the Civil Procedure Rules list the cases where process may be served on a defendant out of the jurisdiction.[17] It should be noted that jurisdiction of the English courts under the rules for service on defendants not present in England is discretionary. The English courts will not exercise jurisdiction unless the application sets out that the claimant believes that the claim

4 2000 c. 8.

5 The Rules are contained in the FSA Handbook, which can be accessed online at http://www.fsa.gov.uk/Pages/Handbook/index.shtml.

6 In the sense of being included in the official list, ss 74-82 FSMA and Listing Rules.

7 Section 85 FSMA, Prospectus Rule 1.1.1R. The UK disclosure regime applies whenever the UK is 'Home State', see PR 1.1.1R. This is determined by the Prospectus Directive, Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003, OJ 2003 L 345/64, Art. 2(1)(m). For issuers incorporated in a country outside the EU, Home State is the Member State where the securities are intended to be offered to the public for the first time or where the first application for admission to trading on a regulated market is made. For the application of ongoing disclosure obligations to issuers incorporated in countries other than the United Kingdom see DTR 1.1.1R, 4.1.1R, 5.1.1R, 5.11, 6.1.1R. The general rule is that such issuers are subject to UK regulation, provided that the UK is 'Home State' as defined above.

8 Sections 85(1), 87A, 87K, 87L, 87M, 91 FSMA.

9 See, for example, *Peek v Gurney* (1873) LR 6 HL 377. The tort of deceit was interpreted restrictively by the House of Lords in *Derry v Peek* (1889) LR 14 App Cas 337. As a response, the legislature introduced an express basis for prospectus liability in the Directors' Liability Act 1890, which, in turn, served as a model for the liability provisions of the US Securities Act of 1933 and the modern rules in the UK.

10 In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] A.C. 465. For decisions applying the tort of negligent misrepresentation to incorrect statements in primary market disclosure see *Al-Nakib Investments v Longcroft* [1990] 3 ALL ER 321; and *Possfund Custodian Trustees v Diamond* [1996] 2 All ER 774.

11 Armour, 'Enforcement Strategies in UK Corporate Governance: A Roadmap and Empirical Assessment' in Armour and Payne (eds), Rationality in Company Law (Oxford: Hart 2009), 71, 85-90, also ECGI - Law Working Paper No. 106/2008, available at http://ssm.com/abstract=1133542.

12 For a comparison of UK and US private causes of action see Gerner-Beuerle, 'Underwriters, Auditors, and Other Usual Suspects: Elements of Third Party Enforcement in US and European Securities Law' (2009) 6 European Company and Financial Law Review 476.

13 For a detailed discussion of the differences see Davies, Liability for misstatements to the market: A discussion paper (2007), paras. 111-118.

14 Collins (ed.), Dicey, Morris and Collins on The Conflict of Laws (London: Sweet & Maxwell, 14th ed. 2006), Rule 22.

15 See, for example, *Siskina v Distos Compania Naviera S.A. Appellants* [1979] A.C. 210 *per* Lord Denning: 'The exercise of this power [to permit service of process out of the jurisdiction] raises delicate questions of the relationships inter se of sovereign states and of international comity. . . . Accordingly it seems to me that this is a statutory and legislative field in which the court should exercise severe self-restraint . . .' Ibid. 240. See also ibid. 254-255 *per* Lord Diplock: The rules allowing for service of process on a person out of the jurisdiction 'are "exorbitant" jurisdictions which run counter to the normal rules of comity among civilised nations. For this reason it has long been held that where there is any room for doubt as to their meaning the provisions of the sub-rules are to be strictly construed in favour of the foreigner . . .'

16 Dicey, Morris and Collins, no. 14 above, para. 11-146.

17 CPR, r6.36, and para. 3.1 of Practice Direction 6B. These provisions apply only to cases that are not governed by the Judgments Regulation (Brussel I), i.e. claims that are outside the scope of the Regulation (Art. 1) and/or defendants that are not domiciled in a Member State (Art. 3). We will also not analyse the problem of when overseas companies within the meaning of Part 34 of the Companies Act 2006 are 'present' within England. For an overview and a discussion of the relation to the Civil Procedure Rules see Fawcett and Carruthers, Cheshire, North & Fawcett on Private International Law (Oxford: Oxford University Press, 14th ed. 2008), 358-370.

has a reasonable prospect of success and the court is satisfied that England is the proper place in which to bring the claim (*forum conveniens*).[18]

The most relevant head for our purposes is the section of the Civil Procedure Rules dealing with claims in tort, given that the liability provisions for incorrect market disclosure are commonly classified as tort law.[19] The 'claim in tort' head provides that English courts may assume jurisdiction where (a) damage was sustained in England; or (b) the damage sustained resulted from an act committed within England.[20] As far as the first limb is concerned, damage is defined as the loss produced upon the claimant as a direct consequence of the wrongful act.[21] It is not necessary that all the damage is sustained in England, provided that this is the case for some significant portion.[22] In foreign-squared transactions (Scenarios (i) to (iii) above), where legal action is brought against a foreign issuer and the claimants purchased the securities on a foreign exchange, but they are resident in England, this part of the test will generally be satisfied. The initial damage can be seen in the actual acquisition of the issuer's securities.[23] In Scenarios (i) to (iii), the centre of this transaction will typically be in England, for example because the investor instructs a local broker and the securities are credited to the investor's account in England.[24] In Scenario (iv), on the other hand, these events will typically not have taken place in England, with the consequence that the jurisdiction of English courts under the first alternative must be denied.

If, despite the investors being resident in England, the first alternative of the 'claim in tort' head does not apply because, for example, the transaction is effected through a foreign broker and the accounts are located abroad, it is necessary to analyze the second limb of the test as well. The second alternative is taken to require that 'substantial and efficacious acts [were] committed within the jurisdiction'.[25] In the case of fraudulent or negligent misrepresentations, courts have held that this requirement is met if the misstatements are made in England.[26] The courts interpret the jurisdiction clause restrictively, stressing the need to avoid multiple competent jurisdictions and conflicting applicable laws.[27] This concern is particularly pertinent in securities litigation. Since the issuer's securities can be purchased by investors located in any country, jurisdiction rules that were too permissive would lead to the issuer being potentially subject to claims in a large number of different jurisdictions.[28]

In Scenario (i) above the misrepresentation originates in England during meetings of LTD's CEO and CFO with local investors. Accordingly, the connecting factor is clearly present and English courts would assume jurisdiction. In both Scenarios (ii) and (iii) the outcome would be different. English courts are of the opinion that the receipt of incorrect information that is communicated from abroad and acting upon the misrepresentation within the jurisdiction do not constitute sufficient connecting factors.[29] The decisions that established this rule for personal communications[30] must hold *a fortiori* for securities fraud, where communication is often impersonal and (in foreign-squared cases) the investors act only partly upon the statement within the jurisdiction, namely as far as they base their investment decision on the incorrect information, whereas the actual securities trade occurs elsewhere.[31] A comparison with libel cases, where the

18 CPR, r6.37(1), (3). For an interpretation of these requirements and the burden imposed on the claimant of showing them see *Seaconsar (Far East) Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 A.C. 438.

19 See Davies, 'Liability for misstatements to the market' (2010) 5 Capital Markets Law Journal 443, 451; van Houtte, 'The Law Applicable to Securities Transactions: Choice of Law Issues' in Oditah (ed.), The Future for the Global Securities Market – Legal and Regulatory Aspects (Oxford: Clarendon Press 1996), 69, 78; Ringe and Hellgardt, 'The International Dimension of Issuer Liability – Liability and Choice of Law from a Transatlantic Perspective' (2011) 31 Oxford Journal of Legal Studies 1, 12, with references.

20 Practice Direction 6B, para. 3.1(9).

21 *ABCI v BFT* [2003] 2 Lloyd's Rep 146, para. 44 (relying on Case C-220/88 *Dumez France v. Hessische Landesbank (Helaba)* [1990] ECR I-49: 'the place where the damage occurred ... can be understood only as indicating the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event', para. 20).

22 *Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, 437; *Cecil v Bayat* [2010] EWHC 641 (Comm), para. 122, reversed on other grounds, [2011] EWCA Civ 135.

23 *Hall v Cable and Wireless Plc.* [2009] EWHC 1793 (Comm), para. 32. The fall in LTD's share price upon disclosure of accurate information does not constitute a separate loss but, rather, 'it crystallises the amount of a present loss, which hitherto had been open to be aggravated or diminished by movements in the ... market', see ibid. para. 33 (quoting *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd. (No.2)* [1997] 1 WLR 1627 at p. 1632 C-D).

24 See *Cecil v Bayat*, no. 22 above, which dealt with misrepresentations concerning shareholdings in a foreign company. In assuming jurisdiction, the court referred to the fact that the 'economic base' of the claimants was England and 'that it was to this country that the shares and profit [of the company] would have been transferred and where the financial loss would have been suffered' by them, ibid. para. 122. This reasoning also applied to a claimant who was working abroad at the relevant time. It should be noted that the fact alone that the claimant received the misrepresentation and entered into a contract in reliance upon the statement in his home country, and that the ultimate financial loss is felt there, is not enough to establish jurisdiction if the initial damage manifests itself abroad, see *Alfred Dunhill Ltd v Diffusion Internationale De Maroquinerie De Prestige S.A.R.L* [2002] 1 All E.R. (Comm) 950 (with regard to Art. 5(3) of the Brussels Convention).

25 *Metall und Rohstoff A.G. v Donaldson Lufkin & Jenrette Inc.* [1990] 1 Q.B. 391, 437.

26 *Newsat Holdings Ltd, Newsat- 425 Ltd., Newsat 1 Ltd v Charles Zani* [2006] EWHC 342 (Comm) (relying on *Domicrest Ltd v Swiss Bank Corporation* [1999] QB 548, a case that concerned Art. 5(3) of the Lugano Convention 1988); *Cecil v Bayat*, no. 22 above, para. 124. See also *ABCI v BFT*, no. 21 above, para. 41. For an application of Art. 5(3) of the Judgments Regulation in this context see *London Helicopters Ltd v Heliportugal LDA-INAC* [2006] EWHC 108 (QB).

27 *Newsat Holdings*, no. 26 above, paras. 36-38 (quoting the Court of Justice of the European Union, Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank* [1990] ECR I-49; Case C-68/93 *Shevill v Press Alliance SA* [1995] ECR I-415).

28 This point was also emphasised by Davies, Davies Review of Issuer Liability: Final Report (2007), para. 63.

29 *Cecil v Bayat*, no. 22 above, para. 125. Before the amendment of what is now CPR, r6.36 and para. 3.1 of Practice Direction 6B in 1987 in order to align the rules with Art. 5(3) of the Brussels Convention (now Art. 5(3) of the Judgments Regulation, which provides for special jurisdiction in tort of the courts at the place 'where the harmful event occurred'), as interpreted by the Court of Justice of the European Union in Case 21/76 *Handelswekerij GJ Bier BV v Mines de Potasse d'Alsace SA* [1976] ECR 1735), the common view was that English courts could entertain the claim if the statement was received and acted upon by the claimant within the jurisdiction. See *Diamond v. Bank of London and Montreal Ltd.* [1979] Q.B. 333; *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd.* [1983] Ch. 258; *Cordoba Shipping Co v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep. 91; and from the literature Dicey, Morris and Collins, no. 14 above, para. 11-218; Fawcett, Harris and Bridge, International Sale of Goods in the Conflict of Laws (Oxford: Oxford University Press 2005), paras. 6.110-6.113.

30 See no. 26 above.

31 In fact, some liability provisions for incorrect market disclosure, notably s 90 FSMA, do not require a showing of reliance. Investors can raise a claim

same problem of a wide dissemination over the internet can arise as in Scenario (iii), confirms this assessment. English courts have held that the location of the publisher's establishment is the place where the harmful act is committed, not the places where the publication is distributed.[32]

Finally, the position of the investors in Scenario (iv) above is even more problematic. Communication of the incorrect information to the investors in their home country would not establish the requisite connecting factor with England, and neither would the receipt of information communicated from abroad in England. Even where the situation is within the letter of the law, for example because the incorrect disclosure originated from England (as in Scenario (i)), it is questionable whether the courts will assume jurisdiction if the investors have no connection to England, other than that they were coincidentally in the country or apprised themselves of the disclosure within the jurisdiction in order to take advantage of English securities laws. In a leading libel case, English courts refused to exercise jurisdiction where foreign claimants took up residence in England for the purpose of pursuing the libel claim, but their real grievance occurred in other countries.[33] Therefore, with respect to non-local investors who purchase their securities on a non-local exchange, there is reason to assume that the English courts will judge the situation in a similar way to the US Supreme Court in *Morrison*.

3. Applicable law

As far as applicable law is concerned, it is useful to distinguish between the express liability provisions in the FSMA and other areas of the law that may provide remedies for securities fraud, notably tort law (in the UK, the relevant instruments are the torts of deceit and negligent misrepresentation[34]). The international reach of the express liability provisions is limited by the requirements that are imposed by these provisions. Section 90 FSMA, the provision for prospectus liability, applies only to misleading statements in the listing particulars[35] or the prospectus.[36] These are technical terms that refer to the listing particulars as defined by the FSMA[37] and required under the Listing Rules,[38] and to prospectuses required because securities are offered to the public in the United Kingdom or admitted to trading on a regulated market in the UK[39] and approved by the competent authority in the UK or, where another Member State of the EU is 'Home State', by the competent authority in that State.[40] While the law is not entirely clear about this, it is, therefore, sensible to interpret the scope of application of section 90 as paralleling that of the prospectus disclosure obligations described above.[41] The legislature was more explicit when it adopted section 90A FSMA. According to schedule 10A of the FSMA, the liability provision applies where the securities of the defendant issuer are, with the consent of the issuer, admitted to trading on a market situated or operating within the UK, or the UK is the issuer's Home State.[42]

Thus, the sections of the FSMA can be interpreted as containing a rule of substantive law coupled with a rule demanding application of the provisions whenever the connecting factor with the United Kingdom (offer of securities to the public in the UK, admission to trading on a regulated market in the UK, or the UK is the issuer's Home State) is present.[43] In Scenarios (i) to (iv) above, the issuer is not incorporated in the UK and its securities are not admitted to trading on a regulated market there. Hence, section 90A FSMA does not apply.[44]

As far as liability outside the scope of the FSMA is concerned (torts of deceit and negligent misrepresentation), the applicability of English law is determined by general principles of conflict of laws. Liability for incorrect market disclosure is commonly classified as being governed by private international tort law.[45] These rules have now been harmonised by the Rome II Regulation.[46] Article 4 of the Regulation deals with tortious liability. The general rule provides that the law applicable to tort/delict shall be the law of the country where the damage occurs (*lex damni*), irrespective of the country where the event giving rise to the damage occurred or the country where indirect consequences occur.[47] This parallels the first alternative of the English rules on jurisdiction. Therefore, in applying the reasoning from the section "Jurisdiction" above,[48] we can conclude that in Scenarios (i) to (iii) above, English law will, in principle (save possible exceptions to be discussed below), be applicable, provided that the relevant

for damages even though they were not aware of the incorrect statement and did not, accordingly, 'act upon it' in any way. This example illustrates that traditional tort law jurisdiction concepts are not well suited to address the idiosyncrasies of securities litigation.

32 *Newsat Holdings*, no. 26 above, para. 37 (quoting Case C-68/93 *Shevill v Press Alliance SA* [1995] ECR I-415). But see also *Loutchansky v Times Newspapers Ltd. (Nos. 2 to 5)* [2002] Q.B. 783; *Dow Jones & Company Inc. v Gutnick* [2002] HCA 56 (holding that the tort of defamation is committed where the defamatory material is downloaded, at para. 44); *Harrods Ltd. v Dow Jones & Company Inc.* [2003] EWHC 1162 (permission to serve out was granted in spite of the very small number of copies of the defamatory material available to readers in England; the court noted that the material was also published online and that the claimant was an English company, at paras. 4, 44). Defamation cases are crucially different from securities fraud in that the damage to reputation occurs, and consequently, the tort is committed, at the place where the defamatory material is available in comprehensible form, *Dow Jones v Gutnick*, ibid. para. 44.

33 *Kroch v Rossell et Cie Société des Personnes à Responsibilité Ltd.* [1937] 1 All ER 725.

34 See no. 10 above.

35 Section 90(1)(b).

36 Section 90(11).

37 Section 79(2).

38 Section 79(1), L.R. 4.

39 Section 85(1), (2).

40 Section 85(7).

41 See no. 7 above.

42 Schedule 10A, para. 1(1).

43 On this interpretation, the norms would be what has been called in the literature 'selbstgerechte Sachnormen' ('self-satisfied' norms of substantive law), i.e. provisions that determine their international scope of application notwithstanding the *lex causae*. See Kegel, 'Die selbstgerechte Sachnorm' in Jayme et al (eds) Gedächtnisschrift für Albert A. Ehrenzweig (Karlsruhe; Heidelberg: C.F. Müller 1976), p 51. This interpretation is not shared by everyone, see Davies, no. 19 above, 451.

44 If the discussions with investors or the communication of information to investors in the UK constitutes a public offer, which may be the case depending on the type of communication, the investors, and the securities, an approved prospectus would be required and liability would, accordingly, attach to misstatements in that prospectus (section 90 FSMA). Offer to the public is defined in s 102B FSMA. The prospectus requirement does not apply to certain types of security and offers to qualified investors and fewer than 100 persons, ss 86, 102A FSMA.

45 See no. 19 above for references.

46 A summary of the UK tort choice of law rules, which continue to apply to matters outside the scope of Rome II (in particular defamation), is given by Fawcett and Carruthers, no. 17 above, 766-768, 868-872.

47 Art. 4(1).

48 Text to notes 21 to 24.

connecting factors with England (instruction of the broker, location of the accounts, etc.) are present.[49]

The Rome II Regulation provides for an exception to the general rule applying the *lex damni* if the case 'is manifestly more closely connected' with another country (so-called 'escape clause').[50] Some commentators suggest to use the escape clause not by way of exception, but as the default rule in securities litigation, and apply, for example, the law of the country where the issuer is incorporated or where it has its primary listing.[51] It may be argued that this is particularly appropriate in Scenario (iii), where the issuer disseminates information globally and does not specifically target local investors of the forum, in order to avoid the application of multiple, potentially conflicting legal regimes. However, it remains to be seen whether the courts will follow this route. This may be unlikely, given that the Rome II Regulation makes clear that the escape clause is intended to apply only in exceptional circumstances (confer the wording: 'manifestly').[52]

France

1. Introduction

For purposes of simplicity, we will assume that the officers of LTD comply with the specific French legal rules applicable to communications with investors on the French national territory in connection with transactions in securities listed on an exchange outside the European Union (the "EU").[53] Specifically, we assume that their communications would not be deemed to be a public offer of securities[54] and do not fall under either the prohibition on solicitation of transactions on an "unrecognized" exchange outside the EU[55], or on impermissible financial solicitation, which covers all unsolicited communications, by any means, with specified, unsophisticated investors with respect to securities traded on such markets[56].

2. Jurisdiction

In the hypothetical scenarios considered, jurisdiction will not be decided through the application of EU rules, in particular the Brussels I Regulation of December 22, 2000 ("Brussels I"). Although the scenarios involve litigation of civil and commercial matters before a court in an EU member state (France) and in an international context, the litigation is not within the field of application of Brussels I because the defendant is not resident on the territory of an EU member state[57]. Such residence is one of the conditions both for applying the general rule of competence established by Brussels I – *actor sequitur rei* –[58] and offering the plaintiff a choice of competent forums in litigation involving contracts[59] or torts[60].

Because the defendant is domiciled outside the EU, the rules of French law regarding territorial conflicts of jurisprudence should be applied for determining the competence of French courts[61]. In the hypothetical scenarios, the competence of French courts is not in doubt to the extent relevant elements connect the litigation to France.

Thus, after first considering that, in principle, the competent jurisdiction is where the defendant is domiciled[62], French law permits French courts to judge matters of tort when the place of the harmful act, or of the damage sustained, is in France[63].

Since the issue under the law of the forum (i.e., France) would be characterized as a tort resulting from the communication by LTD and its officers of fraudulent information[64], the investor plaintiffs would have the right to bring an action against the officers and/or LTD in a French court provided that either the damage was incurred in France, or the harmful act took place in France[65].

Under the law of the forum, identifying the jurisdiction where the damage occurred raises some uncertainty due to the lack of precise guidance in French law.

Since only the primary damage, and not any consequential damage, must be considered[66], one position would be that the damage occurred where the shares of LTD were acquired, which presumably was on the LTD Home Country market.

49 In Scenario (iv), the damage to the foreign investors will typically not occur in the UK. But since it is unlikely that English courts will assume jurisdiction in that case, it is not necessary to pursue the question.

50 Art. 4(3).

51 Davies, no. 19 above, 451; Ringe and Hellgardt, no. 19 above, 23-35.

52 See Fawcett and Carruthers, no. 17 above, 799-800, for a discussion of the escape clause and references.

53 See H. Synvet, A. Tenenbaum, Instruments financiers, Rép. international Dalloz, 2009, numéro 54 *et seq.*

54 French Monetary and Financial Code (*Code monétaire et financier*), Art. L. 411-1.

55 French Monetary and Financial Code, Art. L. 423-1 : "*The public may only be approached, in any form whatsoever and by whatever means, directly or indirectly, in connection with transactions relating to a foreign market for transferable securities other than a regulated market of a European Economic Area Member State, for negotiable futures contracts or any other financial product, if that market has been recognised as determined by decree, and subject to reciprocity*".

This text applies when an offer is made to the public in France, as defined on the basis of residence, by any means, including internet, provided the solicitation is active in character, and not simply passive. See H. Synvet, A. Tenenbaum, op. cit., numéro 54 et s.

56 French Monetary and Financial Code, Art. L. 341-10 4°.

57 Brussels I Art. 2 § 1. Even the exclusive competence provided in corporate matters (Règlement, Art. 22-2), which some commentators argue should be extended to litigations involving the responsibility of corporate management (see D. Cohen, La responsabilité civile des dirigeants sociaux en droit international privé, Rev. crit. de droit international privé, 2003. 585, spéc. p. 613 s.) assumes that the corporate headquarters is located on the territory of an EU member state.

58 Brussels I, Art. 4-1.

59 Brussels I, Art. 5-1.

60 Brussels I, Art. 5-3.

61 Brussels I, Art. 4-1.

62 New French Code of Civil Procedure (*Nouveau code de procédure civile*), Art. 42.

63 New French Code of Civil Procedure, Art. 46. See Mélina Douchy-Oudot, Compétence, Répertoire Dalloz de procédure civile, December 2010, numéro 84 et s.

64 See H. Gaudemet-Tallon, Compétence civile et commerciale, Répertoire international Dalloz, 2007, numéro 12.

65 See H. Gaudemet-Tallon, op. cit. numéro 38 *et seq.*; A. Huet, Compétence des tribunaux français à l'égard des litiges internationaux. Compétence internationale ordinaire. Principe de l'extension à l'ordre international des règles de compétence territoriale interne, JurisClasseur Droit international, Fasc. 581-20, 2002, numéro 37 *et seq.*

66 The place where the damage was incurred does not include the domicile or headquarters of the injured party (Cass. civ. 2°, 15 oct. 1981, Gaz. Pal. 1982. 1. Somm. 100), nor the place where the financial consequences of the alleged misconduct may ultimately be measured (Civ. 2e, 28 February, 1990, numéro 88 11.320, Bull. civ. II, numéro 46), but the location where the damage originally occurs.

Assuming that the information provided to investors (French or non-French) in France was the same as the information available where LTD's securities are traded, this position would lead to the argument that the investors suffered damage by acquiring securities on that market as a result of the over-valuation of the shares resulting from the publication of unjustifiably favorable information about the issuer. Even if the damage remained unseen until the true situation of the issuer was revealed, the damage nevertheless existed and French jurisprudence would recognize it as a certainty[67].

However, connections to other jurisdictions may also be maintained as a result of the complexity of the financial damage and the different analyses possible. The principal alternative would be to locate the damage where the relevant cash or securities accounts used for the transactions were located[68]. This position would be based on the Kronhofer decision of June 10, 2004, by the Court of Justice of the European Union, which interpreted jurisdiction similar to the approach adopted in the Brussels I[69].

If the fraudulent information is communicated to investors in France, by any means (written, oral or visual) or through any medium, there is no doubt that the harmful act occurred on French territory. French courts would thus clearly have jurisdiction in Scenario (i), where LTD's officers are physically present in France, and are likely to have jurisdiction in Scenario (ii), if French investors are considered to be specifically targeted. The targeting of French viewers may be deduced from several possible indicators, such as the use of the French language, a link to a French contact, or ease of access through hyperlinks, search engines or French advertising[70]. This basis for jurisdiction would also permit the French court to take into account all damage incurred by the plaintiffs, even if such damage was incurred outside France[71]. The same result would be reached for non-French plaintiff investors who are resident in France.

However, it is more difficult to determine that the harmful act occurred in France in Scenario (iii) when the fraudulent information did not specifically target French investors but was simply available on LTD's website. Because the act causing the damage occurred where the information was released, identifying where that took place raises important issues of a technical nature (would it be the location of the server, of the website host, or of the internet access provider?) and at a practical level (if these elements are mobile). Although French jurisprudence has not directly addressed this issue, an analysis of decisions regarding the place of damage caused as a result of the internet or the law applicable to torts over the internet appears to demonstrate a growing trend among French judges to look beyond the mere accessibility of the website in France and to require in addition that specific connections to the French legal environment be present to prove that French internet viewers were targeted[72].

In the event sufficient connections to France are not present, which is likely to be the case under Scenario (iii), it should be noted that the jurisdiction of French courts may also be established based solely on the basis of the plaintiffs possessing French nationality (wherever they are domiciled) at the time the action is initiated. Article 14 of the French Civil Code grants French plaintiffs a right to demand the jurisdiction of French courts, at the option of the plaintiff and to the exclusion of any other jurisdiction. Although expressed in restrictive terms, this right may be exercised in both financial and non-financial matters[73].

3. Applicable law

Although, based on the discussion above, it is likely that a French court would have jurisdiction in Scenarios (i) and (ii) and the other circumstances described, it remains to be determined which law, among various possibilities, should be applied. Since jurisdictional and legal authority may be decided as separate matters, the tort law which would be applied by the French judge must be identified.

The choice of law would be determined by applying the rules of conflicts of law established by the EU Regulation of July 11, 2007 on the law applicable to non-contractual obligations, known as "Rome II".

First, the hypothetical scenarios are within the geographic range of Rome II because they involve an international litigation and are subject to the jurisdiction of an EU member

67 "The certainty of the harm arose once the victims purchased shares [...] at a price greater than their true value as a result of the publication of false information", Cour d'appel de Paris, 9e ch. Sect. A, 15 January. 1992 (Affaire « Société Générale de Fonderie ») : Dr. sociétés, September 1992, § 189, note H. Hovasse ; Gaz. Pal., 1992, I, p. 293, note J-P. Marchi ; RTD com., 1992, p.884, note P. Bouzat ; Cass. Crim. 15 March 1993, pourvoi numéro 92-82.263, Bull. Crim. 1993, numéro 112, p. 270. *Adde*, N. Spitz, La réparation des préjudices boursiers, Banque édition, 2011, numéro 357.

68 See *infra* Applicable law.

69 CJCE, 10 June 2004, Kronhofer, aff. C-168/02, Rec. I. 6009 ; Rev. crit. de droit international privé, 2005. 326, note H. Muir Watt ; D. 2005. Pan. 1261, obs. P. Courbe et H. Chanteloup. The Court was answering, in this situation, a question raised in connection with a litigation between M. Kronhofer, who was domiciled in Austria, and financial investment advisors, who were domiciled in Germany, seeking an indemnity for M. Kronhofer for financial losses which he claimed he had suffered as a result of the tortious conduct of the defendants, whom he claimed caused him, over the telephone, to enter into a contract for share purchase options acquired on the London Stock Exchange, but without warning him of the risks involved in such a transaction. Asked to interpret Article 5, point 3, of the Brussels Convention, which establishes as the criterion for jurisdiction the "place where the harmful event occurred", the Court decided that such expression "does not refer to the place where the claimant is domiciled or where "his assets are concentrated" by reason only of the fact that he has suffered financial damage there resulting from the loss of part of his assets which arose and was incurred in another [EU Member] State".

70 See, regarding offers of financial services, le Livre blanc de la Commission bancaire et de la Banque de France, Internet, quelles conséquences prudentielles, published in December 2000.

71 See CA Paris, 15e ch., sect. B., 30 June 2006, Sté Morgan Stanley & Co et a. c/ SA LVMH : JurisData numéro 2006-303479 ; Bull. Joly Sociétés 2006, p. 1453, note D. Schmidt ; Banque et droit 2006, numéro 108, p. 34, note H. de Vauplane ; D. 2006, p. 2241, obs. X. Delpech ; A. Pietrancosta, Affaire Morgan Stanley c/ LVMH : le recadrage de la Cour d'appel de Paris, Revue trimestrielle de droit financier, 2006/1, p. 6 ; C. Chabert, Courtes observations de droit international privé à propos de l'arrêt Morgan Stanley, Communication Commerce électronique numéro 12, décembre 2006, comm. 158.

72 See H. Gaudemet-Tallon, op. cit. numéro 40 ; A. Huet, op. cit., numéro 42 ; D. Bureau, H. Muir Watt, Droit international privé, PUF, 2010, numéro 1016 *et seq.* ; G. Lardeux, La compétence internationale des tribunaux français en matière de cyberdélits, Dalloz 2010 p. 1183.

73 See V. H. Gaudemet-Tallon, op. cit. numéro 108 *et seq.* ; B. Audit, Droit international privé, Économica, 6e éd. 2010, numéro 358 *et seq.*, p. 320 *et seq.* ; A. Huet, Compétence « privilégiée » des tribunaux français ou compétence fondée sur la nationalité française de l'une des parties, Fasc. 581-30 *et seq.*, 2002.

state[74]. Rome II is not limited only to intra-EU matters, but establishes generalized conflicts of laws rules as the international private law of the member states[75]. As stated in Article 3 of Rome II: (Universal Application): "*Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.*"

Second, the hypothetical scenarios are within the substantive reach of Rome II, since the litigation involves compensation for damage caused by the violation of non-contractual civil or commercial obligation.

It is in fact hardly possible to contest that the litigation against the officers and/or the company LTD involves tort law, whether this characterization arises from the position of French law (*lex fori*)[76] regarding the subject, or the extension of the independent interpretation adopted by the Court of Justice of the EU regarding jurisdictional conflicts[77].

The hypothetical litigation also does not appear to be of a nature excluded from Rome II. By its terms, Rome II does not apply to "*non-contractual obligations arising out of corporate law*". However, legal doctrine is largely consistent in considering that this exclusion, despite its lack of precision, concerns only actions based on a violation of the actual terms of corporate law, without reducing Rome II's authority in connection with the tort liability to third parties of a company or its officers[78].

As a result, the conflict of laws should be resolved by applying Rome II. Because there are no provisions specifically addressing market purchases and sales of securities, and there is no contractual agreement between the parties as to applicable law[79], reference should be made to the general rule of Rome II for resolving conflicts of laws. The applicable law would thus be "*the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*"[80] However, Rome II sets apart the case "*where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with [another] country [...] based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected to the tort/delict in question*"[81].

74 See F. J. Garcimartín Alférez, The Rome II Regulation: On the way towards a European Private, International Law Code, The European Legal Forum (E) 3-2007, p. 77, numéro 9 et s. ; G. Lardeux, Sources extra-contractuelles des obligations. Détermination de la loi applicable, JurisClasseur Droit international, Fasc. 553-1, 2008, numéro 7 ; O. Boskovic, Règlement Rome II (Obligations non contractuelles), Répertoire international Dalloz, 2010, numéro 3.

75 See D. Bureau, H. Muir Watt, op. cit. no. 1002, p. 412.

76 See, in favor of the characterization of the plaintiffs as third parties and of their action as a demand in tort, including for litigation initiated by shareholders as a result of false information published in the financial market by a company, F. Danos, La réparation du préjudice individuel de l'actionnaire, RJDA, 5/08, p. 475.

77 V. T. Azzi, Bruxelles I, Rome I, Rome II : regard sur la qualification en droit international privé communautaire, Dalloz 2009, p. 1621.

78 In agreement, see F. J. Garcimartín Alférez, Art. préc. numéro 20 ; O. Boskovic, op. cit. numéro 9. In general, see H. Synvet, Société, Rép. international Dalloz, numéro 111 et s.

79 Rome II, Art. 14.

80 Rome II, Art. 4-1.

81 Rome II, Art. 4-3.

The clear EU preference for the *lex loci damni* results in a presumption that this law of the place of damage is closest to the dispute. This presumption can only be rebutted on an exceptional basis in favor of the law of jurisdiction where the harmful act occurred when such jurisdiction has "manifestly" closer connections with the situation in question[82]. This presumption thus overrides somewhat the earlier approach in French law, which gave equal importance in torts involving more than one jurisdiction to the law of the place of the harmful act and the law of the place where the damage occurred[83], with preference to be given, in principle[84], to the law of the jurisdiction which had the closest connection to the dispute[85].

As a result of the rule retained by Rome II, the place where the damage occurred must be identified, which raises serious difficulties under French law in our hypothetical scenarios, as was seen above. A serious argument may be made that the direct damage, which is the only damage to be considered,[86] occurred where the shares were acquired, which means the Home Country market, due to the initial over-evaluation of the price of the shares resulting from the publication of information unjustifiably favorable to LTD[87]. The law of the place of the market where the shares were purchased should, therefore, be declared applicable in Scenarios (i), (ii) and (iii), its closeness to the dispute reinforced by other facts (the principal market for LTD's shares, the source and principal center for the publication of false information, *lex societatis*) which protect it from replacement by the law of the place where the harmful act occurred. Indeed, it seems unlikely that the law of the place where the harmful act occurred, even if it consisted of an active communication of fraudulent information in France, has "manifestly" closer connections with the dispute.

However, as was seen above, another analysis is also possible, which would place the site of the damage in Scenarios (i), (ii) and (iii) in the jurisdiction where the relevant cash or securities accounts were located. Such an analysis would lead to a different result only if the relevant accounts were located in

82 See E. Loquin, La règle de conflit générale en matière de délit dans le règlement du 11 juillet 2007, *in* S. Corneloup et N. Joubert, (ss. la dir. de), Le règlement communautaire « Rome II » sur la loi applicable aux obligations non contractuelles, 2008, Litec ; D. Bureau, H. Muir Watt, op. cit. numéro 1005, p. 414 ; O. Boskovic, op. cit. numéro 38 *et seq.*

83 See Cass. 1re civ., 14 janv. 1997, Gordon and Breach, Bull. civ. I, numéro 16, p. 8, Rev. crit. de droit international privé, 1997, p. 504, note J.-M. Bischoff, JCP G 1997, II, 22903, note H. Muir Watt, D. 1997, jurispr. p. 177, note M. Santa-Croce ; Cass. 1re civ., 28 October 2003, Bull. civ. I numéro 219, p. 172, D. 2004.233 note P. Delebecque, Rev. cr. 2004.83, note D. Bureau.

84 Regarding the numerous aspects of jurisprudential uncertainty on this issue, see D. Bureau, H. Muir Watt, op. cit. numéro 987, p. 399 ; G. Lardeux, Sources extra-contractuelles des obligations. Détermination de la loi applicable, JurisClasseur Droit international, Fasc. 553-1, 2008, numéro 32 et 51 *et seq.*

85 See Cass. 1re civ., 11 May 1999, Mobil North, Bull. civ. I numéro 153, p. 101, Rev. crit. de droit international privé, 2000, p. 199, note J.-M. Bischoff, JDI 1999, p. 1048, note Légier, D. 1999, somm. p. 295, obs. Audit, JCP G 1999, II, 10183, note H. Muir Watt ; Cass. 1re civ., 5 March 2002, Sisro, Bull. Civ. I numéro 75, p. 58, JCP G 2002 II 10082, note H. Muir Watt, Rev. cr., 2003.440, note J.-M. Bischoff ; Civ. 1re, 27 March 2007, numéro 05-10.480, Bull. civ. I, numéro 132, Rev. crit. de droit international privé, 2007. 405, note D. Bureau ; Civ. 1re, 27 May 2010, numéro 09-65.906, inédit.
Also, with respect to public denigration, the matter of LVMH / Morgan Stanley, CA Paris, 15e ch., sect. B, 30 June 2006, numéro 04/06308, RTDF, numéro 2006/2, p. 6, note A. Pietrancosta.
On the uncertainties of the system, see P. Bourel, Responsabilité civile, Rép. international Dalloz ; Horatia, numéro 985 *et seq.*

86 See Rome II, recitals 16 and 17.

87 See *supra.*

France, as a result of the primary connection with France, the country where the harmful act occurred. From the EU perspective, this analysis has the advantage, in keeping with the goal of coherence expressed by Rome II[88], of being based on the Kronhofer judgment of June 10, 2004, of the Court of Justice of the EU concerning jurisdictional competence[89]. In this case, the location of the investment account of the defendant, to which the defendant transferred funds which were subsequently invested and which became the subject of the disputed financial losses (Germany), was preferred to the domicile of the plaintiff, which was supposed to represent the "place of his wealth" (Austria), while no consideration was given to the fact that the placements had been made in the London market.

In addition to the challenge for the judge of resolving the question of the relevant accounts, which may be extremely difficult, particularly in the context of an international acquisition of book-entry (dematerialized) securities[90], the limits of the analogy with the Kronhofer judgment should be kept in mind, since there are differences between the rules and principles for resolving conflicts of law and jurisdictional conflicts, and also because there are factual distinctions between the case considered in Kronhofer and our hypothetical scenarios.[91]

88 See Rome II, recital 7.

89 See CJCE, 10 June 2004, *supra.*

90 With respect to the legal location of book-entry securities, the position can be taken that the law of the issuer should be applied, since it generally governs the form of issued securities (see H. Synvet, Société, Rép. international Dalloz, numéro 95).

91 The applicable law is granted an overarching authority, since it governs "in particular" (Art. 15):

(a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;

(b) the grounds for exemption from liability, any limitation of liability and any division of liability;

(c) the existence, the nature and the assessment of damage or the remedy claimed;

(d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

The designated governing law only yields before "mandatory provisions" ("lois de police françaises" (Art. 16; it should be noted here that the international application of French criminal or administrative violations in connection with the communication or publication of fraudulent or misleading information is limited essentially to securities listed on regulated markets within the meaning of French and EU law. See the French Monetary and Financial Code, Art. L. 465-3 and the General Regulation of the *Autorité des marchés financiers* (the "AMF", or French Securities Markets Authority), Art. 632-1.); or the French public policy ("ordre public international français") (Art. 26; such as excessive non-compensatory punitive or exemplary damages plus interest, see recital 32).

Germany

1. Jurisdiction

1.1. General

Given that LTD, CEO and CFO all are not resident in a Member State of the Brussels I Regulation, in Denmark or in a Contracting State of the Lugano Convention, the jurisdiction of German courts would be governed by German national law, namely the Zivilprozessordnung (ZPO), by virtue of Art. 4 (1) Brussels I Regulation. Four different heads of jurisdiction are possible candidates for establishing jurisdiction dependent on the facts of the specific case. There is no specific aspect of "extraterritoriality" in this regard since the claims at stake brought forward by investors established under private law are simple claims under private law with public law issues only possibly relevant as incidental questions.

1.2. Random heads of jurisdiction

Two of the possible heads of jurisdiction will find only random application. The first is § 29 ZPO employing the place of performance of a contractual obligation as a head of jurisdiction for claims in contract enforcing that very contractual obligation. This will only come into operation insofar as there are direct contractual relations between LTD and the investors, and even then only for claims against LTD, not for claims against CEO or CFO. The second in this category is § 21 ZPO. Here the connecting factor is a place of business. Evidently this will only apply against LTD again, and a necessary prerequisite is that LTD has a place of business in Germany. The notion of place of business should be interpreted in accordance with the respective yardsticks as established by the Court of Justice of the EU under Art. 5 (5) Brussels Convention. This applies to all settings indicated under (i)-(iii) without further differentiation.

1.3. § 32 ZPO: Jurisdiction in tort

The most likely and predominant candidate is § 32 ZPO basing jurisdiction in tort on the tortious activity.[92] This rule ought to be interpreted in line with the interpretation given to the parallel Art. 5 (3) Brussels Convention or Brussels I Regulation respectively by the Court of Justice of the EU. Hence, the principle of ubiquity will apply vesting jurisdiction in either place where tortious activity was exerted by the tortfeasor or where primary losses were sustained by the victim.[93] The second head of jurisdiction is arguably restricted to claims recovering the loss sustained in that very jurisdiction and does not allow for the recovery of the worldwide loss in this forum.[94]

Under Scenario (i) above, since the CEO and CFO travelled to Germany and divulged relevant but misleading information to investors whilst meeting them in Germany, the first option (where the tortious activity took place) will be availa-

92 Cf. only *Geimer,* Internationales Zivilprozessrecht (6th ed. Köln 2009) para. 1521b.

93 Cf. only BGHZ 124, 245; BGHZ 132, 111; BGHZ 176, 346; BayObLGZ 1995, 303.

94 Transferring the *Shevill* doctrine both towards investment cases and into national law with no supporting case law at hands.

ble. Certainly the core activity leading to liability occurred in Germany where the CEO and CFO delivered the roadshow to investors. Accordingly, both the CEO and CFO acted in Germany, and their activity can be attributed to LTD which they represented, too.[95]

Additionally, the primary loss would be sustained in Germany if the account from which the single investor transfers the monies at stake is held in Germany.[96] Such an analogous treatment to investment fraud is proper, since the loss incurred is the same qualitatively and on the investor's fortune in both situations.

With respect to Scenario (ii) above, other modes of directly transmitting information to Germany, for instance direct e-mailing to recipients evidently resident in Germany, also qualifies as relevant activity exerted in Germany. A website targeted especially at Germany (whether solely or jointly with other countries) might constitute like activity in Germany, too. Yet there is no judicial authority expressly supporting such contention so far. Nonetheless, if a market is misinformed (whether negligently or deliberately), spreading the information on the market concerned is the activity that matters.[97]

Under Scenario (iii) above, whether a global dissemination including Germany via a website constitutes relevant activity in Germany has not been judicially decided yet, either. An educated guess would tend to an answer in the negative. The level of German investors in LTD's shareholder base could possibly make a difference, though, insofar as it might be taken as an indication that Germany is purposefully targeted (even if only among other countries) and the inclusion of investors from Germany is not accidental if German investors are a regular and non-negligible feature which cannot escape attention.

1.4. § 23 ZPO: Jurisdiction based on assets located in Germany

The second likely option at least against LTD is provided by § 23 ZPO granting jurisdiction if the defendant has assets located in Germany. Every asset however small is sufficient.[98] For instance, chairs or tables in an office held by LTD are relevant here if they are LTD's property.[99] Assets feature in particular the defendant's own credit claims (against whomsoever) if the debtor is resident in Germany, since the debtor's residence determines the location of any such claim pursuant to § 23 2nd clause ZPO. Hence, besides LTD's bank accounts in Germany (insofar as they are positive)[100], claims by LTD against other investors who in turn are resident in Germany might trigger jurisdiction. § 23 ZPO ought to be applied restrictively by adding a further link to Germany.[101] Yet such link can stem from the claimant's person: If the claimant is resident in Germany or is a German national, this will suffice.[102] This applies to all settings indicated under (i)-(iii) without further differentiation.

Whether the CEO or CFO respectively can be sued in Germany based on § 23 ZPO depends on the location of their respective assets, since the same yardsticks apply. This applies to all settings indicated under (i)-(iii) without further differentiation.

2. Applicable Law

The applicable law must be determined according to the Rome II Regulation. Neither (c) nor (d) of Art. 1 (2) Rome II Regulation are operative and thus do not exclude the case from the scope and ambit of the Rome II Regulation.[103] [104]

2.1. Pre-contractual liability and Art. 12 Rome II Regulation

Art. 12 Rome II Regulation might deserve some attention insofar as pre-contractual liability is at stake. At least misrepresentations in concrete negotiations will be covered.[105] Art. 12 (1) Rome II Regulation employs an *akzessorische Anknüpfung* subjecting pre-contractual liability to the law governing the ensuing (or envisaged) contract. Which law governs the contract is to be ascertained by virtue of the Rome I Regulation. Yet outside concrete negotiations and contractual dealings, Art. 12 Rome II Regulation should not be deemed applicable.[106]

2.2. Product liability and Art. 5 Rome II Regulation

Amongst the other special rules, only Art. 5 Rome II Regulation on product liability could possibly deserve attention.[107] But this would have to overcome the definition of "products" as contained in Art. 2 Product Liability Directive which is restricted to movables and thus to tangibles. However, there is no respective case law, due to the relative novelty of the Rome II Regulation. As to substance, Recital (20) Rome II Regulation strongly indicates that consumers' health is the main protective target for Art. 5 Rome II Regulation. Accordingly, it would be a far shot to apply Art. 5 Rome II Regulation directly or even *per analogiam* to securities liability.[108]

95 Cf. generally BGH WM 2010, 2214, 2216; OLG Bremen IPRax 2000, 228; *Vollkommer,* IPRax 1992, 207, 211; *von Hein,* IPRax 2006, 460, 461; *id.,* LMK 2010, 308395.

96 Cf. only BGHZ 80, 1; BGHZ 132, 111; BGH NJW-RR 2008, 516; BayObLG MDR 2003, 893; BayObLG MDR 2004, 365; BGH ZIP 2010, 2004, 2006; BGH WM 2010, 2214, 2216.

97 *Van Houtte,* in: *McLachlan/Nygh* (eds.), Transnational Tort Litigation (1996), p. 155, 169; *von Hein,* RabelsZ 64 (2000), 194, 198; *id.,* RIW 2004, 602, 604; *Mankowski,* in: *Magnus/Mankowski,* Brussels I Regulation (München 2007) Art. 5 Brussels I Regulation note 224.

98 BGH NJW 1988, 966, 967; BGH NJW 1990, 990, 991; BGHZ 115, 90, 93; BGH NJW 1997, 324, 325 = JR 1997, 462 with annotation *Mankowski.*

99 Cf. BGH NJW-RR 1991, 423, 425; OLG Frankfurt NJW-RR 1996, 186, 187; Hessisches LAG AR-Blattei ES 920 Nr. 7 with annotation *Mankowski.*

100 Cf. BGH WM 1987, 1353 et seq.; OLG Frankfurt NJW-RR 1988, 572 et seq.; OLG Frankfurt WM 1988, 254 et seq.; OLG Frankfurt WM 1989, 57 et seq.; OLG Düsseldorf NJW 1991, 3103.

101 BGHZ 115, 90; BAG AP Nr. 13 zu § 38 ZPO Internationale Zuständigkeit; BGH NJW 1997, 324, 325; OLG München RIW 1993, 66; OLG Stuttgart RIW 1990, 829, 830.

102 BGH NJW 1997, 324, 325 = JR 1997, 462 with annotation *Mankowski*; BGH NJW 1997, 2886; OLG Stuttgart RIW 1990, 829, 830.

103 In detail *Ringe/Hellgardt,* (2011) 10 OJLS 1, 20 et seq.; to the same avail *Kiesselbach,* [2011] JIBFL 25.

104 Attempts by the UK to introduce an exemption into the Regulation failed and were unsuccessful. Council Document 7928/06.

105 *Kiesselbach,* [2011] JIBFL 25, 26.

106 *Ringe/Hellgardt,* (2011) 10 OJLS 1, 20 ; *Kiesselbach,* [2011] JIBFL 25, 26.

107 As hypothetically argued by *Tschäpe/Kramer/Glück,* RIW 2008, 657, 663.

108 *Tschäpe/Kramer/Glück,* RIW 2008, 657, 663.

2.3. Place where the damage occurs under Art. 4 (1) Rome II Regulation

Generally, the dominant rule is Art. 4 Rome II Regulation. According to Art. 4 (1) Rome II Regulation, tortious liability is to be determined by the law of the place where the relevant damage occurs. Where activities resulting in the damage are located is not significant in light of the unequivocal second clause of Art. 4 (1) Rome II Regulation. The Rome II Regulation can very appropriately employ the jurisprudence particularly of the Court of Justice of the EU relating to the parallel parts of Art. 5 (3) Brussels I Regulation, in part since Recital (7) Rome II Regulation urges this to be done. Hence, it is necessary to identify what constitutes the primary damage in the scenarios considered. Only the primary or immediate damage is relevant for the present purposes.

Primary damage is the damage to the asset originally protected.[109] Which asset is protected must be determined pursuant to the tort in question.[110] Specific torts are designed to protect certain assets or values. Since the tort at stake must provide the answer to the question, an autonomous and uniform approach which would be entirely fact-based is not feasible.[111] If the tort committed was a tort designed to protect the victim's fortune as such, the damage to the fortune is the relevant damage.[112] In this specific scenario, the damage to the investor's fortune is the primary damage. On a general level, the paramount question is whether the tort at stake is an informational tort and protects market integrity or whether it is designed to protect the investor's fortune.[113]

Under Scenario (i) above, where the CEO and CFO participate in a roadshow, both roads (whether the fault involves damage to the investor's fortune or to market integrity) may lead to Rome, which itself leads, however, to German law: If the tort at stake was characterised as an informational tort against market integrity, the primary damage would be inflicted on the German market with the roadshow in Germany indicating beyond any doubt that the German market was targeted. If the tort at stake is identified as against damage to the investor's fortune, it might be assumed that investors who are presented with a roadshow in Germany will have in Germany their accounts from which the moneys to be invested will be withdrawn, and thus the location of these accounts is relevant in this regard[114]. Accordingly, the second limb would also lead to a connecting factor linking the case to Germany and German law insofar as investors with their relevant accounts in Germany are concerned.

The respective torts committed by CEO and CFO would also be located in Germany under Art. 4 (1) Rome II Regulation regardless of whether one would treat these torts as independent means or as incidental to LTD's tort[115].

With respect to Scenario (ii) above, a website targeted especially at Germany (whether solely or jointly with other countries) could likewise inflict damage to the investors' assets held in Germany in a manner foreseeable to LTD. If the misinformation is measured as against inflicting damage on the German market the answer would also be in the affirmative and would lead to the application of German law.

Under Scenario (iii) above, a website globally disseminating incorrect information can inflict like damage to investors' assets held in Germany. It is arguable as to which degree of foreseeability that German assets could be affected, and the inquiry ought to be made.[116] At least a substantive number of investors from Germany in the past would serve as an indication of such foreseeability. But it ought not to be required that they reach a certain percentage of share capital on aggregate.

2.4. Parties' choice of law under Art. 14 Rome II Regulation

Art. 14 (1) Rome II Regulation permits tortfeasor and victim to choose the applicable law *ex post* and if all parties concerned are professionals, even *ex ante*. This rule is applicable in the event of misstatements, too.[117]

3. Foreign investors as co-plaintiffs

On the abstract level, there is no hindrance that foreign investors from third countries outside the EU join in as co-plaintiffs. Yet there must be jurisdiction for each and every claim singled out to allow that claim to be brought in German courts. If LTD holds assets in Germany, jurisdiction can be based on § 23 ZPO. To the extent the foreign investors can assert that they relied on the faulty information dispersed in Germany, § 32 ZPO will open up jurisdiction against LTD under Scenario (i) (roadshows in Germany) and Scenario (ii) (electronic information targeting Germany) above, and also against the CEO and CFO in Scenario (i) above.

Co-plaintiffs are a common procedural feature where they fulfil the requirements as set out by § 59 ZPO that they are entitled by the same factual or legal background.

109 Cf. *Antonio Marinari v. Lloyd's Bank plc and Zubaidi Trading Co.*, [1995] ECR I-2719, I-2739 para. 14; *Rudolf Kronhofer v. Marianne Maier*, [2004] ECR I-6009, I-6030 para. 19; OGH ÖJZ 2005, 111, 112.

110 *Mankowski*, in: *Magnus/Mankowski*, Brussels I Regulation, München 2007, Art. 5 Brussels I Regulation note 233.

111 *Mankowski*, in: *Magnus/Mankowski*, Brussels I Regulation, München 2007, Art. 5 Brussels I Regulation note 233.

112 Cf. only LG Dortmund IPRax 2005, 542, 544.

113 Cf. OLG Frankfurt ZIP 2010, 2217; *Mankowski*, EWiR § 37b WpHG 1/10, 725.

114 Cf. BGH ZIP 2010, 2004, 2006; BGH WM 2010, 2214, 2217; *Junker*, ZZP Int. 9 (2004), 200, 205 et seq.; *Mankowski*, RIW 2005, 561, 562; *id.*, in: *Magnus/Mankowski*, Brussels I Regulation, München 2007, Art. 5 Brussels I Regulation notes 239 et seq.; *Leible*, in: *Rauscher*, Europäisches Zivilprozess- und Kollisionsrecht, Brüssel I-VO/LugÜbk, 3rd ed. 2011, Art. 5 Büssel I-VO note 86b ; *Kiesselbach*, [2011] JIBFL 25, 27.

115 Cf. to the attribution of delictual activity by auxiliary personnel to the main tortfeasor in an international setting related to capital markets BGH ZIP 2010, 2004.

116 Cf. for a parallel discussion *Mankowski*, CR 2002, 450.

117 *Kiesselbach*, [2011] JIBFL 25, 27.

Analysis and Conclusion

1. Analysis in light of the SEC's inquiry regarding international comity, with reference also to the U.S. Supreme Court's decision in Morrison

1.1. General: Private rights of action under UK, French and German law exist in a variety of circumstances in cases involving transnational securities fraud

In each of the jurisdictions examined above, private rights of action under local law could be maintained against foreign companies in cases involving transnational securities fraud. However, the analyses above are based largely on applicable legal principles, since, despite the sophistication of their legal, regulatory and judicial environments, there is a lack of jurisprudence and law or regulation providing clear guidance as to the scope of private rights of action specifically in such cases.

1.2. Scenario (i): When transnational securities fraud is committed against local investors on the national territory, local investors may sue in local courts and, in general, under local law

In each of the United Kingdom, France and Germany, when company representatives commit fraud on the national territory by communicating false information to local investors, investors may bring suit against the company and its representatives in local courts. Local jurisdiction is based principally on the fact that damage resulted from an act committed on the national territory.

Furthermore, under the circumstances of Scenario (i), investors may seek the protection of local law. Each of the United Kingdom, France and Germany is subject to the Rome II Regulation, which establishes the general principles of conflict of laws for the adhering EU member states. Under the Rome II Regulation, the principle inquiry for determining the applicable law is where the damage occurs (*lex damni*), except when circumstances "manifestly" link the case to a different jurisdiction.

In both the United Kingdom and Germany, if the investors harmed by the fraudulent communication used local accounts in connection with the transaction, the damage is deemed to occur locally, and thus local law applies. In addition, in Germany, the fraudulent communication is also deemed to have harmed local market integrity. French jurisprudence also recognizes that the investors' use of local accounts may lead to the conclusion that damage occurred locally, and thus that French courts have jurisdiction and may apply French law; however; a counter-argument, that the damage occurred in the jurisdiction where the shares were purchased - i.e., in the jurisdiction where the company's shares are traded - may prevail before a French court.

The critical point to be retained, however, is that the "bright-line" rule established by the U.S. Supreme Court in *Morrison* - that the applicable law in international securities fraud is the law of the country where the securities are traded - is not consistent with the harmonized approach adopted in the European Union under the Rome II Regulation, which generally applies the law of the jurisdiction where the damage occurs.

1.3. Scenarios (ii) and (iii): When fraudulent information is communicated electronically, the outcome may differ depending on whether local investors were "targeted" by the electronic communications (Scenario (ii)), or whether they simply had access to generally available information (Scenario (iii))

Under Scenario (ii), where LTD specifically targets local investors (for example, through web pages translated into the local language), local courts would have jurisdiction, as under Scenario (i), if damage is deemed to have occurred locally because local investors used local accounts in connection with the transaction. Furthermore, local law would apply in the United Kingdom and Germany; in France, it is not clear whether the court would conclude that the damage had occurred in France (where the investors' accounts are located) or in the country where the securities where purchased (where the trading market is located), and thus it is not clear whether the court would apply local (French) law or the law of the country where the trading market is located.

However, under Scenario (iii), where investors access information on LTD's website which is not specifically targeted toward them, the outcome may differ. Although it may still be possible to establish local court jurisdiction on the basis that damage occurred locally (provided the investors' used local accounts in connection with the transaction), courts may refuse jurisdiction on the grounds that, because the information was not targeted to the investors, the damage actually occurred in the jurisdiction where the fraudulent information was published (i.e., where LTD's website is located) or where the securities were purchased (where the trading market is located). For the same reasons, the investors' local law may be held not to apply.

The critical point to be retained is that in the jurisdictions considered, a distinction may be made in private rights of action in international securities fraud between situations when (i) the jurisdiction of the injured investors was specifically targeted by the issuer's electronic communications, and (ii) the investors accessed generally available, untargeted information. Local investors are more likely to receive protection under local law in the first situation than the second, although the English courts would reject jurisdiction in both situations if the investors' accounts were not located in England. Once again, the "bright-line" test in *Morrison* is inconsistent with the approach taken in the jurisdictions considered, where a relevant factor may be whether the issuer communicated the fraudulent information specifically toward local investors.

1.4. Scenario (iv): The jurisdictions considered would not generally take jurisdiction over claims by a non-resident/non-national investor wishing to join a suit by local investors, except if certain conditions are satisfied

Although no cases on point could be cited, jurisprudential principles in the jurisdictions considered appeared consistent with the ruling in *Morrison* denying private claims in the

"foreign cubed" scenario. However, if the non-resident/non-national plaintiff can demonstrate an independent factual basis for justifying local jurisdiction (and in Germany, if the defendant company LTD has assets there), such non-resident/non-national investor would be permitted to join in a local action.

Conclusion

The SEC's request for public comment on private rights of action in the context of international securities fraud has generated a substantial number of responses from businesses, lawyers, investors, government representatives and others. In connection with the SEC's efforts to make a proposal to the U.S. Congress which provides adequate protection to U.S. investors, maintains the competitiveness of U.S. securities markets and is respectful of international comity, the analyses presented in this article offer key guidance on several matters:

1. ***Private rights of action in cases involving transnational securities fraud which apply local law against foreign defendants are consistent with judicial principles in sophisticated jurisdictions outside the United States.***

2. ***One predominant principle in determining both jurisdiction and applicable law in private actions involving transnational securities fraud is where the damage occurred.***

A common criterion in the jurisdictions considered for determining where the damage occurred is the location of the investor's accounts used in connection with the transaction. However, to eliminate the lack of predictability criticized by the U.S. Supreme Court in *Morrison*, it may be preferable to adopt a criterion based on a more easily anticipated fact situation, such as the jurisdiction where the investor is located.

3. ***A second significant factor in connection with determining whether the investors' local law should apply, particularly when the information is communicated over the Internet, is whether the issuer specifically targeted local investors.***

As applied to U.S. securities markets, two groups of foreign issuers may be presumed to be targeting U.S. investors with their English-language communications: (i) foreign issuers listed on U.S. securities markets, and (ii) foreign issuers with sponsored American Depositary Share (ADS) programs traded on the U.S. over-the-counter (OTC) market.

In both cases, SEC filings by the listed issuers, and corporate website postings by OTC-traded issuers to comply with Rule 12g3-2(b)[118], are clearly targeted to U.S. financial markets and form part of the issuer's strategy to attract or maintain U.S. investor interest. As shown in the country analyses above, the application of U.S. disclosure law to such communications in private actions against transnational securities fraud would be consistent with judicial principles outside the United States.

However, it may not be consistent with legal principles outside the United States for non-US issuers who do not target U.S. investors to be subject to U.S. disclosure law in private actions. For example, it may not be appropriate for a foreign issuer which indicates on its corporate website that the information is not directed toward U.S. investors, and which does not otherwise transmit corporate communications to the U.S. or take steps to promote U.S. investor interest in its securities, to be subject to U.S. disclosure law in private actions by U.S. investors. However, if damage to U.S. investors was "foreseeable", which may be the case if an unsponsored ADS program has been established for such issuer, then the result should perhaps be otherwise.[119]

4. ***As part of the SEC's preparatory work for the report it is to deliver to the U.S. Congress on private rights of action in cases involving transnational securities fraud, and in particular with respect to the concerns expressed over international comity, it may do well to take into account the principles adopted in the European Union's multilateral, harmonized regulations.***

The three countries considered in this analysis, together with 23 other European Union countries, have agreed to harmonize their principles of jurisdictional conflicts and conflicts of laws, and a proposal is currently under consideration to deepen and extend the degree of harmonization in this regard.[120]

Annex: Summary tables for Scenarios (i), (ii) and (iii)

The tables below summarize the principal conclusions of the individual country analyses which are most relevant to the SEC's recent public inquiry. This summary information is subject to the conditions and complementary discussion provided above under each analysis.

118 Rule 12g3-2(b) under the U.S. Securities Exchange Act of 1934, as amended. The purpose of the rule is essentially to ensure that U.S. investors have information equivalent to what is made available in the issuer's home country, while offering an exemption from SEC reporting requirements to unlisted issuers with more than 300 security holders in the United States.

119 If non-US issuers for whom unsponsored ADS programs are to be subject to U.S. disclosure standards in private actions in U.S. courts, the possibility of requiring the foreign issuer's approval for the establishment of such unsponsored ADS programs should be reconsidered by the SEC. If such authorization is not required, but U.S. investors could nevertheless bring actions against issuers on the basis of the issuers' general, untargeted disclosure, the U.S. approach would not be consistent with approaches in non-U.S. jurisdictions which consider generalized, non-targeted information as an insufficient basis for applying the investors' local law.

120 See "Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and enforcement of judgments in civil and commercial matters, final pp. 8, 23-25" available at http://www.europeanlaw monitor.org/legislation/2010/COM2010748text.pdf.

Scenario (i): LTD's CEO and CFO meet with investors in Target Country		
United Kingdom	***Jurisdiction***	English courts would have jurisdiction on two bases: (i) damage sustained in England (*provided* the investors' accounts used in connection with the investment are located there), and (ii) damage resulted from an act committed in England (the roadshow).
	Applicable law	Rome II Regulation: applicable law is the law of the country where the damage occurs (*lex damni*), unless the case is "manifestly more closely connected" with another country. Damage occurs in England if the investors' accounts are located there.
France	***Jurisdiction***	French courts would have jurisdiction since the damage resulted from an act committed in France (the roadshow). A possible additional basis for jurisdiction would exist if it were determined that the damage occurred in France. However, it is currently not clear whether a court would determine that the damage occurred: - in France, which may be the case if the investors' accounts used in connection with the investment are located there, or - in the country where the shares were purchased (ie, where the stock market is located). In all cases, a person of French nationality has the right to demand French jurisdiction.
	Applicable law	Rome II Regulation: applicable law is the law of the country where the damage occurs (*lex damni*), unless the case is "manifestly more closely connected" with another country. It is not currently clear under French law whether the damage would be deemed to have occurred: - in France, which may be the case if the investors' accounts used in connection with the investment are located there, or - in the country where the shares were purchased (i.e., where the stock market on which LTD's shares are traded is located).
Germany	***Jurisdiction***	German courts would have jurisdiction on three bases: (i) damage resulted from an act committed in Germany (the roadshow), or (ii) damage sustained in Germany (*provided* the investors' accounts used in connection with the investment are located there) or (iii) assets held by the defendant in Germany, or the investor (including a non-resident/ non-national) has specific links with Germany (e.g., relied on the information disseminated in Germany).
	Applicable law	Rome II Regulation: applicable law is the law of the country where the damage occurs (*lex damni*), unless the case is "manifestly more closely connected" with another country. Damage occurs in Germany on two bases: - damage to the investors', provided their accounts used in connection with the investment are located in Germany, and - damage to the integrity of the German market ("informational tort").

Scenario (ii): Fraudulent information communicated electronically specifically toward Target Country investors Scenario (iii): Fraudulent information disseminated generally through LTD's web site		
United Kingdom	***Jurisdiction***	English courts would have jurisdiction on the basis of damage being sustained in England (*provided* the investors' accounts used in connection with the investment are located there). If the facts do not support "damage sustained in England", the tortious act would be deemed to have been committed where the publisher of the fraudulent information is located (LTD's Home Country), and English courts would not have jurisdiction.
	Applicable law	Rome II Regulation: see Scenario (i) above for the UK. Damage occurs in England if the investors' accounts are located there. However, under Scenario (iii), it may be argued that the general dissemination of information on LTD's website justifies applying LTD's Home Country law and not Target Country law.

Scenario (ii): Fraudulent information communicated electronically specifically toward Target Country investors Scenario (iii): Fraudulent information disseminated generally through LTD's web site		
France	***Jurisdiction***	Under Scenarios (ii) and (iii), jurisdiction is currently uncertain and would depend on whether the damage is deemed to have occurred: - in France, which may be the case if the investors' accounts used in connection with the investment are located there, or - in the country where the shares were purchased (ie, where the stock market is located). Alternatively, there would be jurisdiction if the court is persuaded that French investors were specifically targeted by LTD's communications, which is likely under Scenario (ii), and unlikely under Scenario (iii) (for information generally disseminated, the place where the damaging act occurs is considered to be the location of publication (i.e., where LTD's web site is located)). In all cases, a person of French nationality has the right to demand French jurisdiction.
	Applicable law	Rome II Regulation applies - as in Scenario (i) above for France, it is not clear under French law where the damage would be deemed to have occurred.
Germany	***Jurisdiction***	German courts would have jurisdiction on the basis of damage sustained in Germany (*provided* the investors' accounts used in connection with the investment are located there). If the facts do not support "damage sustained in Germany", the damage would probably be deemed to have occurred: - in Germany, under Scenario (ii), provided the court determines the targeting German investors constitutes an "activity in Germany"; but - where the publisher of the fraudulent information is located (LTD's Home Country), in Scenario (iii), unless some factor persuades the court that Germany was targeted (e.g., LTD has a high proportion of German shareholders). Jurisdiction can also be based on assets held by the defendant LTD in Germany or if the investor (including a non-resident/non-national) has specific links with Germany (e.g., relied on the information disseminated in Germany).
	Applicable law	Rome II Regulation applies – see Scenario (i) above for Germany. Under Scenario (ii), damage occurs in Germany on two bases: - damage to the investors', provided their accounts used in connection with the investment are located in Germany, and - damage to the integrity of the German market ("informational tort"). Under Scenario (iii), damage may not be deemed to have occurred in Germany if the damage to German investors and the German market was not foreseeable.