The American Advantage in Civil Procedure?
An Autopsy of the Deutsche Telekom Litigation

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Abstract

This article examines the influence of civil procedure on the legal framework that supports securities markets in the U.S. and in Germany, two very different legal systems. It does so by way of comparing parallel shareholder actions against Deutsche Telekom for securities disclosure violations arising out of the same facts and allegations – the first set of actions filed in federal district court in Manhattan, the second filed in district court in Frankfurt, Germany. Deutsche Telekom was accused in both actions of misrepresenting the value of its real-estate holdings in its financial disclosures and for failing to disclose negotiations for the acquisition of the U.S. Company VoiceStream in its July 2000 offering prospectus.

But the cases proceeded very differently and produced dramatically different outcomes. Within five years, and after full discovery, the U.S. class action plaintiffs negotiated a $120 million settlement with the Deutsche Telekom defendants. Meanwhile, the parallel claims by German shareholders, the first of which were filed in 2001, were ultimately dismissed by the German courts in 2012. Until now the German shareholders have received nothing, even after the German Bundestag had adopted a new and unprecedented aggregate litigation mechanism in late 2004 (dubbed “the Deutsche Telekom law”) to afford thousands of complaining German shareholders a reasonable mechanism for pursuing a just and speedier resolution of their claims against the DT defendants. The article also engages claims about the importance of litigation discovery for corporate and securities laws advanced by Michael Halberstam and Érica Gorga in Litigation Discovery and Corporate Governance: The Missing Story About “The Genius of American Corporate Law” 63 Emory Law Review 1383 (2014).
# The American Advantage in Civil Procedure?
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## Table of Contents

**Introduction** ........................................................................................................................................... 1

I. Public Versus Private Enforcement: Whose Advantage? .............................................................. 7

II. Background and Complaints ................................................................................................................. 13
    A. Background ......................................................................................................................................... 13
    B. The U.S. Complaint ............................................................................................................................ 16
       1. VoiceStream Allegations .................................................................................................................... 18
       2. Real-Estate Allegations .................................................................................................................... 20
    C. The German Complaint ....................................................................................................................... 22

III. Development of the Litigation ............................................................................................................. 23
    A. Development of the Litigation in the Southern District of New York ........................................... 23
    B. Development of the German Litigation ............................................................................................. 24
    C. The Attempt to Obtain Evidence From Overseas .......................................................................... 25
    D. The "Deutsche Telekom” Law ........................................................................................................... 27
    E. The Deutsche Telekom KapMug Proceeding .................................................................................. 31

IV. Substantive Law Applied To The Facts .............................................................................................. 34
    1. Materiality .......................................................................................................................................... 34
    2. Materiality in the Merger Context ....................................................................................................... 35
    3. Materiality in the Real Estate Context ............................................................................................... 39

V. Analysis .................................................................................................................................................. 41

VI. Conclusion ............................................................................................................................................. 48
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**INTRODUCTION**

This article examines the influence of civil procedure on the legal framework that supports securities markets in the U.S. and in Germany, two very different legal systems. It does so by way of comparing parallel shareholder actions against Deutsche Telekom for securities disclosure violations arising out of the same facts and allegations – the first set of actions filed in the United States District Court in the Southern District of the New York,¹ the second set of actions filed in district court in Frankfurt, Germany.²

Deutsche Telekom was accused in both the U.S. and German actions of misrepresenting the value of its real-estate holdings in its financial disclosures and for failing to disclose negotiations for the acquisition of the U.S. company VoiceStream in its July 2000 global offering prospectus. DT’s stock price declined substantially after news of the 50 billion Euro VoiceStream acquisition hit the markets, and again, in February of 2001, after the company took a 2 billion Euro write down for a decline in its real estate assets. Shareholders in the US and in Germany filed suit, claiming that the company had violated its securities disclosure obligations.

But the cases proceeded very differently and produced dramatically different outcomes. US class action plaintiffs filed suit in the United States District Court for the Southern District of New York in December of 2000.³ After full discovery, plaintiffs negotiated a $120 million dollar settlement with the

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Deutsche Telekom defendants.\(^4\) The settlement was approved by the court in June of 2005.\(^5\) Meanwhile, German shareholder claims, the first of which were filed in 2001,\(^6\) were dismissed by the Higher Regional Court (Oberlandesgericht) in Frankfurt in 2012.\(^7\) The German shareholders have so far received nothing, even after the German Bundestag had adopted a new and unprecedented aggregate litigation mechanism in late 2004 (dubbed “the Deutsche Telekom law”), to afford thousands of complaining German shareholders a reasonable mechanism for pursuing a just and speedier resolution of their claims against the DT defendants.\(^8\) The case was appealed to the Federal Supreme Court (Bundesgerichtshof), which published its decision on December 11, 2014, affirming the Higher Regional Court’s judgment on the VoiceStream and real estate allegations, but finding fault with the by now 14 year old prospectus on grounds that it illegally booked certain transactions with a subsidiary involving Sprint shares as sales – an issue that was not a focus of the U.S. complaint.\(^9\)

The different developments of these parallel actions speak to the debate about the private enforcement of capital markets regulation in the U.S. and Europe.\(^10\)

\(^5\) Id. at *5-*15.
\(^7\) Supra note 2.
\(^8\) See Kapitalanleger-Musterverfahrensgesetz (KapMuG), Aug. 16, 2005, Bundesgesetzbblatt [BGBl] 2437; KOELNER KOMMENTAR ZUM KAPMUG (Burkhard Hess, Fabian Reuschle & Bruno Rimmelspacher, eds.) (2d. Ed. 2014); See, generally, Tilp & Roth, supra note 6.
There has been a global convergence on the U.S. securities regulations regime so much so that U.S. regulations have become the template for securities market regulation in Europe, Latin America, and Asia. European countries, including Germany, have adopted the U.S. securities disclosure model and established federal regulatory agencies that include their own public enforcement divisions. But recourse against issuers for securities disclosure violations remains very limited – especially for the kinds of retail investors who were courted by the Deutsche Telekom offerings. Europeans have recognized that the nature of such claims requires some kind of class action or aggregate litigation mechanism. Many European countries, including Germany, have consequently implemented litigation mechanisms that aggregate claims or allow for some kind

initiated by the SEC for financial misrepresentation from 1978 through 2004 and comparing penalties from resulting private class action awards.


\[12\] SIEMS, supra note 10, at __. See, e.g., the EU’s adoption of the Transparency for Listed Companies Directive (“Transparency Directive”), 2004/109/EC, as amended to improve the uniformity of securities disclosure requirements for issuers whose securities are listed on stock exchanges within the EU. Like other countries, Germany has passed legislation to implement the Transparency Directive. See Transparenzrichtlinien-Umsetzungsgesetz, 05.01.2007, BGBl I, S. 10 (TUG).

of representative litigation. But the resistance to exporting U.S. style class actions to Europe is universal.

By way of a case study, this article examines how and why private enforcement of securities laws in Europe appears to fail, even after investor-friendly substantive and procedural law changes.

According to Plaintiffs’ attorneys, one major factor in the Deutsche Telekom case was the lack of discovery. In civil actions in the German courts, plaintiffs have a very hard time investigating company internal wrongdoing, because of fundamental principals of civil law adjudication that are deeply embedded in German civil procedure. Party on party discovery is prohibited. Parties must obtain documentary evidence in support of their claims independently and extra-judicially for the most part. Defendants are not required and cannot be forced to produce relevant documents or electronic discovery to support a plaintiff’s case. Based on these principles, the German court (and the U.S. court acting on principles of comity upon receiving a letter from the German government) refused to allow German plaintiffs in the Deutsche Telekom litigation access to discovery materials that had already been produced and in the U.S. litigation. The German government went so far as to vehemently object to such disclosure in U.S. proceedings under 28 U.S.C. § 1782.

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17 See PETER L.MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 275–78 (2004);

18 See OSCAR G CHASE, HELEN HERSHIKOFF, LINDA SILBERMAN, YASUHEI TANIGUCHI, VINCENZO VARANO, & ADRIAN ZUCKERMAN, CIVIL LITIGATION IN COMPARATIVE CONTEXT 207–40 (2007) (comparing the discovery mechanisms in England, the United States, Germany, and Japan).

19 CHASE, et al., supra note 18, at 223 (“Since the parties do not have a general procedural right to obtain the relevant information, they have to rely on their personal knowledge and on the material in their possession.”).

20 The basic privilege of a party not to disclose evidence against its own interest or to open itself up to searching discovery, remains in place in Germany. R.R. VERKERK, FACT-FINDING IN CIVIL LITIGATION: A COMPARATIVE PERSPECTIVE 16 (2010).

by means of which German plaintiffs sought to obtain U.S. documents and deposition transcripts pertinent to their case.\textsuperscript{22}

The article thus considers claims about the importance of litigation discovery for corporate and securities laws advanced by Michael Halberstam and Érica Gorga in an article entitled \textit{Litigation Discovery and Corporate Governance: The Missing Story About “The Genius of American Corporate Law”}.\textsuperscript{23} There we argued that modern litigation discovery has had a profound impact on the evolution of shareholder litigation, corporate governance, and the culture of corporate disclosure in the U.S. We showed how litigation discovery in the U.S. has driven and structured the process of corporate shareholder litigation;\textsuperscript{24} persistently generated information that stimulated the development of case law defining shareholder rights and managerial duties;\textsuperscript{25} induced incremental improvements in corporate governance practices including more exacting decision procedures, internal monitoring, record-keeping, and disclosure;\textsuperscript{26} established templates for independent corporate internal investigations by boards and regulators;\textsuperscript{27} and has given regulators steady insight into changing corporate internal practices and patterns of wrongdoing.\textsuperscript{28}

This article explores the corollary to these claims. Does the lack of adequate tools for fact-investigation in private litigation in Europe (and other Civil Law jurisdictions) compromise the enforcement of shareholder rights -- even in sophisticated jurisdictions like Germany, which Professor John Langbein famously advocated as a model of efficient fact-finding in his controversial article on \textit{The German Advantage in Civil Procedure}.\textsuperscript{29} If so, the German (and European) procedural law would appear unable to support the kind of issuer transparency that European lawmakers have been pursuing.\textsuperscript{30}

\textsuperscript{22 Id. at 84 (“The German authorities expressed concerns that granting discovery would . . . ‘jeopardize German sovereign rights’”).

\textsuperscript{23 See Gorga & Halberstam, supra note 10.

\textsuperscript{24 Id. at 1420-25

\textsuperscript{25 Id. at 1455-61

\textsuperscript{26 Id. at 1453-54

\textsuperscript{27 Id. at 1444-53.

\textsuperscript{28 Id. at 1479.


This article pursues these comparative questions at a very concrete level, by way of comparing two parallel cases. In so doing, it shows up the difficulties of coming to conclusions about the operation and effects of different civil procedure mechanisms, especially during a time when those mechanisms are undergoing significant changes. This comparative case study contributes to the scholarship by highlighting important differences and developments in German law from the perspective of the U.S. attorney and drawing certain conclusions along the way, but also by flagging questions that remain unanswered and require substantial additional research.

Part I of this Article describes how concerns about discovery abuse shape the debate about the private enforcement of securities laws in the U.S. and in Europe. It suggests that European civil law systems, like Germany, cannot promote private enforcement without affording plaintiffs more robust tools of fact investigation. And it explains how the Deutsche Telekom case speaks directly to this debate.

Part II begins by explaining the special significance of the Deutsche Telekom case for the development of the German securities markets. It describes the events that led plaintiffs in both the U.S. and Germany to file suit and details the factual allegations and legal claims in the U.S. and German complaints.

Part III compares the development of the litigation in the U.S. and in Germany. It describes the dramatically different progress of the German and the U.S. cases, the German Plaintiffs’ attempt to obtain discovery from the U.S., the collapse of the German Court system in light of the large number of claims, and how a new aggregate litigation mechanism passed by the German parliament in response to this situation shaped the further development of the litigation.

Part IV considers the differences in substantive laws and legal standards applied in the U.S. and in Germany and how they might have influenced the outcome of the litigation.

Part V examines what inferences we can make about the relative effectiveness of U.S. and German civil procedure from what we have learned. It considers whether the KapMug statute makes aggregate securities litigation more efficient, whether it gives plaintiffs a fair chance at building their case, and how the comparison reflects back on criticisms of securities class actions in the U.S.

Part VI concludes.
I. Public Versus Private Enforcement: Whose Advantage?

On both sides of the Atlantic, there has been an ongoing debate about the proper relationship between the public and private enforcement of securities laws.31

In the U.S., the debate has largely been about how much to reign in securities class actions without undermining their deterrent function.32 Congress and the Supreme Court have repeatedly acted to curtail securities class actions over the past decades, while encouraging greater reliance on public enforcement33 – especially in the wake of the 2002 Enron and Worldcom scandals.34 And several scholars who have questioned the current mix of public and private enforcement go so far as to suggest that an exclusive public enforcement model should be considered.35

In contrast, the European debate has been about how far to go in private enforcement mechanisms, like aggregate or representative to achieve a speedier resolution of investor claims without opening the door to U.S. style class

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33 See generally Carl W. Hittinger & Jarod M. Bona, The Diminishing Role of the Private Attorney General in Antitrust and Securities Class Action Cases Aided by the Supreme Court, 4 J. OF BUS. & TECHNOL’Y L. 167 (2009).

34 DONNA M. NAGY, RICHARD W. PAINTER & MARGARET V. SACHS, SECURITIES LITIGATION AND ENFORCEMENT: CASES AND MATERIALS 665 (3d ed. 2012) (noting the SEC’s congressional appropriations have tripled since 2002).

35 See Rose supra note 10, at 2177.
actions.\textsuperscript{36} Currently, the civil procedure of many EU member states is developing mechanisms of aggregate litigation.\textsuperscript{37} Policy makers at the EU level and in the member states recognize that injuries, like consumer product defects, antitrust violations, and securities disclosure violations, that are distributed across a large number of individuals cannot be adequately addressed without special litigation procedures.\textsuperscript{38} As we shall see, the Deutsche Telekom case stands for this proposition in German jurisprudence. At the EU level, this recognition is reflected in the EU “Transparency Directives” for improving and establishing uniform standards for public company disclosure.\textsuperscript{39} The Transparency Directive \textit{inter alia} calls for the member states to adopt aggregate litigation mechanisms, but explicitly disclaims the U.S. class action model.\textsuperscript{40}

Even as some European countries, like Germany, have passed legislation to do so, public enforcement remains the near exclusive venue for punishing and deterring issuer misconduct.\textsuperscript{41} In these debates, the costs of U.S. style class actions, and in particular of litigation discovery, loom large.\textsuperscript{42}


\textsuperscript{37} See, e.g., Nagareda, supra note 36, at 20ff. See generally, CHRISTOPHER HODGES, THE REFORM OF CLASS AND REPRESENTATIVE ACTIONS IN EUROPEAN LEGAL SYSTEMS (2008).

\textsuperscript{38} See, e.g., HODGES, supra note 36, at 1; Roswitha Mueller Piepenk, \textit{Geleitwort, in CASPER, et al., supra note 11, at XI (citing developments at the EU level).}; Burkhard Hess, \textit{Einleitung, Koelner Kommentar zum KapMUG} (2014).


\textsuperscript{40} Id.


\textsuperscript{42} Id. at 4.
The ability of U.S. plaintiffs to impose substantial discovery costs and burdens on corporate defendants is viewed as a critical component of successfully prosecuting securities class actions. At the same time, the U.S. retreat from the “private attorney general” model in securities litigation is closely linked with the controversial theory that so-called “impositional discovery” enables plaintiff-side attorneys to pressure defendants to settle based on the threat of discovery rather than the merits of the case. Apart from encouraging meritless (and therefore unjust) strike suits, the critics of securities class actions maintain that the costs and burdens of discovery generate over-deterrence. Limiting plaintiffs’ ability to obtain discovery has thus been the principal point of leverage for U.S. reforms.

Even as Europeans introduce aggregate litigation mechanisms into their domestic law, their reactions to litigation discovery in the U.S. class action setting are extreme. Discovery’s purported excesses are viewed with nothing short of horror – the equivalent of “boiling the ocean to heat a tea kettle” in the words of one observer. U.S. litigation discovery is considered to be an extremely inefficient way to acquire evidence for the resolution of civil disputes. This perspective was already laid out in Professor John Langbein’s famous 1983 article, The German Advantage in Civil Procedure. The rise of electronic discovery has only heightened the sense that American’s are “nuts” when it comes to the scope and tools of litigation discovery, and the resources that are allocated to discovery.

The costs and burdens of litigation discovery are thus at the heart of the debate about how to find the right balance between public and private enforcement in the U.S. and in Europe. As already mentioned, this debate is longstanding.

In his 1983 article, Langbein championed the efficiency of German civil procedure. He argued that the German, civil law process of evidence acquisition and fact finding by a judge is far superior to the long and wasteful U.S. process of litigation discovery.

In civil law systems, like Germany, judges have a much more active role in civil litigation than U.S. trial court judges do. There is no jury. The judge

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44 Interview with Klaus Rotter, October 7, 2014.
45 Langbein, supra note 29.
46 See generally Stephen N. Subrin, Discovery in Global Perspective: Are We Nuts? 52 DEPAUL L. REV. 299, 310 (2002)
47 See MURRAY & STÜRNER, supra note 17, at 11.
is the one who resolves all issues of law and fact. The judge identifies the
issues, investigates the facts, hears all the evidence, and proceeds issue-by-issue
looking for the fastest way to resolve the dispute. The system is “inquisitorial”
in the sense that the judge is always active and drives the proceedings. Proceedings are “episodic” in that there is no single trial.

According to Langbein this inquisitorial approach is far superior, because
the judge is able to focus fact investigation based on the legal issues as they come up. And at each stage of the proceedings only evidence relevant to the particular issue at hand is considered. New evidence may be introduced at any time, which avoids the need to engage in useless fact investigation. Much of the work is done via written submissions by the parties. The written depositions recount and interpret the facts for the judge prior to the hearing. The judge will have reviewed the written submissions prior to the hearing and thus is able to focus discussion on questions left unanswered by the submissions.

Langbein argued that U.S. discovery has turned into an adversarial process
in which the parties seek to impose unnecessary costs on one another, but also withhold evidence and make accurate fact-finding less likely. He cited excessive preparation of witnesses for depositions as a prime example of the manipulation of evidence in the U.S. adversarial system of party-on-party discovery. In contrast, he argued that there is no such interference with witness testimony in the inquisitorial system. In Germany, the judge interviews the witness directly and can focus the interview on the issues at stake in the law suit always looking to clarify unanswered questions.

Langbein further pointed out that litigators in the U.S., who are in control of discovery, have no incentive to limit time spent on discovery, because their compensation is based on hourly fees. In contrast, the German judge is focused

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49 Langbein, supra note 29, at 848.
50 MURRAY & STURNER supra note 17, at 11.
51 Langbein, supra note 29, at 830 (“in German procedure the court ranges over the entire case, constantly looking for the jugular -- for the issue of law or fact that might dispose of the case”).
52 See generally Langbein, supra note 29. However, while judges drive fact-gathering, Germany’s civil procedure far from non-adversarial. See id. at 841 (“Outside the realm of fact-gathering, German civil procedure is about as adversarial as our own”).
53 See id. at 830.; Cf MURRAY & STURNER supra note 17, at 14 (characterizing German civil proceedings as “continuous”). But there is an increasing tendency to consolidate hearings.
54 Langbein, supra note 29, at 830.
55 Id. at 831.
56 Id. at 829
57 See Id., at 828
58 Id. at 833-36.
on disposing of the case as expeditiously as possible, because he has a full docket of other cases that require his attention.\textsuperscript{59}

Langbein concludes that German procedure is much less costly and much more efficient than the U.S. system, and typically resolves disputes in less than half the time that it takes in the U.S. courts.\textsuperscript{60}

Langbein’s article was highly controversial.\textsuperscript{61} And his interpretation of German civil litigation law and practice has been challenged on a number of important points.\textsuperscript{62} Critics of Langbein have, for example, pointed out that he limits his comparison to the “traditional bipolar lawsuit in contract, tort, or entitlement” and explicitly excludes from the analysis the “Big Case.”\textsuperscript{63} But empirical evidence shows that it is in the big cases that discovery generates substantial costs and extended discovery, whereas many small cases are resolved with very limited discovery and a significant percentage with no discovery at all.\textsuperscript{64}

It is in the so-called “Big Cases,” where plaintiffs must obtain evidence about wrongdoing by large corporations or government that U.S. litigation discovery becomes a critical tool.\textsuperscript{65} In this vein, I have argued in a previous paper (together with Érica Gorga) that litigation discovery has had a profound impact on the development of U.S. corporate and securities laws, and, more broadly, on the U.S. culture of corporate transparency. In this article, we describe in detail how litigation discovery shines a bright light on corporate internal events and practices when it is allowed. Depositions, document requests, interrogatories, the attorney subpoena power, and third party discovery subject company internal operations, business practices, decision procedures, and specific events to intense scrutiny by outside gatekeepers and party-opponents. We show how the tools and the reach of litigation discovery have become embedded in U.S. practices of public and private enforcement, in corporate internal governance and practices of communication and information management, in the law of fiduciary duty, and in

\textsuperscript{59} \textit{Id.} at 829

\textsuperscript{60} \textit{Id.}


\textsuperscript{63} Langbein, \textit{supra} note 29, at 825.


\textsuperscript{65} Allen, et al., \textit{supra} note 61, at 709.
the expectations of market participants. Contrary to popular views about the unaccountability of corporate directors and officers, we conclude that U.S. corporations are fairly transparent.\textsuperscript{66}

But in Europe, there is no litigation discovery.\textsuperscript{67} There is no specific phase of the litigation process dedicated to the exploration or collection of evidentiary materials in civil law systems. Nor is there a general right to obtain relevant information in connection with the proceedings. Party on party discovery is not permitted and any demand for information from a defendant must be approved and issued by a judge. The parties are thus expected to rely on their personal knowledge and any materials in their possession to make out their case. While there are some substantive and procedural rights to obtain information under certain circumstances—the main procedural tool is a shifting the burden of proof—these are limited. A plaintiff must obtain evidence of corporate internal wrongdoing from other sources, like investigative journalism, government investigations, or whistleblowers. Plaintiff-side attorneys thus view companies as “black boxes” that they are able to penetrate only under special circumstances. Plaintiffs' attorneys and experts\textsuperscript{68} in Germany have deplored that German plaintiffs, like plaintiffs in other European countries, “practically have no access to … [an issuer’s] files” and that “[o]nly prosecutors have the weapons to seize papers, question witnesses and find out what actually happened,”\textsuperscript{70}

\textsuperscript{66} An exception to the populist belief in corporate secrecy can be found in Don Tapscott & David Ticoll’s The Naked Corporation: How the Age of Transparency Will Revolutionize Business (2003). But Tapscott & Ticoll do not consider how the principles and practices of litigation discovery have contributed to this result.

\textsuperscript{67} Oscar G Chase, Helen Hershkoff, Linda Silverman, Yasuhei Taniguchi, Vincenzo Varano, & Adrian Zucker, Civil Litigation in Comparative Context 222 (2007).

\textsuperscript{68} The Economist, April 10, 2008, available at www.economist.com/node/11021139. (“Compared with America we are at a great disadvantage . . .,” said Andreas Tilp, an attorney for the Deutsche Telekom plaintiffs in Germany. “Most aggravating for Mr. Tilp is his inability to secure documents, such as a Bonn prosecutor’s report that he believes concludes there was balance-sheet fraud, and another report from the Federal Audit Court, which was pivotal in the American settlement.”)

\textsuperscript{69} Guido Ferrarini and Paolo Giudici, Financial Scandals and the Role of Private Enforcement: The Parmalat Case, Law, Version 8, Working Paper No 40/2005, May 2005 European Corporate Governance Institute, available at http://ssrn.com/abstract=73403. Ferrarini & Giudici note that the same is true of Germany and France (“Given the lack of efficient discovery rules, investor action against mass wrongdoings is virtually impossible in Italy as it is in the rest of Europe, unless information is gathered by public authorities.”)

\textsuperscript{70} Karin Matussek, Porsche Plaintiffs Seek $5 Billion With Limited Tools, June 26, 2012 (“Different from the U.S., plaintiffs here have no pre-trial discovery, so they practically have no access to Porsche’s files . . . Only prosecutors have the weapons to seize papers, question witnesses and find out what actually happened.”).
But Langbein’s view of U.S. civil litigation, and especially discovery, appears still to be widely shared, especially in Europe. European policy makers are thus, in a sense, attempting to square the circle. On the one hand, they recognize the importance of aggregate litigation. On the other hand, they are unwilling to afford plaintiffs the tools that are necessary to investigate large public companies in a private enforcement proceeding. In the words of Professor Richard Nagareda, “Europe consciously seeks to avoid the U.S. experience,” namely “to harness the closure potential of aggregation, without its enabling potential.”

The debate about who has the advantage in civil procedure when it comes to shareholder and securities litigation is therefore still very much alive in the contemporary struggle to establish and maintain the legal preconditions to strong securities markets. While the corporate governance debate has in some ways moved on, policy makers are very much occupied with this question at present.

II. BACKGROUND AND COMPLAINTS

A. Background

The Deutsche Telekom case is of particular importance for understanding the development of private enforcement of securities laws in Germany. It was the largest German shareholder litigation ever. And it involved share issuances that had a special significance for the German securities markets as a whole.

The company resulted from the German government’s decision to privatize its telecommunications monopoly, which was part of the larger government run Deutsche Bundespost. Deutsche Telekom’s 1996 IPO, which raised approximately $20 billion dollars was not just the largest IPO in Europe ever. It represented a signal initiative to push forward the German government’s efforts to liberalize Germany’s financial markets and create a German shareholder culture. During the 1990s, German policy makers were rewriting German financial markets regulations to encourage greater investment in new technology start-ups, increase the number of publicly-held firms, create a market for firms,

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71 Nagareda, supra note 36, at 9.
72 Tilp, supra note 13, at 332 (citing press reports).
and generally, diversify away from the traditional, highly concentrated, German bank-centered model of corporate finance towards a U.S. model of greater reliance on the stock markets to capitalize firms.\footnote{74 SIEMS, CONVERGENCE OF SHAREHOLDER LAW; ASSMAN & SCHUETZE, HANDBUCH DES KAPITALANLAGERECHTS 21-54 (3d Ed. 2007).} In this context, the Deutsche Telekom IPO’s success was of great importance.

Deutsche Telekom’s Initial Public Offering took place in 1996, the first secondary offering was placed in 1999, and another offering followed in the May/June 2000.\footnote{75 These offerings are referred to in the litigation as DT1, DT2, and DT3.} The share offerings were advertised as a Volksaktie\footnote{76 Tilp & Roth, supra note 6, at 132.} (the “people’s share”) and both the privatization and offerings included unusual features designed to encourage and sustain widespread share ownership.\footnote{77 Gordon, supra note 73, at 15. Tilp & Roth, supra note 6, at 133.} Approximately 40% of the 1996 share offering was allocated to retail purchasers.\footnote{78 Gordon, supra note 73, at 13.} Retail investors could purchase the shares at a discount. And government initially held onto 74%, which could have been interpreted to mean that the government stood behind the company. Deutsche Telekom announced that it expected to pay a 2% dividend in 1997 and a 4% dividend in 1998, which Professor Jeffrey Gordon called “a somewhat remarkable undertaking for a company in the midst of a fundamental business change.”\footnote{79 Id. at 15.} Finally, the public landline telephone monopoly comprised a substantial part of Deutsche Telekom’s business. With a new government regulatory agency setting the rates, “[a] prospective shareholder could well find in these dividend arrangements an implicit promise that the Regulatory Authority will set a rate structure so as to permit payment of a regular dividend regardless of the profitability of Deutsche Telekom’s other business activities.”\footnote{80 Id. In order to reduce its ownership of Deutsche Telekom to below 50%, the German government sold a large block of shares to the German Kreditanstalt fuer Wiederaufbau (KfW), the public entity created to serve as a development bank for the Eastern Germany after the collapse of the GDR. KfW is the development bank that was created by the German government to help finance economic development in the former East German territories.}

The litigation against Deutsche Telekom and its co-defendants in the U.S. and Germany followed unscheduled disclosures by the company in July of 2000 and in February of 2001.

On July 24, 2000, Deutsche Telekom disclosed that it was acquiring the U.S. cellular and telecommunications company VoiceStream for around $50
The extraordinary price Deutsche Telekom would pay to enter the highly competitive U.S. cellular markets raised serious concerns among investors. As a result, the company’s share price dropped by 13 percent on the day of the VoiceStream announcement. By December of 2000, shares had dropped by 30 percent amid declining profits and a slump of European telecommunication shares.

The disclosure of the VoiceStream acquisition came only four weeks after the company first listed its shares on the New York Stock Exchange (NYSE) on June 19, 2000, but was disclosed neither in the May 22 Registration Statement that it filed with the S.E.C., nor its June 17 U.S. Prospectus for the American Depositary Shares. Likewise, the May 2000 German offering prospectus and three prospectus supplements, the last of which was published in June of 2000, contained no mention of the VoiceStream acquisition.

The decision to acquire VoiceStream would cost Deutsche Telekom dearly. In 2002, Deutsche Telekom wrote off around $18 billion in assets relating to VoiceStream, contributing to a loss of $24.7 billion for the first nine months of 2002. The timing of the acquisition, at the height of the dot-com bubble, was a major factor in this result.

In February of 2001, Deutsche Telekom issued another unscheduled disclosure. The February disclosure announced the revaluation of Deutsche Telekom’s substantial real estate holdings in the amount of more than $2 billion Euros (or $1.8 billion dollars). The depreciation of the pretax value of its real-estate holdings would cut estimated net income in 2000 by 1.4 billion euros, revealing a fourth-quarter loss of 2.5 billion euros.

Deutsche Telekom’s share price dropped again. On the Frankfurt stock exchange, the Deutsche Telekom’s so-called T-Share (T-Aktie) was priced at 14.57 Euros in its initial 1996 European IPO. It reached a record 103 Euros, but then dropped back to 60 Euros just before the third stock issuance in June 2000.

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81 Deutsche Telekom Agrees to Acquire VoiceStream Wireless for $50.7 Billion, WSJ.COM (July 24, 2000 12:51 PM), http://www.wsj.com/articles/SB964424432543482052
83 Id.
84 Id.
85 See Tilp, supra note 13, at 338.
87 Id.
The valuation of Deutsche Telekom’s real estate holdings had, by this time, become the subject of a government investigation by a German prosecutor in Bonn. The investigation, which was initiated on July 24, 2000, the same day on which Deutsche Telekom disclosed the VoiceStream acquisition, followed disclosures in the press that Deutsche Telekom had intentionally applied inappropriate valuation methods, going back all the way to its 1996 public financial statements, and had consequently overstated Deutsche Telekom’s assets substantially.

B. The U.S. Complaint

Deutsche Telekom shareholders who bought American Depository Shares in the June 2000 offering filed suit in the United States District Court for the Southern District of New York in December of 2000 against the company, certain control persons, and its underwriters. The complaint named as defendants 1) Deutsche Telekom, 2) its Chairman and CEO Ron Sommer who signed the Registration Statement, 3) the German public development bank, KfW, which had owned the shares that were sold as ADS’s in the U.S. public offering; and 4) the underwriters.

The Amended Class Action Complaint alleged that the May 22, 2000 Registration Statement and subsequent versions of the U.S. Offering Prospectus were materially false and misleading in that they (1) failed to disclose that Deutsche Telekom was at that time engaged in advanced merger talks with VoiceStream Wireless Corp., and 2) overstated Deutsche Telekom’s real estate portfolio by at least 2 billion Euros.

Plaintiffs brought claims against all the defendants under Sections 11 and 12(a)(2) of the Securities Act. The complaint charges Ron Sommer and KfW with “control person liability” under Section 15 and 20 of the Securities Act for Deutsche Telekom’s violation of Section 11 and Section 12(a)(2). The complaint also charges Deutsche Telekom, its CEO Ron Sommer, and KfW with securities

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91 Consolidated Amended Class Action Complaint supra note 1, at ¶ 27-29.
fraud pursuant to Section 10(b) of the Securities Exchange Act, and Rule 10b-5 thereunder.\textsuperscript{92}

Section 11 imposes strict liability on issuers for material misstatements or omission in a registration statement and provides for damages (not to exceed in amount the price at which the securities were originally offered).\textsuperscript{93} Directors, underwriters and non-issuers charged under Section 11 have a “due diligence defense.”\textsuperscript{94}

Section 12(a)(2) overlaps with Section 11 in that it establishes a private right of action for rescission against anyone who “offers or sells a security” using a materially false or misleading prospectus (or oral communication).\textsuperscript{95} “Like Section 11, Section 12(a)(2) waters down the traditional elements of common law fraud.”\textsuperscript{96} Thus, under Section 12(a)(2), the plaintiff does not have to prove scienter, causation, or reliance. Under 12(a)(2) defendants also have a defense of reasonable care, or may avoid liability based on negative causation.\textsuperscript{97}

Finally, Section 10(b) of the Securities Exchange Act,\textsuperscript{98} and Rule 10b-5\textsuperscript{99} thereunder, are the basis for a private right of action for securities fraud. Under 10b-5, a plaintiff must establish scienter and causation, and is subject to the heightened pleading standards of the Private Securities Litigation Reform Act of 1995, which, \textit{inter alia}, require plaintiffs to plead particularized facts that establish a “strong inference” of scienter in order to overcome a motion to dismiss.\textsuperscript{100}

\textsuperscript{92} Consolidated Amended Class Action Complaint \textit{supra} note 1.
\textsuperscript{93} Securities Act of 1933, ch. 38, 48 Stat. 74. § 11 (codified as amended at 15 U.S.C. § 77(k) (year)). It is noteworthy that Section 44 of the German Securities Exchange Law (BoersG) which establishes so-called “prospectus liability” under the German securities laws uses very similar language.
\textsuperscript{96} Nagy, et al., \textit{supra} note 34, at 308 (citing Gustafson v. Alloyd Corporation, 513 U.S. 561 (1995)).
\textsuperscript{99} 17 C.F.R. 240.10b-5 (2014).
1. **VoiceStream Allegations**

Deutsche Telekom filed a registration statement with the SEC on May 22, 2000, as part of a global offering of 200 million shares, 45 million of which were to be sold as American Depository Receipts (ADSs).¹⁰¹

Plaintiffs alleged that by June 16, 2000, the effective date of the Registration Statement, Deutsche Telekom “had already completed advanced merger negotiations with VoiceStream,”¹⁰² agreeing to offer $200 dollars per share for VoiceStream’s stock and planning to fund the transaction primarily by issuing millions of shares of Deutsche Telekom stock.¹⁰³ The Prospectus contained a general reference to Deutsche Telekom’s strategy of growth by acquisition, as follows:

Deutsche Telekom and its affiliates are actively considering and discussing a number of potential acquisition transactions. These may be made using newly issued shares or in the aggregate be material to Deutsche Telekom or its affiliates, cash or a combination of cash and shares, and may individually or in the aggregate be material to Deutsche Telekom or its affiliates. Discussions with third parties may be commenced or discontinued at any time.¹⁰⁴

Plaintiffs alleged that this statement was materially false and misleading, and omitted to disclose material facts, because it failed to disclose the advanced negotiations with VoiceStream. The plaintiffs set forth the timeline of the merger negotiations as follows.

The plaintiffs alleged that Deutsche Telekom contacted John W. Stanton, the chairman and chief executive officer of VoiceStream as of March 7, 2000 to inform him that Deutsche Telekom was interested in acquiring VoiceStream and to arrange a meeting.¹⁰⁵ They further alleged that Stanton and Ron Sommer met on March 13, 2000 in New York to discuss Deutsche Telekom’s interest in acquiring VoiceStream.¹⁰⁶ Later that month, on March 29, 2000, a second meeting occurred at which Deutsche Telekom outlined their proposal for a share exchange. Stanton allegedly rejected the proposal, because *inter alia* Deutsche Telekom’s shares were not publicly traded.

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¹⁰¹ *In re* Deutsche Telekom AG Sec. Litig., No. 00 CIV 9475 SHS, 2002 WL 244597, at *2 (S.D.N.Y. Feb. 20, 2002)
¹⁰² Consolidated Amended Class Action Complaint *supra* note 1, at ¶ 33.
¹⁰³ *Id.* at ¶ 29.
¹⁰⁵ Consolidated Amended Class Action Complaint *supra* note 1, at ¶ 33a.
¹⁰⁶ *Id.*
In the meantime, Deutsche Telekom proceeded with its Global Offering and the preparation for its U.S. Registration Statement and public listing of the ADSs on the New York Stock Exchange (NYSE). On May 22, 2000, Deutsche Telekom filed its Registration Statement with the S.E.C. Then on June 1, 2000, Deutsche Telekom allegedly contacted VoiceStream again to ask whether VoiceStream would consider an equity investment or a written proposal “if it was submitted no later than early June.”\textsuperscript{107} VoiceStream responded by saying it would consider a written proposal, and Sommer and Stanton further discussed the acquisition by telephone.\textsuperscript{108}

Five days later, on June 6, 2000, Deutsche Telekom submitted its written proposal to acquire all of VoiceStream’s shares at a price within the range of $170-$190 per share. On June 12, 2000, Stanton replied in writing that VoiceStream would not consider an offer for less than $200 per share, part of which consideration would have to be in cash.\textsuperscript{109} VoiceStream also offered to permit Deutsche Telekom to begin limited due diligence if Deutsche Telekom believed it could raise its offer to $200 per share. On June 15, 2000, Stanton and Sommer discussed the terms of the deal again, according to the plaintiffs. Deutsche Telekom allegedly agreed to offer at least $200 per share for VoiceStream stock, and VoiceStream began providing Deutsche Telekom with due diligence materials.\textsuperscript{110}

On June 16, 2000, DT’s Registration Statement became effective. It included no mention of VoiceStream. The final U.S. Prospectus, which was dated June 17, 2000, again included no mention of VoiceStream.\textsuperscript{111}

The share offering was a firm commitment underwriting by which the underwriters agreed to buy 200 million ordinary shares of Deutsche Telekom from KfW as part of a global offering in 15 European countries and the United States.\textsuperscript{112} KfW paid underwriting commissions and fees in the amount of $1.033 per ADS. The underwriters also had the option and did purchase another 30 million shares from KfW to cover over allotments. The offering price by the underwriters to the public was $64.38 dollars per share. On June 16, 2000, the

\textsuperscript{107} Id. at ¶ 33c
\textsuperscript{108} Id.
\textsuperscript{109} Id. at ¶ 33d
\textsuperscript{110} Id.
\textsuperscript{111} See Deutsche Telekom, Supplement No. 3 to the Sales Prospectus dated May 26, 2000, supra note 104.
\textsuperscript{112} Id. at 5.
effective date of the Registration Statement, the closing price of the ADSs on the NYSE was $65 per share.\footnote{113}

On July 11, 2000, Bloomberg news published a report that Deutsche Telekom planned to pay at least $30 billion to acquire VoiceStream. The share price of Deutsche Telekom dropped on this news. Additional details about the Deutsche Telekom/VoiceStream merger were disclosed in the news from July 12 through July 23, 2000.

Finally, on July 24, 2000, Deutsche Telekom publically announced its planned $50.7 billion dollar acquisition of VoiceStream. The disclosure reported that VoiceStream shareholders would receive 3.2 shares of Deutsche Telekom and $30 dollars cash for each share as consideration for the merger. “Continuing the downward trend of the previous days in reaction to the news of the merger,” the Complaint states, “shares of the Company declined almost seven dollars per share on July 24 to approximately $45 dollars per share.”\footnote{114}

2. Real-Estate Allegations

The U.S. plaintiffs also challenged Deutsche Telekom’s Registration statement and Prospectus on grounds that it contained material misstatements and omissions with respect to Deutsche Telekom’s real estate portfolio and related assets.\footnote{115} The Prospectus reported that the “book value” and “net carrying amount” of Deutsche Telekom’s real estate assets were 17.2 Billion Euros as of March 31, 2000, the first quarter of 2000.\footnote{116} According to the Prospectus Deutsche Telekom’s real estate assets thus contributed to a total reported 37.709 billion Euros in shareholders equity as of March 31, 2000, with total assets for the company reported at 101.477 billion Euros as of March 31, 2000. The Prospectus also disclosed that Deutsche Telekom had established certain reserves or recognized charges for each of the past three years to cover “potential losses associated with the disposition of properties no longer used in this business.”\footnote{117}

But in February 21, 2001, only 7 months after the July 19 offering, Deutsche Telekom announced that it was taking a special writedown of 2 billion Euros (approx. $1.8 billion) for the land values in its real estate portfolio. Deutsche Telekom’s share price dropped on this announcement. Moreover, on

\footnote{113} Consolidated Amended Class Action Complaint supra note 1, at ¶ 26; Compare Tilp, who says Boersengang was on 6/19 “Umplazierung/Erstnotiz”
\footnote{114} Consolidated Amended Class Action Complaint supra note 1, at ¶ 32.
\footnote{115} Id. at ¶ 34.
\footnote{116} Id. at ¶¶ 35-36.
\footnote{117} Id. at ¶ 34; Deutsche Telekom, Supplement No. 3 to the Sales Prospectus dated May 26, 2000, supra note 104, at 5.
March 19, 2001, Deutsche Telekom’s CFO Karl-Gerhard Eich stated that “I can’t say at this point whether [the 2 billion Euro writedown] will be enough.”

The plaintiffs alleged that the company’s real estate portfolio had been substantially overvalued at the time of the Offering. Deutsche Telekom had valued its real estate assets by grouping them into types of properties and then estimating their current market value. The Company claimed that this so-called “cluster method” of valuing its real estate assets represented the best approximation of their value, because the properties were too numerous to value individually, and historical records for the properties were unavailable.

The February 2001 writedown followed longstanding questions about the cluster method. Friedrich Goerts, the former chief of Deutsche Telekom’s real estate unit, had blown the whistle on what he perceived to be a “vast overvaluation” of Deutsche Telekom’s real estate assets as early as 1995. Goerts and others claimed that the true market value (or fair value) of Deutsche Telekom’s real estate assets were much lower. Whenever the company sold property it would have to take a writedown for realized losses. But the company’s December 1998 and 1999 financial statements, as well as the March 31, 2000 summary financial information for the quarter – all of which were included in the U.S. Registration Statement and Prospectus – reported Deutsche Telekom’s real estate assets on the basis of the cluster method. In September 1998, Goerts finally wrote a letter to senior executives stating that he could no longer participate in what he considered to be balance sheet fraud. Goerts was subsequently fired. Statements by Goerts were published in a March 19, 2001 Wall Street Journal article covering the writedown and in an article accusing Deutsche Post of balance sheet fraud in the German news magazine Der Spiegel, dated February 12, 2001.

Plaintiffs charged that the U.S. registration statement and prospectus, were false and misleading, because they misreported the fair value of the real estate holdings, but also because they failed to reconcile those numbers with U.S. GAAP as required by SEC rules.

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118 Consolidated Amended Class Action Complaint supra note 1, at ¶ 43 (citing BLOOMBERG NEWS SERVICE, March 17, 2001).
119 Consolidated Amended Class Action Complaint supra note 1, at ¶ 44a.
121 The prospectus states: “Certain property, plant and equipment on hand as of December 31, 1992, have been valued at fair values, rather than at historical cost less depreciation, which is required by US GAAP. The Company has not been able to quantify the effect of the difference in accounting treatment because, prior to January 1, 1993, the predecessor company did not maintain sufficiently detailed historical cost records. The fair market values recorded in the opening
Because Deutsche Telekom and its CEO Ron Sommer had knowledge of the alleged overvaluation, plaintiffs charged them with securities fraud under Rule 10b-5.

C. The German Complaint

The complaints filed against Deutsche Telekom in Frankfurt, Germany, contained many additional allegations and claims against the company, but included the two central claims that Deutsche Telekom was liable for damages or rescission for its failure to disclose the advanced merger negotiations with Voicestream, and for falsely valuing its real estate assets in its German prospectus for the May 2000 offering. The prospectus liability claims were actionable under Section 44 and 45 of the German Securities Exchange Act (BoersenGesetz). The real estate allegations also sounded in fraud, with plaintiffs invoking certain tort and criminal law claims and remedies.

Section 44 of the BoersenG provides investors who have purchased securities based on a false or incomplete prospectus the right to sue issuers and other “responsible parties” for rescission or damages not to exceed the purchase price of the securities. Section 45(1) provides for an affirmative defense for defendants who can show that they had no knowledge of the mistake or omission and their lack of knowledge did not result from gross negligence.

The German substantive law thus differed in several respects from the applicable U.S. substantive law in this case. While the 10b-5 securities fraud claim in the U.S. action required a showing of knowledge or intent, an issuer’s liability under Section 11 for material mistakes or omissions in a registration statement admits of no defense and does not require a showing of negligence.

This difference in substantive law might alone have accounted for the different outcomes in the U.S. and in Germany, but the German court never got to rule on the affirmative defense. Instead it decided the case by finding that the prospectus was not materially false or misleading, either with regard to the VoiceStream, or the Real Estate allegations. Both the U.S. and German outcomes therefore turned on whether the prospectuses were materially false or misleading.

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122 Section 823 (2) BGB for the civil law claim for damages; Section 264 StGB (German Criminal Code) for criminal fraud as one possible “protective law” for liability under Section 823 (2) BGB. See, Patrick S. Ryan, Understanding Director and Officer Liability in Germany for Dissemination of False Information, 4 German L. J. 439, 473 (2003).
III. Development of the Litigation

A. Development of the Litigation in the Southern District of New York

In the S.D.N.Y., the case proceeded fairly rapidly. The class action complaint in the original case was filed on December 13, 2000\textsuperscript{123} – before Deutsche Telekom’s February 2001 writedown of $2 billion in real estate assets. Judge Stein set the initial case management conference for January 26, 2001. On March 22, 2001, the cases were consolidated before Judge Stein. On April 11, 2001, the well-known plaintiff-side firms, Bernstein Liebhard & Lifshitz and Milberg Weiss were appointed as counsel to co-lead plaintiffs. The Judge issued a scheduling order on July 16, 2001, requiring the first set of document requests to be served by July 27, 2001 and production of documents to begin by September 29, 2001. A year after the announcement of the VoiceStream merger, the cases had thus been consolidated and gone to discovery.\textsuperscript{124}

KfW was dismissed from the case on February 20, 2002.\textsuperscript{125} Judge Stein granted class certification shortly thereafter, on October 29, 2002.\textsuperscript{126} Discovery lasted just over two years, with defendants repeatedly seeking extensions of discovery, especially with respect to the real estate issues.\textsuperscript{127} Plaintiffs took over 30 depositions and reviewed over 1.9 million documents.\textsuperscript{128}

One week before the October 13, 2003 final discovery deadline, the investment banks and underwriters moved for summary judgment. The memoranda on the motions for summary judgment appear to have never been filed. The parties then took more than a year to negotiate a settlement and applied for judicial approval of a settlement on March 16, 2005. The settlement required Deutsche Telekom to pay $120 million dollars to the plaintiffs’ class fund. The

\textsuperscript{123} Class Action Complaint, supra note 3.
\textsuperscript{124} See Docket, In re Deutsche Telekom AG Sec. Litig., No 00-CV-9475 (SHS), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005)
\textsuperscript{125} Opinion and Order #86601, In re Deutsche Telekom AG Sec. Litig., No 00-CV-9475 (SHS), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005).
\textsuperscript{126} Opinion and Order #87638, In re Deutsche Telekom AG Sec. Litig., No 00-CV-9475 (SHS), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005).
\textsuperscript{127} See generally Docket, In re Deutsche Telekom AG Sec. Litig., No 00-CV-9475 (SHS), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005).
\textsuperscript{128} Stipulation and Agreement of Settlement, at 5, In re Deutsche Telekom AG Sec. Litig., No 00-CV-9475 (SHS), 2005 U.S. Dist. LEXIS 45798 (S.D.N.Y. June 9, 2005).
other defendants paid nothing (except perhaps their legal fees). In the settlement, the defendants admitted to no wrongdoing.129

B. Development of the German Litigation

In the Deutsche Telekom litigation, thousands of plaintiffs swamped the judiciary at the district court in Frankfurt (Frankfurter Landesgericht) to whom the cases were assigned. The plaintiffs in the German litigation were mostly retail investors who had purchased Deutsche Telekom shares subject to the German offering prospectus. Total claims were around $100 million Euros, and the average claim was valued at around 5,900 Euros.130 Because there were three Deutsche Telekom share issuances in Germany, but only one in the U.S., the German litigation against Deutsche Telekom also involved claims relating to the real estate valuations of the earlier German prospectuses going back to 1996.131 All told, 17,000 shareholders who purchased in these three issuances brought claims before the German regional court in Frankfurt by the end of 2003. The large volume of cases overwhelmed the Frankfurt Court. Because there was no class action mechanism, each case would have to be treated separately and tried separately.

The first complaints were filed in late 2001. But the Court in Frankfurt did not hold its first hearing in the matter until November 11, 2004. The hearing took place only after the German constitutional court (BGH) had weighed in on the lengthy delay in the process. To handle the flood of cases, the Frankfurt regional court selected 10 pilot cases that raised the most important issues for expedited proceeding.

Note that, by this time, the U.S. parties had already long concluded discovery and were presumably negotiating a settlement. In Germany, by contrast, the plaintiffs had, at this point, received no information from the defendants, and the German court’s interrogation of its first witness would have to wait another three and a half years. To overcome their lack of company internal information, attorneys for the German plaintiffs sought to benefit from the parallel proceedings in the U.S. They knew that the case there had progressed rapidly and was going through full discovery. In January of 2003, they thus filed a petition pursuant to 28 U.S.C. § 1782 to obtain discovery produced in the U.S. litigation.

130 Tilp & Roth, supra note 6, at 132.
131 German litigants referred to these three issuances DT1 (1996), DT2 (1998), and DT3 (in June 2000).
C. The Attempt to Obtain Evidence From Overseas

28 U.S.C. § 1782 provides that a district court may direct that “a person [who] resides or is found in the district “ give his testimony or statement or … produce a document or other thing for use in a foreign or international tribunal…” The statute “affords access to discovery of evidence in the United States for use in foreign proceedings.” The request may come from “any interested party.” But while the statute “authorizes” a judge to grant such discovery, it also gives judges broad discretion to, inter alia, consider the sovereignty interests of other countries in their own administration of justice.133

The use of 28 U.S.C. § 1782 is a topic that is of great interest to cross-border litigation in that it affords those who litigate in international tribunals or foreign countries a remarkable opportunity for obtaining information about a party-opponent that they would ordinarily be unable to obtain under non-U.S. procedural rules. There is a small, but longstanding practice, by European litigants to attempt to obtain discovery against party opponents in the U.S., which has had some commentators calling §1782 the U.S. statute with the most influence on international proceedings.

In their §1782 petition to Judge Stein in the S.D.N.Y., the German plaintiffs contended that the U.S. securities class action litigation then pending before the Court had “substantially identical” allegations to the allegations in the German actions.134 They sought to obtain all documents that had by that time been produced by Deutsche Telekom’s U.S. counsel Cravath to the lead plaintiffs’ counsel, Milberg Weiss and Bernstein, Liebhard. Milberg, Weiss, and Bernstein, Liebhard took no position as to the production of documents, but Deutsche Telekom objected, arguing they had conducted discovery in the case in reliance on a discovery confidentiality order. More importantly, Deutsche Telekom cited strong objections by the German government and judiciary.

In opposition to the petition of the German investors for access to the U.S. discovery, Cravath filed letters from the Bonn prosecutor and the German Ministry of Justice with the Court opposing the production on the grounds that it would compromise an ongoing criminal investigation into Deutsche Telekom’s real estate valuations by the German prosecutor’s office in Bonn.135 The German

132 In re Edelman, 295 F.3d 171, 175 (2d Cir 2002).
authorities, and experts for Cravath, pointed out that German law prohibited sharing a prosecutor’s documents and files in an ongoing investigation, because it would jeopardize the investigation and violate the privacy rights of the accused.\textsuperscript{136} The German government also noted that the German plaintiffs had already requested the documents from the Bonn prosecutor, who had refused to grant such access for just this reason. Allowing the German plaintiffs to obtain these documents from the U.S. would allow them to perform an end-run around the German judicial authorities thus implicating German sovereignty interests. According to the German Ministry for Justice, the prosecutors’ office would reconsider the German plaintiffs’ request for access to the documents at a later time.\textsuperscript{137}

As already mentioned above, the state prosecutor in Bonn had initiated a criminal investigation into Deutsche Telekom’s valuation of its real estate transactions in connection with its securities issuances. The investigations were terminated in the Spring of 2005, with Deutsche Telekom entering a consent decree that required it to contribute 5 million Euros to charitable organizations.\textsuperscript{138}

Following the conclusion of the criminal investigation, in May of 2005, the regional court in Bonn (LG) finally did afford plaintiffs limited access to the Bonn prosecutor’s files. Plaintiffs recounted that they received over 50 boxes of documents and files from the Bonn prosecutor’s investigations into Deutsche Telekom’s real estate valuations. This was by far the largest trove of documents obtained by the German plaintiffs in support of their case.\textsuperscript{139}

But it is also important to note that they would never have come into possession of these documents, if there had been no criminal investigation of Deutsche Telekom’s real estate valuations. By contrast, the German plaintiffs were unable to obtain the vast majority of documents from Deutsche Telekom regarding the Voice Stream allegations, because these allegations were not the subject of a German criminal investigation.\textsuperscript{140}

\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Tilp, \textit{supra note} 13 at 353.
\textsuperscript{139} Conversation with Tilp, July 14, 2015.
\textsuperscript{140} Id.
D. The “Deutsche Telekom” Law

The Deutsche Telekom litigation is frequently cited in the recent German literature as a prime example for the kind of “mass damages” litigation that call for an aggregate litigation mechanism. As already noted, over 17,000 claimants swamped the judiciary at the district court in Frankfurt. The judicial system simply could not process such a large number of claims by adhering to civil procedure rules that were based on the German (and Civil Law) model of a dispute between two parties, or a limited number of parties. And the cases languished for three years without any hearings. Commentators spoke of a “collapse” of the judicial system.

The German parliament responded by passing the “Capital Markets Model Procedure Act” (Kapitalmusterverfahrensgesetz, or “KapMug”) to render the resolution of damages and rescission claims arising out of securities disclosure violations more efficient. As a result of this close connection between the passage of KapMug and the Deutsche Telekom litigation, KapMug is also frequently referred to as the “Deutsche Telekom Law.”

KapMug, which became effective in November of 2005, provided for an experimental civil procedure limited to claims of securities disclosure violations. In other words, it does not apply trans-substantively to consumer protection or antitrust claims, but was intended as a pilot project for the adjudication of mass claims that might be expanded to other substantive areas of the law in the future. The law had a sunset provision that would expire in 2012 unless renewed by the German Parliament, which it was with certain amendments.

The KapMug procedure does not create a U.S. type class action where claims are bundled in a pre-trial phase and then prosecuted (or settled) by a representative for the class. Rather, it keeps all claims separate, but tries common questions of law and fact in a “model proceeding” (Musterverfahren), which is

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142 Tilp & Roth, supra note 6, at 1.
143 Verse, supra note 30, at 451.
144 KOELNER KOMMENTAR ZUM KAPMUG, supra note 8.
145 Id.
146 KapMug Sect. 1.
147 This generated criticism in the Bundesrat that investors were being afforded special procedural advantages.
binding as to the issues presented and resolved in that “model proceeding.” There is thus no bundling of claims, but a bundling of issues common to a particular controversy (Lebenssachverhalt).

The KapMug proceeding has three phases.

First, Plaintiffs or defendants in an existing action may file applications for the initiation of a special model proceeding (Musterverfahrensantrag/Model Proceeding Application) with the trial court.\textsuperscript{149} If at least 10 such applications are made (or 10 or more joint parties make such application), then the trial court initiates a preparatory proceeding (Vorlageverfahren/Preparatory Proceeding), in which common questions of law and fact are identified and then compiled into a formal brief of questions and issues to be presented (Vorlagebeschluß/Brief of Questions Presented).\textsuperscript{150} This special brief is then certified to a higher court (Oberlandesgericht) for decision.

The second phase consists of the actual model proceeding (Musterverfahren/Model Proceeding) before the higher court.\textsuperscript{151} In the Model Proceeding, the higher court essentially “tries” the issues or questions presented. Recall here that in civil law countries courts of appeal are not limited to the record established in a trial court, but may take evidence under proper circumstances and need not defer to the factual findings of the court below. The higher court then issues an opinion in the form of a set of “determinations” (Feststellungen) regarding the questions presented (Musterentscheid/Opinion Regarding Questions Presented).\textsuperscript{152} During the time the model proceeding takes place, all related cases in the trial court are stayed.\textsuperscript{153}

In the third phase, after the higher court has issued and published its Opinion Regarding Questions Presented, the individual actions that were stayed during the model proceeding are then taken up again separately by the trial court and decided separately, based, in relevant part, on the determinations of the higher court in the model proceeding.\textsuperscript{154} In other words, the higher court’s Opinion Regarding Questions Presented has issue preclusive effect.

\textsuperscript{149} KapMug § 2 (1); Koelnner Kommentar zum KapMug, supra note 8, at 36.
\textsuperscript{150} KapMug § 6; Koelnner Kommentar zum KapMug, supra note 8, at 36-37.
\textsuperscript{151} KapMug § 6; Koelnner Kommentar zum KapMug, supra note 8, at 37.
\textsuperscript{152} KapMug § 16; Koelnner Kommentar zum KapMug, supra note 8, at 496ff.
\textsuperscript{153} KapMug § 5 (1); Koelnner Kommentar zum KapMug, supra note 8, at 36; 245ff.
\textsuperscript{154} KapMug § 22; Koelnner Kommentar zum KapMug, supra note 8, at 38.
In its application for a model proceeding, a party must establish that the issues proposed for resolution in the model proceeding represent common issues of law or fact in parallel actions currently pending. Once the trial court receives a Model Proceeding Application from a party to an action, it must publish the application on its docket (Klageregister), upon which the individual action is automatically stayed.\textsuperscript{155} The stay serves KapMug’s goal of increasing the efficiency of civil adjudication and conserving judicial resources, in that it avoids duplication of effort in evidence acquisition, fact finding, and the determination of law in parallel actions.\textsuperscript{156} It falls to the trial court to determine whether the ten Model Proceeding Applications required to initiate a model proceeding, in fact, raise common issues of fact or law, and which questions or issues of law or fact are to be certified to the superior court. The focus in this inquiry is whether the applications arise out of the same set of facts and circumstances \textit{(Lebenssachverhalt)}, roughly like the joinder and preclusion inquiries operate in federal court.\textsuperscript{157}

The goal of this new aggregate procedure was to increase the efficiency with which mass claims would be disposed of. In particular, the resolution of common questions in a Model Proceeding would consolidate evidence acquisition and fact-finding in hundreds or thousands of individual cases, e.g. regarding the accuracy of Deutsche Telekom’s prospectus, in a single proceeding.\textsuperscript{158} But in so doing, KapMug also clashes with civil law principles of due process.

One such principle is the principle of Party Presentation. The principle of “Party Presentation,” also translated as “the Principle of Adversary Hearing,”\textsuperscript{159} requires that litigating parties have the right and the duty to provide the necessary information and materials on which the court must base its decision. Huang describes the principle as follows:

\begin{quote}
The right to provide materials means not only that the party has a right to be heard, but also that the party is able to confine the scope of informational sources available for the court to base its decision on. The duty to advance materials dictates that the party’s failure to proffer evidence necessary for his case will result in defeat. This principle stands in contrast with the principle of investigation \textit{ex officio}, which means that it is for the court to investigate necessary facts and collect relevant evidence to resolve the dispute. Except for the cases in which public interests are involved, such as family disputes or child
\end{quote}

\textsuperscript{155} KapMug § 5; Koelner Kommentar zum KapMug, \textit{supra} note 8, at 245ff.
\textsuperscript{156} KapMug, § 2 (1); Fabian Reuschle, \textit{Das Kapitalanleger-Musterverfahrensgesetz – Eine erste Bestandsaufnahme aus Sicht der Praxis in CASPER}, \textit{supra} note 11, at 278,
\textsuperscript{157} \textit{Id.}, at 279.
\textsuperscript{158} \textit{Id.} at 278.
\textsuperscript{159} Huang, \textsc{Introducing Discovery Into Civil Law} 21 (2007).
adoption, almost all civil disputes are adjudicated under the principle of party presentation.\textsuperscript{160}

The principle of party presentation challenges the conventional interpretation of civil law adjudication as inquisitorial, and common law adjudication as adversarial. In civil law adjudication the parties themselves are responsible for collecting and presenting relevant evidence to the court (\textit{Beibringungmaxime}). A judge must respect the autonomy of the parties to determine what evidence is submitted for consideration. Civil law judges are thus very limited in what they are permitted to investigate on their own initiative. Whereas judges in Germany do have the authority to seek additional information from the parties, this authority is quite limited, and very rarely exercised.\textsuperscript{161} It follows that the judge may not compel a party to divulge documents, information or testimony that the party does not offer the court voluntarily. Each party is responsible for preparing its own case and, generally speaking, cannot be compelled to provide information to support the other party’s claims or defenses.

In this sense, civil law adjudication may be deemed more adversarial than U.S. litigation under the modern discovery rules. The modern discovery rules reduce information asymmetries between the parties and require the parties to exchange information relevant to all claims and defenses. But as Huang notes, the principle of party presentation “makes it perfectly appropriate and legitimate for a party to hold back adverse material that has decisive bearing on the outcome of the litigation, and to obtain victory simply because his opponent has no access to that material.”\textsuperscript{162}

The principle that a party should have control over the presentation of its own case has long been deemed to preclude full-fledged representative litigation, as it is practiced in the U.S. class action. The adjudication of common issues of law and fact in a representative proceeding that is preclusive for all class-members, including those who never agreed to join the proceedings, is anathema to the German right to control one’s own case presentation. The KapMug thus eshews full-fledged representative litigation and keeps individual cases separate, even as it resolves shared questions of law and fact in the Model Proceeding – but it does so at a cost to efficiency. Moreover, the Model Proceeding does not bind non-litigants, thus distinguishing itself from the U.S. opt-out model. Nonetheless, KapMug forces all litigants who have filed related claims into the Model Proceeding by binding them by the determinations made during the Model Proceeding.

\textsuperscript{160} Huang, supra note 159, at 22.

\textsuperscript{161} Murray & Stürner, supra note 17, at 263; Huang, supra note 159, at 22. The judges in the Deutsche Telekom litigation did not exercise this authority. Conversation with Andreas Tilp (Oct. 17, 2014).

\textsuperscript{162} Huang, supra note 159, at 27.
Proceeding. In this way, the preclusive effect of the Model Proceeding still contravenes the principle of party presentation. The Courts have responded by giving the interveners a right to present evidence as well, thus mitigating the concern that they will be bound by proceedings in which they had no voice.\textsuperscript{163}

The implications of the Principle of Party Presentation go beyond the class action setting. As suggested by Huang, U.S. style litigation discovery in and of itself conflicts with the autonomy of a party, under German law, to determine what gets presented to the judge, because U.S. discovery forces a party to produce information to support her opponent’s case.\textsuperscript{164} What is hard for the U.S. attorney to grasp is that parties in Germany (and civil law jurisdictions generally) are given very limited tools for fact investigation. For the most party, a party cannot be forced to produce evidence to support an opponent’s case. Indeed, in the 19\textsuperscript{th} Century, U.S. common law adhered to the same principle and only courts of equity could obtain information from a party opponent, which required a bill in equity.\textsuperscript{165} This changed with the “discovery revolution” initiated by the passage of the Federal Rules of Civil Procedure in 1937 and its subsequent development up until the 1970s. Only in 2001 was the German Civil Code changed to include “relevance” as a basis for obtaining evidence from another party, whereby the party seeking the evidence must make an application to the judge, identifying the specific document or thing that it seeks to obtain, show that it exist and that it is relevant evidence in the case.\textsuperscript{166} Note that the code of procedure always refers to documents in the singular, i.e. “the document.” Blanket requests for “All documents relating to . . . .” are not contemplated. Both the scope and the tools of fact investigation in German civil court are therefore extremely limited.

E. The Deutsche Telekom KapMug Proceeding

In December of 2005, shortly after the effective date of KapMug, plaintiffs in one of the pilot cases filed their application for a model proceeding. Others soon followed. The lower Frankfurt Regional Court drafted a 193-page Brief of Questions Presented, including 33 questions or issues for resolution by

\textsuperscript{163} Tilp, \textit{supra} note 13, at 355.

\textsuperscript{164} See Gorga & Halberstam, \textit{supra note} 10, at 1390 (discussing principle of \textit{Nemo Tenetur Edere Contra Se}, which also informs the principle of party presentation).


\textsuperscript{166}MURRAY & STÜRNER, \textit{supra} note 17, at 277 (“[Prior to the recent 2001 reforms of the German code of civil procedure,] there was no right to production if the request was based solely on the document’s relevance to a decisive issue in the case. . . . If a party had a substantive right to possession of a document in the hands of a third party, that party could request that the proceeding be stayed to permit him to exercise his right to possession . . . .”).
the Higher Regional Court.\footnote{167} The 193-page Brief, which was made public, included references to documents, affidavits and witnesses that each side would rely on to make its case. This Brief of Questions Presented was worked out in a preparatory proceeding based on briefs by the various parties and negotiations as to what could be stipulated. It also referenced expert opinions submitted by the parties regarding the real estate valuations. The original order to refer the Brief to the Higher Regional Court was issued on July 11, 2006.

On July 25, 2006, the Higher Regional Court chose the “model claimant” (or perhaps lead plaintiff) for the claims arising out of the June 2000 offering. But evidentiary hearings would not begin until April 17, 2008. The delay was in part due to amendments to the Brief. In the meantime, the lower court encountered difficulties adjudicating which of the thousands of cases would be stayed pending the outcome of the model proceedings – a laborious and time-consuming process. This process took nearly one year, because the lower Court had to make a separate determination for each case.\footnote{168} Those litigants would enjoy the status of interveners in the model proceeding. Due process concerns about the “intervenors” (beigeladene) right to a fair hearing resulted in an order by the Higher Regional Court to grant parties the right to actively participate in the model proceeding and give all parties’ attorneys access to all the pleadings and briefs on a password protected website. This is of interest, because it introduced a level of publicity into the proceedings that is ordinarily not contemplated by German civil procedure.\footnote{169}

Hearings before the Higher Regional Court began on April 4, 2008. Thirteen full days of hearings were held during April and May during which the court heard testimony from 16 witnesses, mostly executives of the defendant Deutsche Telekom. An important victory for the plaintiffs was a decision by the Court to order defendants to produce key depositions in their possession that were taken in the U.S. litigation. These depositions relied on to some extent as corroborating evidence by the Court. It is worth noting that Plaintiffs were able to obtain the depositions by judicial order only because they knew that these documents were in the possession of the defendant Deutsche Telekom. The

\footnote{167} Tilp & Roth, supra note 6, at 136.
\footnote{169} Unlike court filings in the U.S., briefs to the court are not accessible to the public in Germany, but the Court administration does have discretion to provide access to such material upon special request to legal scholars for research purposes.
depositions became part of the record and were referred to by the Court in its decision.

It took the German Court another four years to issue its main decision in the model proceeding. The opinion was published on May 16, 2012 and is 184 pages long. We discuss the opinion in the Part V. But it is important to note the unusual length and factual detail of the opinion, which stands out among the typically concise summary opinions of not more than few pages that German courts usually issue.

After the Regional Court in Frankfurt issued its opinion on the model proceedings, the plaintiffs appealed the decision to the German Federal Court in Karlsruhe (Bundesgerichtshof). The appeal has meant that the individual cases are still suspended. Plaintiffs declined to appeal the Regional Court’s decision on the VoiceStream allegations, because they felt they had insufficient evidence to make their appeal. They did, however, appeal the Regional Court’s decision that Deutsche Telekom’s offering prospectus properly disclosed the value of its real estate assets.

In addition, the plaintiffs appealed a third issue, which was not accorded as much attention in the KapMug proceedings or the U.S. litigation, that is, whether Deutsche Telekom had properly accounted for the sale of its holdings in the U.S. telecommunications company Sprint to one of its affiliates. Deutsche Telekom had booked the transaction as a sale, but the German plaintiffs had claimed that the transaction was merely a transfer within Deutsche Telekom’s group of affiliated businesses. It took another two years, until December 11, 2014, for the federal panel to render its decision. After 13 years of litigation, the case is not over. The Federal Supreme Court affirmed the Higher Court’s ruling that Deutsche Telekom’s overvaluation of its real estate assets did not rise to the level of materiality. But it reversed as to the accounting for the Sprint shares and held that the June 2000 prospectus was materially false in this regard. This surprising decision means that the lower Courts must at the very least now contend with the issue of damages and causation, and potentially litigate the question of fault.

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170 The Bundesgerichtshof serves as the role of a federal Supreme Court for non-constitutional issues.
171 Conversation with Andreas Tilp, July 2015.
172 BGH XI ZB 12/12, Beschlüf vom 21 Okt. 2014.
173 Id.
174 Id.
175 Id.
176 Id.
177 Recall that liability for mistakes in an offering prospectus under Sections 44-45 of the Boersengesetz is not strict, as it is under Section 11 of the Securities Act, but affords defendants
IV. SUBSTANTIVE LAW APPLIED TO THE FACTS

The most viable claims against Deutsche Telekom, both in the U.S. and in Germany were that the issuer had sold securities subject to a materially false or misleading registration statement and prospectus.

As already noted, Section 11 subjects an issuer to strict liability for false or misleading statements in a prospectus – an extraordinary provision considering comparable common law tort standards. The main issue for claims under Section 11 is whether the registration statement is materially false or misleading. Similarly, the issue on which the German court decided the case, was whether the prospectus was “materially” false or misleading. In the following, I discuss how “materiality” is interpreted under U.S. and German law.

1. Materiality

In the U.S. “materiality” is defined in terms of what a “reasonable investor” would “with substantial likelihood” have considered important in making her investment decision. The standard is fact-intensive and depends upon the ability of plaintiffs to obtain discovery. The leading case on the definition of “materiality”, Basic v. Levinson, is on point. In Basic, the Supreme Court considered whether management’s statements concerning a merger were materially false or misleading. The management of Basic, Inc. had denied three times, over the course of two years, that it was in merger talks with Combustion Engineering. The last denial occurred within eight weeks of the company’s announcement that the Basic board had endorsed Combustion Engineering’s tender offer. In that context, the Supreme Court rejected the bright-line standard proposed by the defendants, that is, that a merger must be disclosed only after the merger partners have executed an agreement-in-principle. Instead, the Court held that a factfinder’s determination as to whether disclosure of a contingent future event, like a merger, was material depended on “whether the ‘reasonable investor’ would have considered the omitted information significant at the time.”

In this canonical decision, the Court thus took the TSC Industries, “total mix of information standard” applied it in the merger context and extended it to Rule 10b-5 securities fraud actions generally. In TSC Industries, the Supreme Court held that a fact is material if there is “a substantial likelihood that the . . .

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178 Id. at 226-29.
179 Id. at 231 (citing TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)).
fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.\textsuperscript{180} Determinations of materiality, according to the TSC Industries Court, required "delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him …."\textsuperscript{181} This makes the inquiry into materiality fact-intensive.

The German equivalent of material in Section 44 of the Boersengesetz, which applied at the time, is the term “wesentlich.” German materiality also focuses on the investor and asks whether the investor received an appropriate (zutreffendes) picture (Bild) of the investment, and whether the prospectus accurately and completely informed the investor about all circumstances that are or could be material for the investor’s decision.\textsuperscript{182} “A statement is considered material for liability purposes if it is more likely than not that a reasonable investor would take it into account when making his investment decision.”\textsuperscript{183} In contrast to the U.S. interpretation of materiality, however, German law appears to prefer bright line rules.

2. \textit{Materiality in the Merger Context}

In the merger context, where the fact-finder must determine whether a contingent future event should have been disclosed, the Basic Court gave additional guidance as to how the “reasonable investor” standard should be interpreted. The Court held that “under such circumstances, materiality ‘will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.’”\textsuperscript{184}

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\textsuperscript{181} TSC Industries, 426 U.S. at 450.
\textsuperscript{184} Basic, 485 U.S. at 238 (citing SEC v. Texas Gulf Sulphur Co., 401 F. 2d 833, 849 (2d Cir. 1968)).
The assessment of the magnitude of a transaction is relatively straightforward in the merger context. In the Deutsche Telekom case, the $50 billion acquisition of VoiceStream clearly represented a transaction of sufficient magnitude to warrant disclosure. Seperately, Deutsche Telekom also had a duty to disclose, because it was issuing securities subject to a new registration statement.

The key question for establishing the Section 11 liability based on the VoiceStream allegations, would thus have been whether the merger negotiations between VoiceStream and Deutsche Telekom were sufficiently advanced to warrant disclosure. In the words of the Court, how likely is it that the transaction will occur. This question, indeed, was also the focus of the German Court’s discussion as to whether Deutsche Telekom had properly disclosed its acquisition activity in the German Prospectus.

In Basic, the Court held that:

Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels. Without attempting to catalog all such possible factors, we note by way of example that board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material.

Based on the allegations in the amended complaint, the interest in the merger was present at the highest levels of management as of March 2000. Ron Sommer had several phone calls with Mark Stanton, the VoiceStream CEO. The management teams met to explore the numbers in the Spring. Deutsche Telekom made at least two offers to VoiceStream in June of 2000, one on June 6, the other on June 15. Negotiations about price led Deutsche Telekom to increase its offer to $200 per share – the final price that Deutsche Telekom paid for the VoiceStream shares. And towards the end of June, Deutsche Telekom began its due diligence. The commitment to the deal, the structure of the deal, and the price range would appear to have been available for disclosure when the June 2000 securities issuance was sold.

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185 See S.E.C., STAFF ACCOUNTING BULLETIN: NO. 99 – MATERIALITY (1999), available at http://www.sec.gov/interps/account/sab99.htm (recognizing that thresholds of 5 to 10 percent have been used by auditors as a “rule of thumb,” but cautioning the use of a simple quantitative approach). Here, the Voice Stream acquisition represented around 50% of Deutsche Telekom’s asset value.

186 Basic, 485 U.S. at 239.

187 Consolidated Amended Class Action Complaint supra note 1, at ¶ 33.
Because the U.S. case was settled, discovery proceeded subject to a confidentiality agreement, and motions for summary judgment were never filed, our ability to assess the merits of plaintiffs’ case is limited. We do not have access to documents, emails, or depositions in the U.S. case either directly or indirectly through exhibits or discussions of facts in briefs or opinions. What we do have is an unusually detailed and lengthy Opinion Regarding Questions Presented in the Model Proceeding by the German Oberlandesgericht in Frankfurt, which makes reference to key documents and depositions from the U.S. case. The new KapMug statute indeed appears to have contributed to this unusually detailed discussion of facts on the record by the German court. Here we can use this information to reconstruct the evidence and arguments that would have been developed by the Deutsche Telekom defendants in the U.S. case to support a finding that the merger was not yet sufficiently probable at the time that the U.S. Registration statement was filed, or at the time that the Final Prospectus was issued. The German Court heard 18 witnesses, including the senior management of Deutsche Telekom and VoiceStream, but also frequently referenced the U.S. deposition transcripts that the Court obtained by order from Deutsche Telekom.

Deutsche Telekom’s Chief Executive Officer Ron Sommer testified that all of the discussions with Voicestream, up until the middle of July 2000, were primarily aimed at developing and maintaining Deutsche Telekom’s contacts with VoiceStream in the context of an active and competitive market for firms in the telecommunications industry. 188 During the first six months of 2000, VoiceStream, QWest, and Sprint were all in sale of company (or substantial investment) negotiations with various suitors. 189 By June of 2000, Voicestream had received several offers from third parties. 190 As late as July 25 of 2000, VoiceStream was still engaged in parallel negotiations with the European Company Orange, which is corroborated by the joint proxy statement that Deutsche Telekom and VoiceStream filed with the SEC on July 25, 2000. 191 According to Sommer and others, Deutsche Telekom’s engagement with VoiceStream from March through mid-July – including Deutsche Telekom’s offers dated June 6, June 22, and July 5 of 2000 – was aimed at retaining a seat at the table in the negotiations between VoiceStream and other suitors. Deutsche Telekom board members testified that the decision to enter into an agreement with VoiceStream was made only on July 23, 2000, more than four weeks after Deutsche Telekom’s June 19 share issuance.

188 Musterverfahrensbeschluß, dated May 16, 2012, paragraph 5.
189 Id.
190 Id.
191 Id.
According to Sommer and several other witnesses, Deutsche Telekom was most interested in a deal with QWest up until mid-July, because a deal with Qwest would have best advanced Deutsche Telekom’s overall global expansion strategy. Deutsche Telekom’s global expansion strategy was to find an acquisition target that would further more than one of Deutsche Telekom’s five lines of business. Qwest satisfied these requirements, but VoiceStream – which operated as a wireless telecommunications provider – did not. An acquisition or investment with QWest was therefore the focus of Deutsche Telekom’s U.S. expansion activities until July of 2000. Only after it became evident that an agreement with Qwest would not be reached, during a July 12, 2000 meeting in Salt Lake City between Deutsche Telekom executives (including Sommer) and Qwest’s Chairman of the Board Chairman, did Deutsche Telekom prioritize merger negotiations with VoiceStream.192

According to the German Court, the testimony of Deutsche Telekom and VoiceStream executives was consistent on the timing of the negotiations that led to the July 23 agreement-in-principle. Testimony by Stanton, the Chairman of VoiceStream’s board, confirmed that VoiceStream regarded an offer of $200 per share as a precondition to any serious negotiations. Other suitors had already offered $200 a share. Deutsche Telekom’s June 22 offer of $200 a share was therefore merely a condition for participating in further negotiations and did not represent an agreement. As a result of its June 22 offer, Deutsche Telekom was permitted to send a team to Seattle (VoiceStream’s Headquarters) to conduct initial due diligence towards the end of June. Plaintiffs cited this as evidence that an agreement had already been reached between VoiceStream and Deutsche Telekom. But the German Court credited the testimony of Deutsche Telekom executives and others that such preliminary due diligence was common to establish a proper valuation of the target and that similar due diligence had been conducted with Qwest, Nextel and Cable Wireless, all of which were of interest to Deutsche Telekom as potential investments.

Under U.S. law, the question as to whether the advanced merger negotiations should have been disclosed would have gone to a jury. And we do not know what other facts a U.S. jury would have had available as a basis to conclude that the advanced merger negotiations were material and should have been disclosed.

Under German law, the applicable standard of materiality in the merger context is more rigid and favorable to the defendants. A merger need not be disclosed until a company’s board (the German supervisory board or Aufsichtsrat)

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192 Musterverfahrensbeschluß, ¶5. The German Court also references the May 9, 2003 deposition in the S.D.N.Y., pp. 79 & 94.
has adopted an agreement-in-principle.\textsuperscript{193} This contrasts with the U.S. probability/magnitude standard, which does not require that an agreement in principle has been executed.\textsuperscript{194} According to this standard, and based on the facts already discussed, the German court thus found that the June prospectus was not materially false or misleading, because the supervisory board only voted to go forward with the merger on July 23, 2000 and no disclosure was required before this date.

3. \textit{Materiality in the Real Estate Context}

Deutsche Telekom’s February 21, 2001 write down of $2 billion to account for a decline in the value of its real estate assets came after serious questions about how the company had valued its real estate assets.\textsuperscript{195} As already noted, a German prosecutor in Bonn initiated a fraud investigation into Deutsche Telekom’s real estate valuations in June of 2000. The investigation reflected profound concerns on the part of Deutsche Telekom’s own former head of the real estate division, who departed from Deutsche Telekom because he considered the valuations to be fraudulent.\textsuperscript{196}

In and of itself, however, the February 2001 write down did not concede that the valuations had been false or misleading, or that it was material to investors. The company did not restate its financials, nor did it file an 8k with the S.E.C. Instead it merely reduced the carrying value of its real estate assets on its balance sheet by reassessing their value in 2001 in light of purportedly changed circumstances in the real estate markets.

The German court ultimately held that the pre-2001 real estate valuations \textit{could not have been fraudulent, because they were not material}.\textsuperscript{197} In contrast, the U.S. settlement would suggest that defendants were concerned a jury could find that the pre-2001 valuations \textit{were fraudulent and therefore material}. The standard for materiality deployed by each court was thus also central to the resolution of the real estate allegations.

S.E.C. Staff Bulletin No. 99 sets forth the S.E.C.’s interpretation of materiality for accounting purposes.\textsuperscript{198} While it recognized that accountants make use of a rule of thumb that “misstatements or omissions of an item that falls under a 5\% threshold is not material in the absence of egregious circumstances”

\begin{itemize}
\item\textsuperscript{193} Musterverfahrensbeschluß.
\item\textsuperscript{194} Id.
\item\textsuperscript{195} Supra note __.
\item\textsuperscript{196} Supra note __.
\item\textsuperscript{197} Musterverfahrensbeschluß.
the staff rejects any purely quantitative measure of materiality. Here too the TSC Industries “reasonable investor standard” applies. In its Statement of Financial Accounting Concepts No. 2, the FASB stated the essence of the concept of materiality as follows:

The omission or misstatement of an item in a financial report is material if, in the light of surrounding circumstances, the magnitude of the item is such that it is probable that the judgment of a reasonable person relying upon the report would have been changed or influenced by the inclusion or correction of the item.199

In the accounting SEC Staff Bulletin No. 99 notes that this formulation in the accounting literature is in substance identical to the “total mix of information” formulation set forth by the Supreme Court in TSC Industries and in Basic.

Deutsche Telekom’s real estate write down represented less than 5% of the total balance sheet assets of Deutsche Telekom, but it did represent around 5% of the company’s 37.7 billion dollars in shareholders equity. The Prospectus reported that the “book value” and “net carrying amount” of Deutsche Telekom’s real estate assets were 17.2 Billion Euros as of March 31, 2000, the first quarter of 2000.200 According to the Prospectus Deutsche Telekom’s real estate assets thus contributed to a total reported 37.709 billion Euros in shareholders equity as of March 31, 2000, with total assets for the company reported at 101.477 billion Euros as of March 31, 2000.

As in the merger context, the materiality standard applied to the real estate valuations by the German Court was more rigid and bright-line. The German Court found no mistake in the prospectus.201 The German Court based its decision on the fact that the 2 billion Euro write down on February 21, 2001, constituted only around 12 percent of the total 17.2 billion in Deutsche Telekom’s real estate assets, which difference was well within the legally allowable tolerance of up to plus/minus 30 percent in the valuation of the real estate assets under German law.202

The Court ruled that any discrepancies were thus immaterial and could not give rise to liability for a false or misleading prospectus. The Court explicitly rejected plaintiffs’ argument that the cluster method of real estate valuation was improper and therefore misleading and that Deutsche Telekom’s reliance on such method was therefore in and of itself materially misleading.203

199 Id.
200 Consolidated Amended Class Action Complaint, supra note 1, at ¶35-36.
201 Musterverfahrensbeschluß.
202 Id.
203 Id.

Michael Halberstam
V. ANALYSIS

It is difficult to second-guess the outcome of the Deutsche Telekom litigation in the U.S. or in Germany. But we can make some observations about the process.

The U.S. litigation proceeded in a timely and organized fashion. The case went to discovery rapidly. Discovery took just under two years, and was concluded in December of 2003. And the parties reached a settlement within five years of the filing of the complaints. The U.S. litigation thus proceeded fairly rapidly.

By contrast, the German litigation took over 11 years, more than twice as long, to generate a first substantive decision in 2012. The 2012 decision in the Model-Proceeding resolved the VoiceStream issues, but the plaintiffs appealed the Higher Regional Court’s decision on the real-estate valuation and on certain accounting practices related to Deutsche Telekom’s sale of shares in Sprint, to the Federal Supreme Court. On December 11, 2014, the Federal Supreme Court (Bundesgerichtshof) issued its opinion affirming the court below on the real estate claims, but holding that the prospectus did not properly value the sale of the Sprint shares to its own subsidiary. The time it takes to finally resolve the German litigation may well turn out to be three times as long as it took in the U.S. litigation.

The Telekom example supports the conclusion that the U.S. system has an advantage in civil procedure in the kind of private enforcement that Europe is now seeking to introduce. The fact that the U.S. litigation was a relatively simple, straightforward securities class action only underscores the point that the German system is unable to handle so-called “Big Cases.”

One might counter that the German litigation went to trial, was subsequently appealed, and therefore had to go through many more stages than the U.S. litigation. But by the time the German courts began to hear the first witnesses in 2008, the U.S. litigation had long been concluded. Resolving

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204 Plaintiff-side attorney Andreas Tilp explained that the VoiceStream decision was not appealed because the plaintiffs did not believe they had a strong case and lacked sufficient evidence to go forward on the issue.

205 See, e.g., remarks by plaintiffs-side attorney Andreas Tilp in Andreas Toller, Ich Empfehle der Telekom einen Gesamtvergleich, WIRTSCHAFTSWOCHE, December 19, 2014. Indeed, in 2004, the Frankfurt Regional Court Judge, Meinrad Woesthoff, who presided over the Deutsche Telekom litigation, estimated that it would take 15 years to work through the Deutsche Telekom litigation. Daniel Schwoenwitz, et al., Die T-Aktie Vor Gericht, WIRTSCHAFTSWOCHE, April 8, 2008.
motions for summary judgment in New York, which were drafted by the parties in early 2004, might have taken a year, and a trial might have taken another year. But even so, the U.S. case would likely have been tried, if not appealed, by 2006, whereas the German trial only began in 2008.

But comparing the timelines in this manner ignores that the very purpose of U.S. litigation discovery is to encourage settlements before trial by eliminating information asymmetries between the parties and bringing them closer in their respective assessments of the value of a case and the risk of going to trial. Indeed almost all securities class actions are settled before trial. The development of the U.S. Deutsche Telekom litigation is thus the norm, rather than an outlier, and reflects fundamental choices about the design of the litigation process.

One of the choices made by the German (and Civil Law) system is to make appeals on both the law and the facts readily available, which helps expedite litigation at the trial court level, but also encourages appeals.206 “Indeed,” writes John Reitz, “the entire proof process is so economical that the first level of appeal in German courts is de novo and routinely includes rehearing of witnesses with regard to the crucial factual issues still in dispute.”207 But in complex cases, a system that is not successful in encouraging settlements (German procedure does indeed try to encourage them), may take longer to resolve cases and impose a heavier burden on judicial resources.208

The KapMug tries to mitigate the inefficiencies of relitigating issues on appeal, by making the Higher Regional Court – which usually serves as a court of appeals – the forum in which common issues of law and fact are litigated. The Lower Regional Court serves instead to prepare the issues, factual allegations, and offers of proof for adjudication by the Higher Court. This means that the appeal from decisions in the Model Proceeding go straight to the Federal Supreme Court, thus eliminating one of the stages of appeal.209 But apparently, the process of

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206 Richard L. Marcus, Putting American Procedural Exceptionalism into Globalized Context, 53 AM. J. COMP. L. 709, 720 (2005) (In Germany, “[a]ppellate review may occur ‘at almost any stage of the proceedings,’ and can involve consideration of facts not brought before the lower court.”) (citing MURRAY & STÜRNER, supra note 17, at 357).


208 HUANG, supra note 159, at 38 (“Many more cases are disposed of by a fully contested judgment in the continental system than in the common law system, despite the fact that the civil judges tend to push settlement much harder than their common law colleagues…. By introducing discovery, the continental system could both promote settlement and improve the quality of settlements.”); MURRAY & STÜRNER, supra note 17, at 259 (“The German court is statutorily mandated to encourage voluntary settlement of civil cases at all stages of the proceedings.”) (citing ZPO 278(1)).

209 Halfmeier, supra note 168, at 58.
preparing and consolidating all the issues, factual allegations, and proffers of evidence in a brief of issues to be decided in the Deutsche Telekom model proceeding involved heavy briefing, hearings, negotiations between the parties, and took at least as much time as discovery took in the U.S.

More important is the question why the entire proof process is deemed so “economical” at the trial court level?

One of the main reasons is that the German (and civil law systems) eliminate the phase of discovery, which tends to be the lengthiest phase of U.S. litigation. Instead, the German judge takes control of fact investigation, document review, witness interrogation, and generally “plays the central role in building the record.”210 This may well expedite the resolution of smaller cases, because it eliminates party on party discovery prior to trial, and effectively consolidates the separate and consecutive information processing tasks of U.S. litigation in one and the same process in which everything passes through the judge.211 Making the judge do most of the work, however, clearly imposes a greater burden on judicial resources. The burden on individual judges may be alleviated by employing more judges, which is indeed what Germany does, and what, in part, accounts for Germany’s efficient court system.212

But in complex cases a single judge (or a panel of judges) may become overwhelmed. As the Deutsche Telekom case seems to suggest, the U.S. separation and specialization of tasks, and the outsourcing of discovery to a team of litigation attorneys for each party, is likely to lead to a far more speedy resolution of disputes, and may even be necessary to process the large amounts of information required to investigate wrongdoing by large organizations with tens of thousands of employees, thousands of offices and properties, and a global footprint like Deutsche Telekom. Large projects require specialization and teamwork, which also renders them more efficient.

One might well object that the German Deutsche Telekom litigation cannot be the measure of KapMug’s efficiency, because it was the “test case” for

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210 Id. at 990.
211 While German attorneys submit briefs to the court, one of the problems of the German statutory fee schedule is that it bases its fees on specific actions completed, rather than the time it took to complete them. STÜRNER, supra note 17. While this may keep down costs, one of the consequences is that attorney work product is often inferior, and judges are often in the position of having to help attorneys who are not well-enough prepared satisfy their obligations to their clients. Id. It is part of the role of the judge, as a neutral arbiter, to make sure that the parties get a fair hearing. Thus, unlike in the U.S., where a party loses its rights if it does not assert them, the German judge will assist a party’s attorney in making sure that the party takes advantage of all of its procedural rights.
212 STÜRNER, supra note 17.
a procedural innovation that was being invented as the case went along. On this view, it should have been expected that the litigation would take longer. As the KapMug proceeding becomes more routine, it may well become more efficient. But so far, the evidence does not suggest as much. A 2009 study evaluating KapMug for the German Federal Justice Department (Bundesjustizministerium), concluded that most of those surveyed about the KapMug, which had by then been employed in 24 cases,213 doubted that the KapMug resulted in a speedier litigation process, or if it did, the improvement was very limited.214 The KapMug was reauthorized and amended in 2012, in part to increase the speed and efficiency of the process. At this point, we do not know what the results will be. But from the authorization, it is also clear that German lawmakers remain committed to developing private enforcement of securities disclosure violations.215

The difference between U.S. litigation discovery and German fact acquisition is not merely that more resources are dedicated to the process in the U.S., and that the judge in civil law systems does what the attorneys for the parties do in the U.S. Rather, there is neither discovery, nor any functional equivalent of discovery in civil law systems like Germany. As noted above, the principle of party presentation and other fundamental principles of civil law do not merely prohibit parties, but also the judge from engaging in probing fact investigation, let alone the broad and intrusive type of discovery that characterizes U.S. civil litigation.

Recall, that most of the documents obtained by the parties in the German litigation came from the prosecutor in Bonn and were not developed during the litigation. Moreover, the plaintiffs were only able to obtain the detailed information about the VoiceStream acquisition because the plaintiffs already knew that deposition transcripts concerning the VoiceStream acquisition were in the possession of the defendants together with the attached exhibits. Thus, access to this critical information was possible only because it had already been developed in other proceedings. But we cannot know what other information was generated and might have influenced the U.S. settlement, because the U.S. settlement and discovery were subject to a confidentiality agreement. It is, for example, possible, that the U.S. plaintiffs’ attorneys strategically withheld some

213 Halfmeier, et al., supra note 168, at 50-52. Note that although there were 24 separate cases, many of them were related cases with the same parties. In other words, KapMug proceedings were only brought against 10 issuers, but challenging separate securities issuances by the same issuer.

214 Halfmeier, et al., supra note 168, at 57.

215 Lawmakers, however, explicitly declined to extent the Model Proceeding mechanism to other types of mass claims.
of the most important documents from the witnesses during depositions in order to use them more effectively at summary judgment, which became the basis for the settlement negotiations, or at trial.\(^{216}\)

This raises the question whether the German civil law process gives plaintiffs a fair chance at building their case. Can KapMug’s variant on representative litigation encourage private enforcement without also introducing forms of discovery into civil law that would give plaintiffs or courts the tools to engage in proper corporate internal investigations?\(^{217}\)

There have been almost no larger cases like the Telekom litigation in the German courts. This is often attributed to the German substantive securities laws, which the Government has been amending to strengthen confidence in the markets by providing at least the theoretical opportunity for holding issuers and other market participants to greater accountability. But the longtime lack of provisions in the substantive law that would enable private enforcement can also be seen as a reflection of a civil procedure that is unable to handle such claims.\(^{218}\) The lack of discovery helps explain why the question of recklessness or intent in prospectus liability becomes an affirmative defense. Without discovery it would be impossible for plaintiffs to prove recklessness or intent on the part of the defendant. Recognizing the problem of proof facing plaintiffs, the lawmaker thus employed the device of burden shifting, which is commonly used in this way in German (and civil) law. But burden shifting may not be enough to afford plaintiffs a fair chance, because it still does not require the defendant to produce all relevant information bearing on the question of recklessness or intent. The information thus revealed necessarily remains one-sided.

Just like the burden shifting mechanism – which is frequently written into German substantive law to address the lack of a procedural mechanism for obtaining relevant information from a party opponent – other aspects of German substantive law, may well reflect the absence of tools for adequate fact investigation. The German reliance on “objective standards” of materiality in the merger context (requiring a vote by the board) and in the balance sheet valuation process (ignoring intent to manipulate the balance sheet in favor of a bright line rule based on percentages) might be explained by the fact that these threshold

\(^{216}\) I want to thank my colleague Christine Bartholomew for pointing out this possibility.

\(^{217}\) Gorga & Halberstam, supra note 10.

\(^{218}\) Indeed, changes in civil procedure in the U.S. that introduced a robust class action mechanism, combined with an increasingly liberal discovery regime, are credited with influencing U.S. substantive laws in many different fields. See, e.g., Jack H. Friedenthal, A Divided Supreme Court Adopts Discovery Amendments to the Federal Rules of Civil Procedure, 69 CALIF. L. REV. 806, 818 (1981); Gorga & Halberstam, supra note 10, at 1455ff.
requirements can be more readily identified and measured without discovery about corporate internal communications.

But what of the costs of discovery? Is the German system less costly, because it insufficiently investigates the facts? Or is the U.S. litigation too expensive and a waste of resources?

Critics of the U.S. litigation process complain that “discovery has become the focus of litigation, rather than a mere step in the adjudication process . . . [and that] the effort and expense associated with electronic discovery are so excessive that settlement is often the most fiscally prudent course—regardless of the merits of the case.” But here, in the U.S., the defendants settled only after discovery was concluded, which means that the purpose of the settlement could not have been the avoidance of discovery costs. The defendants had already spent all they would on discovery, and these costs were thus sunk costs when the settlement was reached. The claim that discovery costs are used to threaten companies to settle is thus not supported by this litigation.

Attorneys in Germany have speculated that there were other motives for settling the U.S. litigation, namely to assure that evidence of wrongdoing on the part of Deutsche Telekom’s management would remain confidential and would not be able to be used in the German litigation. They point to the fact that the German government vehemently opposed Plaintiff’s request under 28 U.S.C. §1798 to gain access to the discovery in the New York litigation. But it seems unlikely that the threat of civil liability in Germany would have been the decisive factor in choosing to settle the case in the U.S, given the much less plaintiff-friendly substantive law in Germany. A more likely consideration would have been the desire to avoid the spectacle of a trial in New York that would have forced Deutsche Telekom’s former management to take the stand. Because the U.S. case was settled and discovery was conducted subject to a confidentiality agreement, it is difficult to ascertain the likelihood of plaintiffs’ success on the merits. But the large settlement amount suggests that there was a significant risk of liability for Deutsche Telekom if the case had gone to a jury.

The empirical literature shows remarkable consistency over time about the use and costs of discovery. Discovery costs are related to the stakes of the litigation. Reports by the federal judicial center have shown that median


\[\text{220} \quad \text{Sommer left Deutsche Telekom in 2002.}\]
discovery costs represent around 3.3 % of the value of the case.\textsuperscript{221} In larger cases discovery costs are often higher.

Here, Plaintiffs received a total of $1.44 million dollars in fees and expenses, which amounts to around 1.2 % of the $120 million recovery.\textsuperscript{222} If 90 % of that is attributable to discovery, then plaintiffs’ discovery costs represented less than 1.1 % of the value of the settlement. But Deutsche Telekom claimed that its litigation costs in the U.S. amounted to 17 million Euros, around $20 million dollars (at the 2004-2005 exchange rate).\textsuperscript{223} Total discovery costs were therefore more than 10 % of the settlement value, but perhaps less than that if we consider Plaintiffs’ original claims. These cost were certainly substantial. But litigation costs in the German KapMug litigation were also high. At one point, the German court contemplated ordering an independent expert opinion on valuing Deutsche Telekom’s real estate assets. The expert opinion was estimated to cost between 20 and 70 million Euros, but the plaintiffs balked, and the court thus avoided ordering the report.\textsuperscript{224}

As I have argued (with Érica Gorga), however, the cost/benefit analysis of discovery should not be calculated based on the value of the dispute in a single case.\textsuperscript{225} There are private benefits from discovery for a defendant corporation in the long run by way of corporate governance improvements that result from such corporate internal investigations.\textsuperscript{226} And there are social benefits of discovery that go beyond the private benefits.\textsuperscript{227} As Gorga and Halberstam have argued, it is precisely the ability to obtain detailed information about corporate internal practices and procedures relating to specific transactions and events all the way up the corporate hierarchy that makes discovery so important in promoting good corporate governance. Indeed German lawmakers are trying to make cases like the Deutsche Telekom litigation possible in Germany, not merely or even primarily to compensate investors for losses, but because of their larger social


\textsuperscript{222} In Re Deutsche Telekom Securities Litigation, Civ. No. 00-CV-9475, Final Order and Judgment, at 6 (S.D.N.Y. June 9, 2005).

\textsuperscript{223} Urteil Az. 18 U 108/07, OLG Köln, May 28, 2009) (note that the Deutsche Telekom’s claimed costs are disputed).

\textsuperscript{224} Halfmeier, supra note 168, at 55. Verse, supra note 30, at 451, writes that KapMug saves judicial resources and litigation costs, “mainly because costly expert evidence will be required only one in the model case proceedings.”

\textsuperscript{225} Gorga & Halberstam, supra note 10, at 1477-1479.

\textsuperscript{226} Id.

\textsuperscript{227} Id.
benefits in promoting strong securities markets. Thus the private costs of discovery must be considered along with the private and social benefits of the greater transparency and deterrence that private enforcement brings.

VI. CONCLUSION

The aim of this Article has been to examine the influence of civil procedure on the legal framework that supports securities markets in the U.S. and in German, in light of the considerable convergence of German and European securities regulation on the U.S. model of securities disclosure regulation. The article has shown just how different the development and outcome of the Deutsche Telekom litigation has been in the U.S. and in Germany, in spite of the relatively similar standards of substantive law under which the cases were decided. Even as Germany has implemented a new aggregate litigation mechanism to enable investors to vindicate their right to accurate securities disclosures, the process is neither very efficient, nor does it grapple with the critical question of how plaintiffs are to investigate issuer misconduct without anything like the tools of modern U.S. litigation discovery.

Conversely, current debates about U.S. litigation discovery in commercial and securities litigation have focused almost exclusively on the purportedly excessive cost and burdens of U.S. discovery. But the consequences of procedural rules in European (and other Civil Law) jurisdictions like Germany, which prohibit discovery, have rarely been considered by such critics.