The case for a single-document-driven European issuer-disclosure regime

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ABSTRACT : *The disclosure regime to which corporate equity issuers listed on European regulated markets are subject under the relevant European financial regulation have similar objectives whether or not the issuer is offering securities at the time of disclosure. From this premise, this article argues that the content and format of disclosure should be the same on primary and secondary markets, at least with respect to large and thickly traded issuers whose securities are traded in an efficient market. More specifically, a move to an integrated disclosure regime and to a company registration system is advocated. This includes the suppression of the separate drafting, dissemination and storage of periodic reports which should be replaced by a periodic update of the initial disclosure document. The suggested scheme should lower the costs for issuers and supervisory authorities. It should also make comparisons by investors easier.*

I. Introduction

Corporate issuers of equity listed on European regulated markets are subject to various disclosure requirements. To the extent European financial regulation is concerned, these are set out in various European legislations. First, the regulation relating to prospectuses, when companies issue securities on European regulated markets.[2] Second, the European directives relating to on-going reporting requirements, which provide for the periodic disclosure requirements of issuers listed on a European regulated market.[3] And third, the European directive relating to insider dealing and market manipulation, to the extent it is concerned with *ad hoc* disclosures of inside information from issuers listed on a European regulated market.[4] The disclosure requirements subjecting corporate equity issuers listed on European regulated markets further to the Prospectus Directive, the Transparency Directive and the MAD are hereinafter together referred to as the "EU issuer-disclosure regime".

In the European Commission's view, the EU issuer-disclosure regime pursues two objectives: investor protection and market efficiency.[5]

A third objective could arguably be added, i.e., corporate governance. Corporate governance has to be understood here from the perspective of agency theory, towards "*persuad[ing], induc[ing], compel[ling], and otherwise motivat[ing] corporate managers to keep the promises they make to investors*"[6] or "*regulat[ing] large or active shareholders so as to obtain the right balance between managerial discretion and small shareholder protection*".[7] Some authors have contended that the EU issuer-disclosure regime contributes to reduce the agency problems that European corporate issuers are likely to face.[8] They argue that it does so by reducing the costs associated with the corporate governance tools that mitigate agency problems, thereby impacting their efficiency, like shareholders' vote and shareholders' monitoring of the controlling party or management.

As these objectives are similar on primary and secondary markets, i.e., whether or not the issuer is issuing securities at

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2 See Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, *OJEU*, 31 December 2003, L 345/64 (hereinafter the Prospectus Directive); Commission Regulation (EC) no 809/2004, 29 April 2004, *OJEU*, 30 April 2004, L 149/1 (hereinafter the Prospectus Regulation). See also, the proposed revision of the Prospectus Directive on the European Commission web-site.

3 See Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *OJEU*, 31 December 2004, L 390/38 (hereinafter the Transparency Directive); Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, *OJEU*, 9 March 2007, L 69/27 (hereinafter the Transparency Implementing Directive). See also, the proposed revision of the Transparency Directive on the European Commission web-site.

4 See Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJEU*, 12 April 2003, L 96/16 (hereinafter the MAD). A proposal for the revision of the MAD will probably be ready by the end of 2010.

5 See for references to investor protection, recitals (16) and (21) as well as recitals (18), (33) and (41) of the Prospectus Directive; recital (41) and recitals (1) and (36) of the Transparency Directive; recital (12) and also recitals (2) and (13) of the MAD. See for references to market efficiency, recital (10) of the Prospectus Directive and recital (1) of the Transparency Directive.

6 JONATHAN R. MACEY, Corporate Governance - Promises Kept, Promises Broken (Princeton University Press. 2008), at 1. Comp. with European academics who are more concerned about the relationships between controlling shareholder and minority shareholders, given the concentrated ownership structures in most Continental European listed companies, including, *inter alia*, MARCO BECHT, et al., *Corporate Law and Governance*, *in* Handbook of Law and Economics - II, (A. Mitchell Polinsky, et al. eds., 2007). ("[i]n a nutshell, the fundamental issue concerning governance by shareholders today seems to be how to regulate large or active shareholders so as to obtain the right balance between managerial discretion and small shareholder protection").

7 MARCO BECHT, et al., *Corporate Law and Governance*, *in* Handbook of Law and Economics - II, (A. Mitchell Polinsky, et al. eds., 2007).

8 See, *inter alia*, GAËTANE SCHAEKEN WILLEMAERS, The EU Issuer-Disclosure Regime - Objectives and Proposals for Reform (Kluwer Law International. 2010 (forthcoming)); KLAUS J. HOPT, *Modern Company and Capital Market Problems: Improving European Corporate Governance After Enron*, *in* After Enron - Improving Corporate Law and Modernising Securities Regulation in Europe and the US, (John Armour, et al. eds., 2003); EILÍS FERRAN, Building an EU Securities Market (Cambridge University Press. 2004), at 127-30; NIAMH MOLONEY, EC Securities Regulation (Oxford University Press Second ed. 2008), at 321.

the time of disclosure, this article argues that the content and format of disclosure should be the same on both markets.[9]

In this context, it is first suggested to introduce an "integrated disclosure regime" in European financial law. This would make sure that the information required to be disclosed at the time of a public offering and at any time thereafter is aligned to be virtually identical. This is not currently the case as each of the Prospectus Directive and the Transparency Directive has its own requirements and its own definitions with little standardisation.

Second, this article recommends moving closer to a "company registration system", which would replace the transaction-based regime, under which each new equity issue requires a new approval procedure of a new offering document. This suggestion draws on the US experience: it is built on similar assumptions, i.e., it invokes market efficiency as a metric, and offers comparable advantages.

Third, this contribution suggests to suppress the separate drafting, dissemination and storage of periodic reports and to replace them by a periodic update of the initial disclosure document.

This article is only concerned with large, well-established corporate issuers, i.e., issuers who are familiar with capital market transactions because they regularly access capital markets. Small and Medium-sized Enterprises (hereinafter SMEs) are excluded from the scope of this contribution as not only is it difficult to define an SME,[10] but more importantly is it difficult to set the appropriate level of disclosure for them.[11] Indeed, lighter touch as well as heavier touch have their drawbacks. On the one hand, the market for SMEs is less efficient in terms of price accuracy and liquidity as disclosure works less well. SMEs generally have a limited follow-up among more sophisticated market actors, including financial analysts, who are believed to positively affect market efficiency.[12] It is likely that their secondary market price will not be an accurate determinant of the primary market price of a further secondary public offering. But on the other hand, SMEs face different cost constraints than large companies. For these reasons, a separate analysis is required to determine to what extent a change to existing European regulations is warranted in their respect. By contrast, well-established companies are well followed-up by more sophisticated actors and have a reporting history. As a result, much information is available in the market about them and their market is efficient, at least under normal market conditions. Their secondary market price is consequently likely to be an accurate determinant of the market price of a further secondary public offering.[13]

II. Integrated disclosure system

There is no full co-ordination between the Prospectus Directive and the Transparency Directive with respect to the content of documents approved or filed with the competent supervisory authority. Moreover, the Transparency Directive seeks only minimum harmonisation which does not allow making comparable information available to the market.[14] This causes practical problems, costly overlaps, duplicative and inconsistent disclosures.[15] The E.U. has arguably repeated the mistake made by the US Securities and Exchange Commission (hereinafter the SEC) in not adopting a fully integrated regime at the outset of the federal securities regulation programme.

For instance, the content requirements for the management report in the annual financial report as mandated under the

9 See for a similar argument in the US context, MERRITT B. FOX, *Civil Liability and Mandatory Disclosure*, 109 Colum. Bus. L. Rev. 237, (2009); MERRITT B. FOX, *Rethinking Disclosure Liability in the Modern Era* 75 Wash. U. L. Rev. 903, (1997).

10 See the compromise reached in article 2.1(f) of the Prospectus Directive. See also, the suggested insertion of a definition for "companies with reduced market capitalisation", in new article 2.1(t) further to EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010).

11 See article 7.2(e) of the Prospectus Directive. *But* see that the Prospectus Regulation has not provided for any special treatment concerning SMEs that are not considered as start-ups. See also, new article 7.2(e) suggested in EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council amending the Prospectus Directive and the Transparency Directive (2009). ("proportionate disclosure regime") and recital (18) of EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010). Comp. with US regulations, and see, *inter alia*, JOHN C. COFFEE, et al., Securities Regulation (Foundation Press ed., Thomson West 10th ed. 2007).

12 See on this, *inter alia*, RONALD J. GILSON, et al., *The Mechanisms of Market Efficiency*, 70 Virginia Law Review 549, (1984). See for contributions that show that analysts promote market efficiency by impacting price accuracy, Do European Brokers Add Any Value through Recommendations? , pt. (2009); BENJAMIN C. AYERS, et al., *Evidence That Analyst Following and Institutional Ownership Accelerate the Pricing of Future Earnings*, 8 Rev. Acct. Stud. 47, (2003); RICHARD FRANKEL, et al., *Characteristics of a Firm's Information Environment and the Information Asymmetry Between Insiders and Outsiders*, J. Acct. & Econ. 229, (2004), at 232. See for a study showing that analysts contribute to increase market efficiency by impacting liquidity, DARREN T. ROULSTONE, *Analyst Following and Market Liquidity*, 20 Contemp. Acct. Res. 551, (2003).

13 See EUROPEAN SECURITIES MARKETS EXPERT GROUP, Report on the Prospectus Directive (2007), at 7 (arguing for a differentiation between issuers in terms of disclosure requirements to make it easier for blue chips to issue new securities).

14 *Accord* EUROPEAN COMMISSION, Commission Staff Working Document - The review of the operation of Directive 2004/109/EC: emerging issues - accompanying document to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market COM(2010)243 (2010), at 4 and at 6; EUROPEAN COMMISSION, Commission Staff Working Document - Report on more stringent national measures concerning Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2008).

15 See for a critic of the lack of a coherent regime under the directives passed under the Financial Services Action Plan of 1999, including the Prospectus Directive, the Transparency Directive and the MAD, the works of the Financial Markets Law Committee; the call of the International Bar Association; the opinion of the committee on legal affairs in EUROPEAN PARLIAMENT, Report on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (COM(2009)0491 – C7-0170/2009 – 2009/0132(COD)) Committee on Economic and Monetary Affairs Rapporteur: Wolf Klinz (2010).

Transparency Directive are not as onerous as those relating to an operating and financial review (hereinafter OFR) which must be included in a prospectus for a share offering according to the Prospectus Regulation. The OFR can be compared to the management discussion and analysis of financial condition and results of operations (hereinafter MD&A) required by regulation of the SEC for publicly traded US companies.[16]

The present situation where the information required under the Transparency Directive is less demanding than the information required under the Prospectus Directive with respect to, respectively, the management report and the OFR, does not make sense if one considers that the objectives of the management report are the same as the objectives of the OFR. Moreover, this is not convenient as companies under the current system usually use annual financial reports as basis for any subsequent share offering prospectus. It requires companies to add to disclosures used in management reports when planning a share offering, except to the extent they voluntarily put a more comprehensive management report into their annual financial reports and except to the extent Member States have imposed super-equivalent requirements for a management report. Besides, periodic reporting required by the Transparency Directive under the current regime lags behind the standard required for international securities offerings and European share offerings.

Therefore, a well-functioning integrated disclosure system, i.e., a system that applies similar disclosure requirements to offering documents and subsequent disclosure, needs to be introduced in the E.U. This integrated disclosure is the necessary prerequisite of a company registration system, as further developed below.

To seek consistency, the enactment of an entirely new regulation for disclosure of issuers listed on a regulated market whose equity securities are heavily traded (hereinafter the European Regulation) seems to be the most convenient solution. A regulation instead of a directive is warranted to avoid inconsistent implementation in Member States' national laws. It could be something similar to US Regulation S-K, which prescribes a single standard set of instructions for filing forms under the US securities regulation. Regulation S-K serves as the basis for coordinating disclosure under both the US Securities Act of 1933 registration requirements for new offerings and the US Securities Exchange Act of 1934 periodic disclosure requirements by having the requirements for each incorporate by reference questions set out in a single regulation.[17]

16 Comp. article 4.2(b) of the Transparency Directive and article 46 of the Fourth Council Directive of 25 July 1978 based on Article 54 (3) (g) of the Treaty on the annual accounts of certain types of companies (78/660/EEC), *OJ*, 14 August 1978, L 222/11, as amended (hereinafter the Fourth Company Law Directive) or, for companies required to prepare consolidated accounts, article 36 of the Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Article 54 (3) (g) of the Treaty on consolidated accounts, *OJ*, 18 July 1983, L 193/1, as amended (hereinafter the Seventh Company Law Directive) (content of the management report of the annual financial report) with, on the one hand, Item 9 of Annex 1 to the Prospectus Regulation (OFR) and, on the other hand, Regulation S-K, Item 303 of the SEC (MD&A).

17 See for a description and comments on the integrated disclosure regime in the U.S., *inter alia*, JOHN C. COFFEE, et al., Securities Regulation (Foundation Press ed., Thomson West 10th ed. 2007)., at 136 et seq.; JEFFREY N. GORDON, et al., *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U.L. Rev. 761, (1985), at 762 and 810 as well as note 131 and accompanying text.

Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) to the Prospectus Regulation as well as the disclosure requirements under the Transparency Directive, the Transparency Implementing Directive, the Fourth and the Seventh Company Law Directives to the extent concerned by, *inter alia*, the periodic non-financial corporate governance-related disclosures contained in the corporate governance statement, and the disclosure of environmental, social and governance data,[18] and the disclosure requirements under the MAD, to the extent concerned by disclosure of inside information,[19] should be considered for purposes of the European Regulation.

The European Regulation should at a minimum provide the information relating to a public offering and any time thereafter, i.e., continuing disclosure. But the European regulator could go one step further than US Regulation S-K and provide all disclosure-related matters relating to a public offering or any time thereafter, like dissemination, storage, language, and liability issues,[20] while Regulation S-K only deals with disclosure.[21]

The European Regulation should, in those respects only, replace what is currently provided under the existing regulations.

III. The European company registration system

Under the suggested scheme of company registration, a large established issuer would register once when it decides to go public for the first time (the initial public offering; hereinafter the IPO) by submitting to the competent supervisory authority a registration prospectus for approval. This registration prospectus would thus replace the current prospectus under the Prospectus Directive.

The registration prospectus should contain what is required under the European Regulation. It should be written at least in English. To be sure, it could be that the national law of Member States will need to be changed further to this sugges-

18 Note that the issue has been raised as to whether these disclosure requirements should be integrated in the Transparency Directive regime, under the European Commission recent report relating to the Transparency Directive. See EUROPEAN COMMISSION, Commission Staff Working Document - The review of the operation of Directive 2004/109/EC: emerging issues - accompanying document to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market COM(2010)243 (2010), at 17 and at 103 et seq. See also, ROBERT G. ECCLES, et al., One Report: Integrated Reporting for a Sustainable Strategy (2010). (providing best practice examples from companies around the world, showing how integrated reporting adds value to the company and all of its stakeholders, including shareholders, and also ultimately contributes to a sustainable society).

19 Note that the obligation under article 6(1) of the MAD was originally designed to form part of the Transparency Directive: see, European Commission, Towards an EU Regime on Transparency Obligations of Issuers Whose Securities are Admitted to Trading on a Regulated Market (the Transparency Report), MARKT/11/.07.2001.

20 See for suggestions relating to liability issues, GAËTANE SCHAEKEN WILLEMAERS, The EU Issuer-Disclosure Regime - Objectives and Proposals for Reform (Kluwer Law International. 2010 (forthcoming)).

21 See US Regulation C for many but not all other matters.

ted scheme. This will be the case if the national law requires that documents drafted in compliance with securities laws be disseminated at least in the local language. But, although this could give rise to a heated debate as it touches upon protectionist sensibilities, these difficulties should be surmounted, given the perceived advantages. Any translation in local language (of the home Member State or the host Member State(s)) should be left to the discretion of the issuer, depending on its perception of market expectation. The registration prospectus should be placed on the issuer's web-site and/or on the web-site of its financial intermediaries, as the case may be.[22] Besides, the issuer should not be required to deliver to people requesting it a paper copy of the prospectus free of charge when the prospectus has been made available in electronic form.[23] This possibility should be left optional, at the discretion of the issuer. In addition, the home Member State should be able to require issuers who make registration prospectuses available in a newspaper or in a printed form also to publish it on their web-site.[24] Lastly, the registration prospectus should be stored on the web-site of the competent supervisory authority.[25]

The registration prospectus should be accompanied by a summary registration prospectus. It is to be considered as a marketing tool.[26] Indeed, how could summary registration prospectuses be effective to meet their expected goal of less sophisticated retail investor protection, if registration prospectuses of which they are an abbreviated form do not themselves protect less sophisticated retail investors?[27] One cannot say, without running contrary to market realities, that summary registration prospectuses protect less sophisticated retail investors. However, it should be admitted that summary registration prospectuses are useful to the extent they ease potential investors' search for the most important pieces of information that will determine their potential interest in the offering.[28] They should enable prospective investors, be they (less sophisticated) retail or professional investors, to avoid to read through the (currently dozens and sometimes hundreds pages long) registration prospectuses without knowing the main characteristics and risks of the issue.

The summary registration prospectus should be disseminated in the same way as provided for registration prospectuses and translated in the host Member State(s)' official language(s).[29]

Lastly, liability should only be attached to misleading, inaccurate or inconsistent information contained in the summary prospectus,[30] when read together with the prospectus.[31] Indeed, the summary registration prospectus should not be seen as being of and by itself an investment document.

After the IPO, this large, established, publicly traded issuer should provide continuing information pursuant to a duty to update information contained in the registration prospectus and summary registration prospectus. This should consist of complying with current MAD disclosure requirements and the schedule of disclosure to be set out by the European Commission for periodic updates of the registration prospectus with previously disclosed MAD information and information not subject to MAD disclosure. That information includes financial statements and (interim) management report drafted in compliance with applicable regulations, including the Fourth and the Seventh Company Law Directives.[32] The issuer's web-site should have flashing tags drawing market actors' attention to the new postings further to the updating requirement. Market actors should be kept informed of the new postings by an opt-in system of electronic communication of new postings.[33] Besides, the system should also mandate the use of data disseminators to ensure a wide dissemi-

22 *Accord* suggested amendment to article 14.2(c) in EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010).

23 *Accord* HIGH LEVEL GROUP OF INDEPENDENT STAKEHOLDERS ON ADMINISTRATIVE BURDENS, Opinion of the High Level Group, subject: Stakeholders' suggestions ('offline-consultation') (2008).

24 *Accord* suggested amendment to article 14.2, alinea 2, in EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010).

25 See for further details on these language, dissemination and storage regulatory suggestions, GAËTANE SCHAEKEN WILLEMAERS, The EU Issuer-Disclosure Regime - Objectives and Proposals for Reform (Kluwer Law International. 2010 (forthcoming)).

26 Comp. with recital (3) and article 4.3 of EUROPEAN COMMISSION, Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website (2010). (suggesting that key investor information under UCITS IV is not an "item of promotional literature"). See for further regulatory suggestions relating to the content and format of the summary registration prospectus, GAËTANE SCHAEKEN WILLEMAERS, The EU Issuer-Disclosure Regime - Objectives and Proposals for Reform (Kluwer Law International. 2010 (forthcoming)).

27 *Accord* LACHLAN BURN, *KISS, but tell all: short-form disclosure for retail investors*, 5 Capital Markets Law Journal 141, (2010).

28 *Accord* suggested recital (15) and suggested amendment to article 5.2 in EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010).; LACHLAN BURN, *KISS, but tell all: short-form disclosure for retail investors*, 5 Capital Markets Law Journal 141, (2010) (referring to the "quick read" function of summary prospectuses, that is useful to both intermediaries and retail investors).

29 Comp. with article 19 of the Prospectus Directive.

30 See article 6.2, alinea 2, of the Prospectus Directive.

31 *Accord* EUROPEAN PARLIAMENT, Report on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (COM(2009)0491 – C7-0170/2009 – 2009/0132(COD)) Committee on Economic and Monetary Affairs Rapporteur: Wolf Klinz (2010). *But* see, recital (10) and articles 5(b) and 6 of EUROPEAN COMMISSION, Proposal for a Directive of the European Parliament and of the Council amending the Prospectus Directive and the Transparency Directive (2009). See also, the compromise reached in suggested amendment to article 6.2, alinea 2, of the Prospectus Directive in EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010).

32 See below for more details.

33 See below for more details.

nation of these updates.[34] Indeed, data disseminators take into account the wider capital markets-related reasons for requiring wide dissemination to the market generally and easy access to published information, for which individual company web-sites are not well-suited.

Under this suggested scheme, the issuer would be able to offer subsequent shares with the only requirement to submit to the competent supervisory authority a short-form offering prospectus which should allow incorporating by reference the up-to-date information contained in the registration prospectus. The only information that should actually be set out in full text in the short-form offering prospectus is information relating to the specific issue. This concerns the use of its proceeds and a description of any material change since the last update of the registration prospectus, including, in particular, the economic and financial position of the issuer and its prospects as seen by management.[35] Annex III of the Prospectus Regulation could serve as basis (Minimum Disclosure Requirements for the Share Securities Note). The short-form offering prospectus should be written in a language, disseminated and stored in the way, applicable to registration prospectuses.

Updated information of short-form offering prospectuses which consists of incorporation by reference should be properly reviewed by the competent supervisory authority without delaying the offering process. To that purpose, the competent supervisory authority should review the updated information on a regular rotating basis, complying with the schedule and criteria to be detailed by the European legislator.[36] This review should mainly focus on the company's accounting practices. It should also be concerned with the main areas of substantive disclosure, like risk factors, OFR and market risk disclosure. As showed by US experience, this should lead to reduced likelihood of triggering a review when filing a short-form offering prospectus and delaying this short-form offering prospectus being declared effective.

The approval of the short-form offering prospectus relating to a secondary public offering would not be necessary in some circumstances under the suggested scheme:

– no approval at all should be required where shares of the same class are offered/issued to existing shareholders by the way of a rights issue.[37] This rests on the assumption that these investors should be familiar with and confident in the company in which they have already invested. It also rests on the assumption that the continuous disclosure regime mandated by the MAD means that sufficient information should be publicly available for secondary trading, to which the decision to participate in a rights issue materially resembles;

– where securities of the same class as the securities already traded are issued, the competent supervisory authority, at its discretion, the arguments of the issuer being heard, should determine whether or not it subjects the short-form offering prospectus to any approval procedure. If this is the case, the period for approval should be kept to a minimum to allow issuers to benefit from market conditions as much as possible.[38] Approval could be necessary where the competent supervisory authority has not made a check of the last updated information contained in the registration prospectus;

– the approval procedure should be systematic only where securities other than the ones already listed are issued.

An exception to the suggested scheme of company registration should be provided for "large issues". Large issues could be for instance issues in the range of at least 30% or 40% of the outstanding shares. The issuer should in that case be treated in the same fashion as in an IPO for two reasons. First, an offering of this scale is likely to be accompanying a transformative event in the history of the firm and so the fact that the secondary market price prior to the offering was efficient provides much less assurance that the offering price will be efficient. Second, like for an IPO, significant marketing efforts will be needed to find new people willing to hold the many new shares being offered and so, again, an efficient secondary market in the issuer's shares provides less assurance that the offering price is efficient. Therefore, an extensive prospectus with due approval might make sense in that circumstance.[39]

The short-form offering prospectus should be accompanied by a summary offering prospectus, for marketing purposes. It should be disseminated and translated in the same way as provided for summary registration prospectuses. It should consist of the up-to-date summary registration prospectus as well as any additional information specific to the issue.

IV. No more periodic reports but periodic update of the registration prospectus

1. The single-document-driven disclosure regime in theory

The market volume of secondary trading dwarfs the volume of primary market offerings. According to Goldman Sachs,

34 Comp. with the UK concept of "regulated information service providers" on the web-site of the UK Financial Services Authority. Comp. with Spain, where an electronic system allows issuers to send regulated information simultaneously to the supervisory authority that acts as data disseminator that will spread it to the press, and to the stock exchange.

35 Comp. with the US Form S-3 short-form registration.

36 Comp. with the U.S., where there is also a selective review process by the SEC. See Section 408 of the Sarbanes-Oxley Act for minimum standards for the review of Securities Exchange Act of 1934 reports. See generally, JOHN C. COFFEE, et al., Securities Regulation (Foundation Press ed., Thomson West 10th ed. 2007), at 173.

37 Comp. with EUROPEAN PARLIAMENT, Legislative resolution of 17 June 2010 on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (2010) (providing for a "proportionate" disclosure regime for all rights issues and not just, as currently provided, rights issues which are free of charge). See for the costs relating to rights issues, EUROPEAN SECURITIES MARKETS EXPERT GROUP, Report on the Prospectus Directive (2007), at 17; the opinion of the committee on legal affairs in EUROPEAN PARLIAMENT, Report on the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (COM(2009)0491 – C7-0170/2009 – 2009/0132(COD)) Committee on Economic and Monetary Affairs Rapporteur: Wolf Klinz (2010).

38 Comp. with the US system of shelf-registration.

39 *Accord* in the US context, MERRITT B. FOX, *Civil Liability and Mandatory Disclosure*, 109 Colum. Bus. L. Rev. 237, (2009), at note 97.

proceeds from new issues represented USD46.1 billion in 2003 on a market of USD388 billion (i.e., a market share of 11.9%) and, according to Morgan Stanley, proceeds from new issues represented USD54.2 billion in 2004 on a market of USD505 billion (i.e., a market share of 10.7%). In that context, disclosure of information to the markets on an on-going basis is crucial after a security has been listed. Disclosure of material events on an *ad hoc* basis alone is not sufficient for investors to be able to make investment decisions as, among other things, they would lack a tool which would aggregate information and which would make comparisons easier.[40]

But are periodic reports the right tools to meet the objectives of on-going information?

Periodic reports include annual financial reports, half-yearly financial reports and interim management statements as provided by the Transparency Directive and the Fourth and Seventh Company Law Directives.

Annual financial reports are made out of the audited financial statements, the management report and the management certification. The annual report must also include a corporate governance statement which must contain, *inter alia*, a description of the main features of the company's internal control and risk management systems. But this is only in relation to the financial reporting process.[41] Companies may also, where relevant, provide an analysis of environmental and social aspects necessary for an understanding of the company's development, performance and position.[42] Any stronger requirement to report on non-financial matters was excluded.[43] This being said, some Member States have been more ambitious in that respect and impose environmental and social reporting on listed issuers.[44]

Half-yearly financial reports are made out of condensed set of financial statements, interim management report and management certification.

And interim management statements are made out of an explanation of material events and transactions that have taken place during the relevant period; their impact on the financial position of the issuer and its controlled undertakings; and a general description of the financial position and performance of the issuer and its controlled undertakings during the relevant period.[45]

According to the Efficient Capital Market Hypothesis (hereinafter the ECMH), i.e., the founding theory behind market efficiency,[46] information disclosed further to the MAD immediately gets impounded into price. To the extent information contained in the periodic reports currently provided under the Transparency Directive is disseminated after a MAD disclosure of the same information, this information is outdated on the day periodic reports are disseminated. This casts serious doubts on the extent of the usefulness of periodic reports in the investment decision-making process.

This article therefore calls for the suppression of the separate drafting, dissemination and storage of periodic reports and to replace them by a periodic update of the registration prospectus. The great majority of disclosure documents further to the EU issuer-disclosure regime would then be replaced with a single-document-driven disclosure regime subject to mandatory updating according to a schedule defined by the European regulator, next to MAD immediate disclosure requirements.[47]

This suggestion does not impact the national law requirements relating to the drafting, audition, approval, filing and publication of (yearly, condensed or quarterly) financial statements. Financial statements are indeed subject to different regulations.[48] This scheme does not impact either the national law provisions related to the drafting, approval, filing and publication of (interim) management reports.[49]

2. The single-document-driven disclosure regime in practice

Under the suggested scheme, the registration prospectus should be the base disclosure document, together with any supplement thereto.

The other disclosure documents that should be required to be separately drafted are:

40 See in recognition of the importance of on-going disclosure, IOSCO Technical Committee of the International Organisation for Securities Commissions, Principles for Periodic Disclosure by Listed Entities - Final Report (2010). See on the importance for institutional investors of the availability of information that can be compared, CRA International, Evaluation of the Economic Impacts of the Financial Services Action Plan - Final Report to the European Commission (2009), at 173.

41 See article 46(a)1(c) of the Fourth Company Law Directive and article 36.2(f) of the Seventh Company Law Directive.

42 See the wording of article 46(1)b of the Fourth Company Law Directive and article 36(1), alinea 2 of the Seventh Company Law Directive.

43 See the last revision of the Fourth and Seventh Company Law Directives, and in particular, recital (10) of directive 2006/46/EC of the European Parliament and of the Council of 14 June 2006 amending, *inter alia*, the Fourth Company Law Directive and the Seventh Company Law Directive, *OJ*, 16 August 2006, L 224.

44 See, for instance, article L225-102-1 of the French commercial code, introduced by article 116 of the French law on new economic regulations (*loi sur les nouvelles régulations économiques*, otherwise referred to as the *loi NRE*), as modified, and **Decree nr 2002-221 of 20 February 2002**.

45 Comp. with the U.S., where there is a requirement to file annual reports (on Form 10-K), quarterly reports (on Form 10-Q) as well as "current reports" (for major new developments, on Form 8-K).

46 See Louis Bachelier, Théorie de la spéculation, Gauthier Villars, 1900 reprinted as The Theory of Speculation, Princeton University Press, 2006. See on the history of the ECMH, Michael C. Jensen, et al., The Modern Theory of Corporate Finance (2d edition) (McGraw-Hill Education ed. 1984). or Stephen F. LeRoy, *Efficient Capital Markets and Martingales*, 27 J. Econ. Literature, (1989). See for early works on the ECMH, *inter alia*, Benoît Mandelbrot, *Forecasts of Future Prices, Unbiased Markets, and "Martingale" Models*, 39 J.Bus. 242, (1966); Paul A. Samuelson, Proof that Properly Anticipated Prices Fluctuate Randomly, 6 Indus. Mgmt. Rev. 41 (1965), reprinted in 3 The Collected Scientific Papers of Paul A. Samuelson 782-790 (R. Merton ed. 1972); Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 The Journal of Finance 383, (1970).

47 See for similar suggestions in the US context, Joseph A. Grundfest, et al., Reinventing the Securities Disclosure Regime: Online Questionnaires as Substitutes for Form-Based Filings (2008); Janis Sarra, *Disclosure as a Public Policy Instrument in Global Capital Markets*, 42 Tex. Int'l L. J. 875, (2007); Donald C. Langevoort, *Toward More Efficient Risk Disclosure for Technology- Enhanced Investing*, 75 Wash. U.L.Q. 753, (1997); Donald C. Langevoort, *Information Technology and the Structure of Securities Regulation*, 96 Harv. L. Rev. 747, (1985).

48 See, *inter alia*, the Fourth and Seventh Company Law Directives in that respect.

49 See, *inter alia*, the Fourth and Seventh Company Law Directives as well as the Transparency Directive in that respect.

– the summary registration prospectus, for marketing purposes, together with any supplement thereto,

– the short-form offering prospectus, together with any supplement thereto,

– the summary offering prospectus, for marketing purposes, together with any supplement thereto,

– the (interim) management report,

– the (condensed set of) financial statements.[50]

Once the registration prospectus is initially placed on the issuer's web-site, and as already mentioned, the issuer should be required to update those items that have been subject to a MAD disclosure and/or a requirement to provide a supplement.[51] In addition, it should be required to replace the (interim) management report and the (condensed set of) financial statements with the latest version. Besides, the issuer should comply with the specific timetable relating to the updating of data set out in the European Regulation. According to this timetable, information in the registration prospectus corresponding to current annual financial reports requirements should be annually updated whereas information in the registration prospectus corresponding to current half-yearly financial reports requirements should be updated half-yearly and information corresponding to interim management statements should be updated on a quarterly basis. The OFR should be updated on a continuous basis.[52]

The system should automatically focus attention of the users on changes from prior disclosures. If the company's business does not change as of the next date on which an update is required, no additional information would be necessary. The system should simply carry forward the prior disclosure with an automatically generated notation that there is no change from a prior update. If a change occurs, the issuer should amend its prior disclosures. Changes or amendments to already published materials should be easily recognisable. The system should automatically note the fact that a change has occurred and various software tools should be applied to highlight text that has been dropped from or added to the disclosure, like track changes. The system should be engineered so as to allow efficient identification of changed information. Audit trails should allow easy identification of the date and content of any modification, thereby allowing users to reconstruct easily any issuer's disclosure history as well as to trace any disclosure item.

To avoid the temptation of an issuer to make cosmetic changes, the European Regulation should require minimisation of the amount of altered text, thereby making it even easier to track and understand the changes and updates.

There should be an opt-in system where those who have disclosed their e-mail address to the issuer receive notice that new information has been posted with the appropriate web-link. The e-mail should specify whether the update is made pursuant to a requirement to make public any price sensitive information, i.e., information to be made public pursuant to the existing MAD provisions, or pursuant to a requirement to update the registration prospectus according to the schedule set out by the European Regulation, including the requirement of supplements. This should allow investors to determine the importance of the update and when they should review it.

V. Conclusions

The disclosure regime to which corporate equity issuers are subject under the Prospectus Directive, the Transparency Directive and the MAD have similar objectives whether or not the issuer is offering securities at the time of disclosure. Therefore, this article argued that the content and format of disclosure should be the same on primary and secondary markets, at least with respect to large and thickly traded issuers whose securities are traded in an efficient market.

In this context, it was suggested to replace the disclosure requirements under the Prospectus Directive, the Transparency Directive and the MAD by a single European Regulation as this would allow for the obvious advantage of consistency among the various disclosure and disclosure-related rules. This would achieve an integrated disclosure system on European primary and secondary markets.

Besides, it was suggested to make a move to more company registration system in European financial laws. Under the suggested scheme of company registration, where information is adequately disseminated to the market-place and to investors through disclosure subsequent to the registration prospectus, the European disclosure regime would be tailored to scale back the existing issuer-disclosure requirements to the extent that only a short-form offering prospectus should be required for further issues, except for large issues.[53]

It means that secondary public offerings issuers should not any longer be burdened with time-consuming requirements that provide no significant added-value in the flow of information to investors.

It also means that competent supervisory authorities should not anymore have to approve, where they have to approve at all, lengthy documents for secondary public offerings where it is not necessary from a market's perspective. This is especially important where there is a pricing-risk associated with an extended time-scale for approval of the relevant documents.

It would also reduce issuer's costs by avoiding the separate drafting (and dissemination, as the case may be) of periodic reports while at the same time increasing the possibilities for investors to make useful comparisons to take informed investment/trading decisions.

50 Management certifications are not mentioned as the author does not consider that they offer any added value with a view to increase investor protection. See for further details, Gaëtane Schaeken Willemaers, The EU Issuer-Disclosure Regime - Objectives and Proposals for Reform (Kluwer Law International. 2010 (forthcoming)).

51 See for provisions on supplements to prospectuses, article 16 of the Prospectus Directive.

52 *Accord* in the US context, with respect to the MD&A, Donald C. Langevoort, *Managing the 'Expectations Gap' in Investor Protection: The SEC and the Post-Enron Reform Agenda*, Vill. L.Rev. 1139, (2003), at 20.

53 This does not mean however that disclosure requirements are scaled back across the board as, given the developments in connection with an integrated disclosure system, periodic disclosure could become more demanding under this scheme than is currently the case.

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