United in diversity: maximum versus minimum harmonization in EU securities regulation

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Key points

- This articles uses the recent drive in the UK to abolish gold-plating as a starting point to analyse whether EU legislation on prospectus disclosure, transparency requirements, and market abuse provides for maximum harmonisation or allows Member States to adopt super-equivalent implementing measure.
- In addition, the article develops a number of general criteria to identify situations where maximum harmonisation may be beneficial, and cases where the setting of minimum standards, or merely the removal of obstacles to cross-border mobility, is advantageous.
- The article argues that prospectus disclosure entails largely maximum harmonisation. The character of the Transparency and Market Abuse Directives, on the other hand, is ambivalent. Recent case law calls into question the permissibility of the super-equivalent implementation of the Market Abuse Directive by UK law.
- As far as the benefits of harmonisation are concerned, the article distinguishes between disclosure obligations and liability provisions. It is submitted that harmonisation is beneficial with respect to the latter, but should be scrutinized carefully in case of the former.

1. Introduction

Judging by recent policy statements by HM Government, gold-plating, ie the super-equivalent implementation of EU law,[1] is increasingly falling out of favour in the UK. The general position is that gold-plating should be avoided, unless in exceptional circumstances.[2] The reason usually given for this policy decision is that UK businesses should not be put at a competitive disadvantage compared with their European counterparts.[3] If we focus on the securities markets directives, then this is a somewhat narrow explanation, since the listing in a highly regulated environment can also be interpreted by investors as a signal for the quality of the issuer, which may translate into lower costs of capital for the issuer.[4]

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1 Generally on gold-plating see Davidson Review, *Implementation of EU legislation: Final Report* (2006), 17–35.

2 See HM Government, *Transposition Guidance: How to Implement European Directives Effectively* (2011) 2.7.

3 ibid.

4 So-called 'bonding hypothesis', see Andreas Charitou, Christodoulos Louca and Stelios Panayides, 'Cross Listing, Bonding Hypothesis and Corporate Governance' (2007) 34 JBFA 1281; John C Coffee, 'Racing towards the Top: The Impact of Cross-Listing and Stock Market Competition on International Corporate Governance' (2002) 102 Colum L Rev 1757; Tobias H Tröger, 'Corporate Governance in a Viable Market for Secondary Listings' (2007) U Pa J Bus Employ L 89.

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This article uses the policy change in the UK as a starting point to analyse the extent to which gold-plating remains permissible in EU securities regulation, focusing on prospectus disclosure, transparency requirements and market abuse. In addition, it attempts to identify situations in which maximum harmonization may be beneficial, and cases where the setting of minimum standards, or merely the removal of obstacles to cross-border mobility, is advantageous. Section 2 will give a brief overview of the theoretical considerations informing the maximum/minimum harmonization debate. Section 3 describes the development of EU securities regulation towards a comprehensive, single rulebook on capital markets law and analyses the scope that a number of EU instruments leave for gold-plating and regulatory competition. Section 4 seeks to develop a legal matrix that facilitates the distinction between situations that lend themselves to full harmonization, and situations where minimum rules should be preferred. Section 5 concludes.

2. Harmonization and regulatory competition

The debate about gold-plating, maximum and minimum harmonization, and the promulgation of a single EU rulebook on securities regulation centres around the question whether regulation in partly integrated legal systems, ie federations of states or supranational organizations such as the EU, should be centralized or decentralized. This question has been discussed extensively in the academic literature.[5] Therefore, it will suffice to give a brief overview to place the issues that are relevant for the purposes of this article into context. It is argued that rule-making at the local level, and accordingly the facilitation of (at least limited) regulatory competition, allows experimentation and the adoption of laws that are tailored to the demands and preferences of the local constituencies.[6] In other words, local rule-making addresses two difficulties that harmonisation and centralisation potentially face. First, it introduces a measure of the appropriateness of a legal rule by enabling the addressees to select or deselect it. Of course, the selection and deselection is only possible if the market participants have a real choice between different regulatory models because they can move between jurisdictions at a low cost. The European Union has satisfied this basic precondition at least partially,

5 See, for example, John Armour, 'Who Should Make Corporate Law? EU Legislation versus Regulatory Competition' (2005) 58 CLP 369; William W Bratton and others (eds), *International Regulatory Competition and Coordination: Perspectives on Economic Regulation in Europe and the United States* (Clarendon Press 1996); Stephen J Choi, 'Promoting Issuer Choice in Securities Regulation' (2001) 41 Va J Int'l L 815; Simon Deakin, 'Legal Diversity and Regulatory Competition: Which Model for Europe?' (2006) 12 ELJ 440; Luca Enriques and Matteo Gatti, 'Is There a Uniform EU Securities Law After the Financial Services Action Plan' (2008) 14 Stan JL Bus & Fin 43; Luca Enriques and Matteo Gatti, 'The Uneasy Case for Top- Down Corporate Law Harmonization in the European Union' (2006) 27 U Pa J Int'l Econ L 939; Luca Enriques and Tobias H Tröger, 'Issuer Choice in the EU and its Impact on the Market for Corporate Law' [2008] RTDF 4; Daniel C Esty and Damien Géradin, *Regulatory Competition and Economic Integration: Comparative Perspectives* (OUP 2001); Niamh Moloney, *EC Securities Regulation* (2nd edn, OUP 2008) 27–31; Roberta Romano, *The Genius of American Corporate Law* (AEI Press 1993); Roberta Romano, 'Law as a Product: Some Pieces of the Incorporation Puzzle' (1985) 1 JL Econ & Org 225; Roberta Romano, 'Empowering Investors: A Market Approach to Securities Regulation' (1998) 107 Yale LJ 2359.

6 Deakin (n 5) 441–42.

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although the costs of, for example, electing a corporate law regime by incorporating in a country other than the country of residence of the incorporators are non-zero.[7]

Second, decentralization ensures that more local knowledge is used in the process of designing and enforcing legal rules. The central rule-making authority, if such an authority exists, is necessarily constrained with respect to the information that it can gather and process.[8] The constraints are more significant if the population and territory over which it exercises its jurisdiction are large. In an EU of about 500 million people, diverse cultural preferences and economic conditions, it is evident that the gathering of accurate data regarding, for example, the impact of proposed legislation on local markets and businesses, is highly complex. Local authorities may be better placed to judge these conditions because they interact more closely with the local market participants and are more familiar with the social idiosyncrasies of the respective place. Given that cultural, economic or other social differences may necessitate differences in regulation, decentralized rule-making has the advantage of providing for flexibility to take account of these differences and avoiding the risk of a one-size-fits-all regulatory approach. The required flexibility can, of course, also be achieved in legislation promulgated by a central authority, for example by providing for opt-outs or regulating by means of soft law.[9] But this is, essentially, comparable to a delegation of rule-making power to the local level, where the decision is taken whether to make use of opt-outs and follow soft law or not to comply.

On the other hand, decentralization and regulatory competition are often criticized for giving rise to the risk of a race to the bottom,[10] increasing transaction costs for market participants that operate internationally, being detrimental to legal certainty, and creating psychological barriers for non-professional market actors (consumers or retail investors)

7 The extent to which the precondition is satisfied will be discussed in greater detail in Section 4 below. However, it should be noted that even if the legal prerequisites for regulatory choice are present, the well-known phenomenon of home bias may call into question the willingness or ability of issuers and investors to actively choose the regime that is most suitable for them, see Moloney (n 5) 30–31. In addition, it is doubtful whether the market is able to identify and price differences in the quality of regulation correctly, see James D Cox, 'Regulatory Duopoly in U.S. Securities Markets' (1999) 99 Colum L Rev 1200, 1232–33.

8 This problem was already identified by Friedrich A Hayek, 'The Use of Knowledge in Society' (1945) 35 Am Econ Rev 519.

9 See, for examples, the recent corporate governance initiatives of the European Commission, eg Commission Recommendation 2009/384/EC of 30 April 2009 on remuneration policies in the financial services sector [2009] OJ L120/22; Commission Recommendation 2009/385/EC of 30 April 2009 complementing Recommendations 2004/913/EC and 2005/162/EC as regards the regime for the remuneration of directors of listed companies [2009] OJ L120/28; Commission Recommendation 2004/913/EC of 14 December 2004 fostering an appropriate regime for the remuneration of directors of listed companies [2004] OJ L 385/55; Commission Recommendation 2005/162/EC of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board [2005] OJ L52/51. A much-discussed example of differentiated regulation through opt-outs is the EU Takeover Directive, Directive 2004/25/EC of 21 April 2004 on takeover bids [2004] OJ L 142/12. For an analysis of the different options contained in the Takeover Directive see Paul L Davies, Edmund-Philipp Schuster and Emilie van de Walle de Ghelcke, 'The Takeover Directive as a Protectionist Tool?' in: Wolf-Georg Ringe and Ulf Bernitz (eds), *Company Law and Economic Protectionism* (OUP 2010).

10 This argument was famously made with respect to regulatory competition for corporate charters in the United States by William L Cary, 'Federalism and Corporate Law: Reflections upon Delaware' (1974) 83 Yale LJ 663. However, empirical evidence does not seem to confirm that the risk of a race to the bottom in the securities markets materializes where regulatory competition is allowed to unfold, see Howell E Jackson and Eric J Pan, 'Regulatory Competition in International Securities Markets: Evidence from Europe in 1999 – Part I' (2001) 56 Business Lawyer 653.

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that may lack confidence in a heterogeneous regulatory regime.[11] It is submitted that, ultimately, it is an empirical question whether the arguments in favour or against regulatory competition prevail, which must be answered by the policy-maker on a case-by-case basis after a careful assessment of the relevant variables. The goal of the policy assessment must be a determination of the optimal, ie cost-minimizing, balance between, on the one hand, the beneficial effects of regulatory competition, notably in the form of the greater responsiveness of the legal regime to local particularities and changed market conditions, and, on the other hand, the costs of regulatory competition, as outlined above.

While this is not a legal issue that could be resolved in abstract and general terms, and this article, accordingly, does not endeavour to do so, it is useful to map the legal framework within which the conflict between harmonization and localized law-making unfolds. In the literature, it has been pointed out that, depending on the institutional setup, decentralized rule-making may give rise to two different types of regulatory competition that have been termed 'competitive federalism'[12] and 'reflexive harmonization'.[13] Competitive federalism is characterized by the far-reaching removal of obstacles to cross-border mobility, without the setting of common rules, in order to allow a competitive market for regulatory standards to evolve. This type of regulatory competition is likely to result in the dominance of the legal system that is able to attract most 'consumers' of the legal rules.[14] Reflexive harmonization argues that 'some' level of harmonization is needed in order to provide for appropriate conditions under which experimentation and adaptation can occur.[15] Thus, reflexive harmonization does not intend to identify the 'one' optimal regulatory regime (which may not exist), but rather enable legal diversity.

The EU market freedoms are mainly concerned with the first type of regulatory competition. By way of negative integration, barriers to mobility are removed and discrimination prohibited, but substantive rule-making is not centralized.[16] EU securities regulation, on the other hand, has long gone beyond the negative integration model by establishing sets of rules that have evolved into a comprehensive regulatory framework for the capital markets. The question remains whether this framework is (or should be) more calibrated towards the removal of barriers to cross-border economic activity or the setting of substantive standards that leave only limited, or no, room for national diversity.

11 Holger Fleischer and Klaus Ulrich Schmolke, 'The Reform of the Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure?' (2011) 12 EBOR 121, 134–35. The last point is an argument that is often advanced by the Commission in pushing for full harmonization.

12 Romano, 'Empowering Investors' (n 5) 2361.

13 Simon Deakin, 'Two Types of Regulatory Competition: Competitive Federalism versus Reflexive Harmonisation. A Law and Economic Perspective on Centros' (1999–2000) 2 Cambridge YB Eur Legal Stud 231.

14 The paradigm is, of course, Delaware's success in the US states' competition for incorporation, see Romano, *Genius of American Corporate Law* (n 5) 6–12.

15 Deakin (n 13) 232–33.

16 For a general discussion of the different models of integration underpinning the common market see Catherine Barnard, *The Substantive Law of the EU* (3rd edn, OUP 2010) 17–29.

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The following section will analyse where EU securities regulation can be located in this continuum.

3. Federalization of EU securities regulation

The development of a supra-national regulatory regime for the European capital markets began with the harmonization of the requirements for the admission of securities to stock exchange listing[17] and the setting of common disclosure standards[18] in order to facilitate the access of issuers to capital markets throughout the EU. The Commission's initiatives intended to reduce the regulatory burden by achieving 'an adequate degree of equivalence'[19] in the regulatory requirements imposed by the Member States. Rather than striving for uniformity, the directives generally aimed at minimum harmonization. They left room for the Member States to go beyond the requirements of the directives and impose stricter rules.[20] In addition, the early capital markets directives introduced the principle of mutual recognition (which should later become the passport regime) to ensure that market participants that satisfied the regulatory requirements in one Member State were granted partial relief from the authorization and disclosure requirements in the other Member States.[21]

Not surprisingly, the national regimes remained diverse and complex. This was a function of the use of the directive as a legislative instrument, instead of the regulation, the open-ended formulation of the provisions, which gave Member States room to adopt diverging rules, and the ambivalent requirements regarding cooperation between competent authorities, which did not always succeed in removing the burden of

17 See Council Directive 79/279/EEC of 5 March 1979 coordinating the conditions for the admission of securities to official stock exchange listing [1979] OJ L66/21 (Admission Directive). The harmonized admission requirements are now contained in Title II and Title III, arts 42–63, of Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L184/1 (Consolidated Admissions Requirements Directive (CARD)).

18 In the primary market, disclosure was harmonized by the Listing Particulars Directive, Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing [1980] OJ L100/1, and in the secondary market by the Interim Reports Directive, Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing [1982] OJ L48/26.

19 Listing Particulars Directive (n 18), recital 4.

20 See, for example, ibid (describing the objective of the Directive as eliminating the legal differences between Member States 'by coordinating the rules and regulations without necessarily making them completely uniform'); Interim Reports Directive (n 18), art 3 (expressing the minimum harmonization character of the Directive).

21 Mutual recognition can now be found in the Prospectus Directive, Directive 2003/71/EC of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading [2003] OJ L345/64, arts 17, 18; Directive 2004/39/EC of 21 April 2004 on markets in financial instruments [2004] OJ L145/1 (MiFID), arts 31, 32; and the UCITS regime, see Directive 2009/65/EC of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities [2009] OJ L302/32, arts 5 (UCITS), 6 (management companies), 27 (investment companies). Mutual recognition is supplemented by the principle of home Member State control, which finds its expression, for example, in the requirement to seek approval of the securities offering prospectus by the competent authority of the home Member State (Prospectus Directive, art 13(1)), the empowerment of the regulator of the home Member State to collate the regulated information disclosed pursuant to the Transparency Directive and enforce the disclosure obligations (Directive 2004/109/EC of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2004] OJ L390/38, arts 19, 24), and the authorization and supervision of UCITS, management companies, and investment firms by the competent authority of the home Member State (UCITS Directive, arts 5–8, 10, 27; MiFID, arts 5, 16, 17; on the allocation of supervisory jurisdiction between home and host State see also Moloney (n 5) 424).

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duplicative national requirements.[22] In any case, the approach to regulation in the 1980s and 1990s focused on reducing the obstacles to the cross-border operations of issuers and investors. Effective regulatory competition by selecting an advantageous legal environment was possible due to the minimum-harmonization character of most legislative instruments.

Beginning with the seminal Financial Services Action Plan (FSAP) of 1999[23] and the development of the Lamfalussy process,[24] the regulatory approach changed fundamentally. European securities regulation moved towards a model of full (maximum) harmonization, with enhanced cooperation between Member States in enforcement matters.[25] The policy choices of the national rule-makers were increasingly substituted with those of the Commission. In the literature, this development has been called 'harmonization as transformative regulation'.[26] The main rationale underlying the shift in regulatory philosophy was the Commission's belief, substantiated by economic studies, that market integration and deep and liquid securities markets have a positive impact on the issuers' cost of capital.[27] In addition to removing obstacles to cross-border economic activity, the Commission pursued further substantive policy goals. It intended to promote EU securities markets and strengthen market finance by increasing investor confidence, providing for a high level of prudential supervision and investor protection, and opening up retail markets.[28] As a consequence, the post-FSAP approach to securities regulation combined the passport and home Member State control, ie devices that allow, in principle, regulatory competition and the selection and deselection of regulatory regimes by the market participants, with the promulgation of detailed, harmonized rules, the more frequent use of regulations, and, most recently, the establishment of supranational supervisory authorities with comprehensive powers.[29]

22 For an overview of the reasons for the failure of the early capital markets directives to reduce the regulatory burden on international issuers see Moloney (n 5) 107–09. A crucial obstacle was the continuing requirement in many Member States to translate the complete disclosure documents, ibid 107.

23 Commission Communication of 11 May 1999, *Implementing the framework for financial markets: action plan*, COM (1999) 232 final.

24 See Committee of Wise Men, *Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets* (2000).

25 Takis Tridimas, 'EU Financial Regulation: Federalization, Crisis Management, and Law Reform' in Paul Craig and Gráinne de Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011) 784–85, identifies five phases in the development of EU financial law: The first, spanning the 1970s, focused on the harmonization of corporate law, the second and third were characterized by the use of mutual recognition and home country control to promote the internal market. The development described in the main text is associated with the fourth phase, which saw a marked increase in legislative activity in financial regulation, initiated by the FSAP. The fifth phase consists in the response of the EU to the financial crisis, including the setting up of a new supervisory architecture for the financial services.

26 Moloney (n 5) 40.

27 London Economics, *Quantification of the Macro-Economic Impact of Integration of EU Financial Markets* (Final Report to the European Commission, 2002). The conclusions of the London Economics study echoed the assessment of the Lamfalussy report that the competition and choice brought about by deep and liquid pan-European markets would 'drive down the cost of capital'. See Committee of Wise Men, *Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (2001) 9.

28 Moloney (n 5) 88 argues that the post-FSAP strategy was characterized by the policy goal of 'actively driving the integration of markets, changing issuer and investor behaviour, and further entrenching the growth of market finance'.

29 For an analysis of the rule-making and supervisory powers of the European Securities Markets Authority, established in 2011, see Niamh Moloney, 'The European Securities and Markets Authority and Institutional Design for the EU Financial Market – A Tale of Two Competences: Part (1) Rule-Making' (2011) 12 EBOR 41; 'Part (2) Rules in Action' (2011) 12 EBOR 177.

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This shift does not mean that all capital markets directives are now full harmonization measures. Rather, every regulatory initiative, and indeed individual regulatory instruments contained in the directives, such as disclosure obligations or the prohibition of specified types of market behaviour, must be analysed separately to identify whether they entail minimum or maximum harmonization. We will focus here on three legislative measures to analyse the federalization of EU securities regulation in more detail: prospectus disclosure (Prospectus Directive), periodic disclosure (Transparency Directive) and insider dealing and market manipulation (Market Abuse Directive).

Prospectus disclosure

Prospectus disclosure illustrates well how the regulatory emphasis of the Commission changed over time. The early primary market disclosure directives[30] and the Consolidated Admissions Requirements Directive (CARD) allowed the Member States to go beyond the requirements of the directives.[31] While not formally promulgating maximum harmonization, the Prospectus Directive modernized the 'partial and complex'[32] mutual recognition mechanism of the earlier directives in several ways that effectively introduced a set of uniform rules exhaustively regulating the primary market. First, the derogations and exemptions possible under the Prospectus Directive are designed as binding provisions, rather than options within the discretion of the Member States.[33] Second, the mutual recognition principle is implemented more stringently. Under the earlier directives, the Member States were asked to 'use their best endeavours' to avoid the duplication of formalities and exempt the issuer, 'as far as possible', from the preparation of new listing particulars if the issuer's securities had been admitted to official listing in another Member State within the past six months.[34] In addition, the States were able to require full translations of the offering documents and supplements to listing particulars already approved by the State of first listing 'as necessary to meet the individual requirements' of the Member State.[35] Prospectuses for public offerings without listing were exempted from any form of approval procedure once they had been formally approved in one Member State, but the Member States could require the inclusion of 'information specific to the market of the country in which the public offer is made'.[36]

30 Listing Particulars Directive (n 18); Public Offers Directive, Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public [1989] OJ L124/8.

31 Listing Particulars Directive (n 18), recital 4; Public Offers Directive (n 30), recital 6; CARD (n 17), recitals 6, 11, arts 8, 71 (emphasizing that the harmonized requirements 'should be sufficiently flexible to enable account to be taken of present differences in the structures of securities markets in the Member States and to enable the Member States to take account of any specific situations with which they may be confronted', ibid recital 6).

32 Prospectus Directive (n 21), recital 1.

33 For example, compare the exemptions pursuant to art 6 Listing Particulars Directive and art 5 Public Offers Directive (Member States 'may allow' or 'may provide for partial or complete exemption' from the obligation to publish listing particulars or a prospectus in specified cases) with art 4 Prospectus Directive ('The obligation to publish a prospectus shall not apply . . . ').

34 Listing Particulars Directive (n 18), art 24.

35 ibid art 24(1).

36 This was information 'concerning in particular the income tax system, the financial organizations retained to act as paying agents for the issuer in that country, and the way in which notices to investors are published', see Public Offers Directive (n 30), art 21(1).

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The Prospectus Directive replaced this ambivalent recognition mechanism by a simple notification procedure that consolidated all approval and administrative powers in the hands of the home Member State, even those regarding supplements dealing with material new factors arising after the initial approval of the prospectus.[37] A full translation can no longer be required, only a translation of the summary.[38] Third, the detailed contents of the prospectus, which were specified in an annex to the Listing Particulars Directive, are now laid down in the directly applicable Prospectus Regulation, thus removing the possibility of gold-plating.[39] As a consequence of these innovations, the Prospectus regime leaves little scope for diverging Member State rule-making, at least as far as disclosure standards are concerned.[40] Arguably, the risk of differences in the interpretation of key terms that are not well defined in the Directive[41] and the reluctance of host State competent authorities to embrace the spirit of the rules wholeheartedly remains,[42] but the Prospectus regime largely subscribes to maximum harmonization. This view has been reinforced by the latest amendments to the Prospectus Directive and the establishment of the European Securities and Markets Authority (ESMA).[43] The Commission envisages that the activities at the European level will result in a single rulebook fostering convergence in interpretation and application of the requirements of the Directive.[44]

Transparency

The transparency regime started from a similar point of fragmentary minimum harmonization as the prospectus regime. The transparency requirements were scattered over several directives, including the Fourth and Seventh Company Law Directives,[45] the

37 Prospectus Directive (n 21), art 17.

38 ibid art 19.

39 Commission Regulation (EC) 809/2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements [2004] OJ L215/3.

40 Liability for incorrect market disclosure, on the other hand, is only harmonized rudimentarily, see Prospectus Directive, art 6. Furthermore, the Member States retain (limited) authority to impose additional requirements 'in the context of admission to trading of securities on a regulated market (notably regarding corporate governance)' and include supplementary information in the prospectus 'if necessary for investor protection', Prospectus Directive, recital 15, art 21(3)(a).

41 See, for example, the discussion in the Member States regarding the concept of 'public offer' (Prospectus Directive, art 2(1)(d)), eg Markus Lenenbach, *Kapitalmarktrecht und kapitalmarktrelevantes Gesellschaftsrecht* [Capital Markets Law and Corporate Law with Relation to the Capital Markets] (2nd edn, RWS Verlag 2010) paras 10.263–10.265.

42 See the feedback of market participants, Centre for Strategy & Evaluation Services CSES), *Study on the Impact of the Prospectus Regime on EU Financial Markets* (Final Report, 2008) 19, expressing their concern that the competent authorities in the different Member States had sometimes adopted different interpretations of the Prospectus Regulations or added additional requirements. For example, it was pointed out that some competent authorities required translation checks or the publication of an advertisement or a notice in a local newspaper.

43 Directive 2010/73/EU of 24 November 2010 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 harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2010] OJ L327/1.

44 ibid recital 8. Commentators also expect that the powers of ESMA to adopt binding technical standards (which are, subject to endorsement by the Commission, generally applicable in the Member States pursuant to arts 290, 291 TFEU) will 'lead to a significant intensification of the EU rule-book', see Moloney (n 29), 'Part (1) Rule-Making', 64. The powers of ESMA to adopt such standards are laid down in Regulation (EU) No 1095/2010 of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority) [2010] OJ L331/84, arts 10–15.

45 Fourth Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies [1978] OJ L222/11; Seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts [1983] OJ L193/1.

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Admission Directive of 1979,[46] the Interim Reports Directive of 1982[47] and the Substantial Shareholdings Directive of 1988.[48] These directives required issuers whose shares were admitted to official listing to produce annual and half-yearly reports,[49] inform the public of major new developments[50] and disclose substantial holdings.[51] The transparency regime was cumbersome. It did not operate on the basis of full harmonization.[52] Neither did it provide for safeguards against the application of multiple regulatory regimes, for example by establishing home Member State control and allowing the use of passports. Instead, the regulatory approach at that time was to encourage cooperation between competent authorities of different Member States with a view to producing a single disclosure document acceptable to all regulators involved.[53] In addition, so-called Contact Committees were set-up to facilitate harmonized implementation and consultation between Member States in case some States adopted super-equivalent provisions.[54] As a consequence of the fragmentary harmonization, the national laws differed significantly with regard to disclosure obligations.[55]

The Transparency Directive employs the techniques developed for prospectus disclosure to address the deficiencies of the old transparency regime and improve market integration. It uses a concept of home Member State that closely follows the definition of the Prospectus Directive,[56] entrusts the competent authority of the home Member State with the control of the issuer,[57] and streamlines the language requirements so that the disclosures do not need to be translated into the languages of all Member States where securities are admitted to trading on a regulated market.[58] However, in contrast to the prospectus regime, the Transparency Directive is explicit in establishing only minimum rules. The Directive provides that the home Member State may make issuers subject to requirements more stringent than those under the Directive.[59] The same is the case for the obligation to disclose major holdings, which does not only apply to the

46 Admission Directive (n) 17.

47 Council Directive 82/121/EEC of 15 February 1982 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing [1982] OJ L48/26.

48 Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of [1988] OJ L348/62.

49 Interim Reports Directive (n 47), arts 2, 4–8.

50 Admission Directive (n 17), schedule C(5)(A), schedule D(4)(A).

51 Admission Directive (n 17), schedule C(5)(C); Substantial Shareholdings Directive (n 48), art 4.

52 For example, the Interim Reports Directive (n 47), art 3, and the Substantial Shareholdings Directive (n 48), art 3, allowed Member States to subject the addressees of the measures to more stringent obligations than those provided for by the Directives.

53 Similar to the early primary market directives (n 34), the competent authorities were expected to 'use their best endeavours' to accept a single text, see, eg the Interim Reports Directive (n 47), art 10.

54 Admission Directive (n 17), art 20; Interim Reports Directive (n 47), art 11; Substantial Shareholdings Directive (n 48), art 16.

55 Committee of Wise Men (n 24) 16.

56 Based on the place where the issuer's registered office is located and including limited choice for issuers of debt securities denominated in €1,000 or more per unit. See Transparency Directive (n 21), art 2(1)(i).

57 ibid art 19. The host Member State can only act if this is necessary to protect investors and the home Member State fails to address irregularities committed by issuers adequately, ibid art 26 (precautionary measures). This is again comparable to the mechanisms under the prospectus regime, see Prospectus Directive (n 21), art 23.

58 ibid art 20.

59 ibid art 3(1).

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issuer, but also shareholders and potentially other natural or legal persons.[60] The host Member State, on the other hand, is prohibited from imposing additional requirements on issuers regarding the admission of securities to a regulated market in its territory or on shareholders as regards the notification of major holdings.[61]

The UK used the flexibility granted by the Directive to provide for super-equivalent requirements in several respects. Notably, the thresholds for the disclosure of major holdings are lower than under the Directive[62] and disclosure obligations are extended to encompass cash-settled derivatives.[63] Many other Member States also made extensive use of gold-plating.[64] The level of harmonization achieved by the Directive has, accordingly, been criticized as being low.[65] This should, in principle, not be a major obstacle to issuers who are generally only subject to one regulatory regime due to the home Member State control and mutual recognition mechanisms enshrined in the Directive.[66] However, it poses an obstacle for investors who may be subject to varying notification requirements in different Member States where they invest. This differential effect of the Transparency Directive was confirmed by the impact assessment, which found that a significantly larger proportion of investors than issuers felt that they were adversely affected by the non-uniform implementation of the Directive.[67] The amendments to the Transparency Directive proposed in October 2011 address the problem by retaining minimum harmonization for disclosure obligations imposed on issuers, but replacing it by maximum harmonization with respect to the notification requirements of shareholders, natural persons or legal entities (other than the issuer).[68]

The arguments in favour of full harmonization are the same as those advanced with respect to prospectus disclosure. A single EU rulebook on transparency would simplify cross-border investments, reduce compliance costs for issuers and investors that operate

60 For example, pursuant to arts 10, 13.

61 ibid art 3(2).

62 Compare the Transparency Directive, art 9(1), and the FSA Disclosure Rules and Transparency Rules, DTR 5.1.2R.

63 The Directive only requires disclosure if the derivatives 'result in an entitlement to acquire, on such holder's own initiative alone, under a formal agreement, shares to which voting rights are attached', Transparency Directive, art 13(1). This is defined as meaning that the holder must enjoy, 'on maturity, either the unconditional right to acquire the underlying shares or the discretion as to his right to acquire such shares or not', Directive 2007/14/EC, art 11(1). UK disclosure rules, on the other hand, also apply to financial instruments which 'have similar economic effects' (DTR 5.3.1R(1)(b)(ii)) to those described in the Directive, ie derivatives referenced to shares, where 'the holder of the financial instrument has, in effect, a long position on the economic performance of the shares, whether the instrument is settled physically in shares or in cash.' See DTR 5.3.3G(2)(a).

64 A comprehensive overview is given by European Commission, *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*, SEC (2008) 3033 final (2008). For an analysis of gold-plating in Germany see Fleischer and Schmolke (n 11) 126–27.

65 Mazars, *Transparency Directive Assessment Report, External Study Conducted for the European Commission* (2009) 54.

66 See the discussion below in Section 4.2.

67 ibid 56. Only 12–16% of issuers believed that the non-uniform implementation was problematic, while the figure ranged between 33–36% for different groups of investors and went as high as 66.7% for financial analysts. See also European Commission, Impact assessment accompanying the Transparency Directive amendments, SEC(2011) 1279 final/2, 21–22.

68 Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, COM(2011) 683 final, art 1(2) (amending art 3(1) of the Transparency Directive). It should be noted that home Member States remain free to set lower notification thresholds than those laid down in art 9(1). The Commission believed that this flexibility was important to take account of differences in the ownership structures of companies in the Member States, see Proposal 7–8.

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internationally, ensure a level playing field across the EU and reduce uncertainty.[69] However, the feedback to the latest reform proposals was ambivalent in its assessment of the necessity of maximum harmonization, in particular as regards issuer disclosure.[70] The Commission's proposal, accordingly, combines elements of maximum and minimum harmonization, as described above. Compared with the prospectus regime, the regulatory approach can be described as placing a greater emphasis on the removal of obstacles to cross-border economic activity and the demarcation of the scope of application of potentially conflicting national regulatory regimes, rather than the promulgation of a single transparency rulebook.

Market abuse

The greatest difficulties in evaluating the maximum or minimum-harmonization character of European securities law are posed by the EU's market abuse regime. The development of the regulation of insider trading and market manipulation on the European level exemplifies the drive towards a single rulebook and maximum harmonization, but it remains unclear to what extent full harmonization has actually been achieved.

The first legislative measure in this field, the Insider Dealing Directive of 1989,[71] explicitly stated that the Member States were entitled to adopt provisions more stringent than those laid down by the Directive, for example by extending the personal or material scope of the insider dealing prohibition.[72] The Court of Justice confirmed the general minimum harmonization character of the Insider Dealing Directive in one of its first European securities regulation judgments, *Verdonk*.[73] In that case, the Belgian implementing legislation went beyond the directive in that it did not only prohibit insiders from taking advantage of inside information 'with full knowledge of the facts',[74] but whenever the insider knew, or ought reasonably to have known, that he or she was trading on the basis of inside information.[75] At the same time, however, the Belgian law exempted information possessed by holding companies because of their role in the management of the companies that they owned from the definition of inside information.[76] The Court held that, while it was permissible to adopt a more stringent insider dealing regime than that provided for in the directive, the Member States were required to ensure that the national prohibition was 'the same for all natural or legal persons subject to the legislation' and did not treat particular types of market participants more favourably than others.[77] Thus, the interpretation of the Court of Justice embodied

69 European Commission, *Feedback Statement: Summary of responses to the consultation by DG Internal Market and Services on the modernisation of the Transparency Directive (2004/109/EC)* (2010) 28.

70 ibid 28–31.

71 Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [1989] OJ L334/30.

72 ibid art 6.

73 Case C-28/99 *Public Prosecutor v JMGH Verdonk, RAA Everaert and EM De Baedts* OJ C121/8 [2001] ECR I-3399.

74 Insider Dealing Directive, art 2(1).

75 *Verdonk* (n 73) paras 8, 31.

76 ibid para 7.

77 ibid paras 34, 35.

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an understanding of the internal market rooted in limited regulatory competition, unfolding within a regulatory framework that focused on setting minimum standards and removing obstacles to cross-border financial activity.

The character of the Market Abuse Directive,[78] which repealed the Insider Dealing Directive and introduced the prohibition of market manipulation,[79] is more ambivalent. The directive does not expressly enjoin Member States from adopting more stringent rules. Accordingly, the Market Abuse Directive was qualified as a 'minimum-standards measure' by commentators.[80] Several Member States, including the UK, have prohibitions in place that are wider than those of the Directive.[81] However, the shift in regulatory philosophy can be deduced from the fact that the Market Abuse Directive no longer explicitly authorizes the Member States to adopt super-equivalent rules. Rather, the recitals criticize that the market abuse rules vary from one Member State to another[82] and emphasize the importance of establishing a level-playing field.[83] Furthermore, the provisions of the Market Abuse Directive are characterized by a high level of detail, in particular if read in combination with the implementing measures,[84] which could be interpreted as laying down exhaustive definitions and prohibitions.

The question of whether the Market Abuse Directive leaves room for gold-plating became relevant in the recent *Spector Photo Group* decision of the Court of Justice.[85] The case concerned again the Belgian legislation implementing the insider dealing prohibition. The referring court was doubtful whether the Belgian law, which prohibited any person in possession of inside information from acquiring or disposing of securities, was in compliance with the Directive. The Directive was, arguably, narrower since it contained the additional requirement that persons in possession of inside information were prohibited from 'using that information' by acquiring or disposing of securities.[86]

78 Directive 2003/6/EC of 28 January 2003 on insider dealing and market manipulation (market abuse) [2003] OJ L96/16.

79 ibid art 6. Market manipulation was not caught by the Insider Dealing Directive of 1989, which led to legal loopholes, see, eg Case C–391/04 *Ypourgos Oikonomikon and Proïstamenos DOY Amfissas v Charilaos Georgakis* [2007] ECR I-3741 (cash-sales that were carried out exclusively between the shareholders of a company in order to increase the market price of the company did not constitute insider trading if all parties to the transactions were in possession of the same information). Closing these loopholes was one of the objectives for the adoption of the Market Abuse Directive, see Directive 2003/6/EC, recital 13.

80 Moloney (n 5) 35.

81 In the UK, the Financial Services and Markets Act 2000 (FSMA), ss 118(4), 118(8), 118A(2) and 118A(3) go beyond the Directive. They stem from the regulatory framework pre-existing the Market Abuse Directive. The UK legislature decided to retain them, but make them subject to a sunset clause. The sunset clause was recently extended (for the third time) until 31 December 2014 in order to await the outcome of the EU's review of the Market Abuse Directive, see The Financial Services and Markets Act 2000 (Market Abuse) Regulations 2011 (2011 No. 2928). For an overview of implementing legislation in all Member States, see European Securities Markets Expert Group (ESME), *Market abuse EU legal framework and its implementation by Member States: a first evaluation* (2007).

82 Market Abuse Directive (n 78), recital 11.

83 ibid recital 35.

84 Commission Directive 2003/124/EC of 22 December 2003 implementing Directive 2003/6/EC as regards the definition and public disclosure of inside information and the definition of market manipulation [2003] OJ L339/70; Commission Directive 2003/125/EC of 22 December 2003 implementing Directive 2003/6/EC as regards the fair presentation of investment recommendations and the disclosure of conflicts of interest [2003] OJ L339/73; Commission Regulation (EC) No 2273/2003 of 22 December 2003 implementing Directive 2003/6/EC as regards exemptions for buy-back programmes and stabilization of financial instruments [2003] OJ L336/33.

85 Case C-45/08 *Spector Photo Group NV and Chris Van Raemdonck v Commissie voor het Bank-, Financie- en Assurantiewezen (CBFA)* [2009] ECR I-12073.

86 Market Abuse Directive (n 78), art 2(1).

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The Belgian court, therefore, asked, *inter alia*, whether the provisions of the Market Abuse Directive called 'for full harmonisation, with the exception of those provisions which explicitly permit the Member States to interpret measures as they wish'.[87] This question was ultimately irrelevant, because the Court interpreted the additional requirement of the Directive ('using' inside information) in a way that essentially eliminated the conflict with the Belgian law.[88] However, the substantive discussion of the Court can be understood as implying that the discretion of the Member States in going beyond the Directive is severely limited. For example, with respect to the main insider dealing prohibition of the Directive,[89] the Court points out:[90]

> [T]he fact that a primary insider who holds inside information trades on the market in financial instruments to which that information relates implies that that person 'used that information' within the meaning of Article 2(1) of Directive 2003/6 . . . However, *in order not to extend the scope of the prohibition laid down in Article 2(1) of Directive 2003/6 beyond what is appropriate and necessary* to attain the goals pursued by that directive, certain situations may require a thorough examination of the factual circumstances enabling it to be ensured that *the use of the inside information is actually unfair so as to be prohibited* by the directive in the name of the integrity of financial markets and investor confidence.

The Court seems to delimit the range of acceptable definitions of the scope of the insider dealing prohibition. These limits are set by the goals pursued by the Directive, which, it could be argued, are not only important for an interpretation of the Directive itself, but also the implementing legislation.

The Advocate General in *Spector Photo Group* addressed the question more directly. She first submitted that the character of the Directive as a maximum or minimum measure could not be answered in general terms for the Directive as a whole, but had to be examined for each provisions separately.[91] She adopted a teleological approach and suggested that the relevant criteria for the assessment were 'the wording and the spirit and purpose of the provision in question'.[92] Applying these criteria, she held that the sanction regime of the Directive was based on minimum harmonization.[93] The Directive only requires the Member States to provide for 'appropriate' administrative sanctions, ie sanctions that are 'effective, proportionate and dissuasive', but leaves it to the States to determine what satisfies these attributes and whether to impose also criminal sanctions.[94] The insider trading prohibition of Article 2(1) of the Directive, on the other hand, was considered to be exhaustive. Referring to the purpose of the Directive to increase confidence in the integrity of the financial markets, Advocate General Kokott argued that

87 *Spector Photo Group*, para 23.

88 ibid paras 30–62. The court argued that the trading on the basis of inside information triggered the presumption that the insider had 'used' the information. For a criticism of this interpretation of the elusive concept of 'using inside information' see Carsten Gerner-Beuerle in Carsten Gerner-Beuerle and Stuart Fleet (eds), *Gore-Browne on EU Company Law* (Jordans 2011) ch 13[12].

89 Market Abuse Directive (n 78), art 2(1).

90 *Spector Photo Group* (n 85), paras 54–55 (emphases by author).

91 *Spector Photo Group* (n 85), Opinion of AG Kokott, para 75.

92 ibid para 76.

93 ibid para 77.

94 Market Abuse Directive (n 78), art 14.

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the prohibition was intended to apply, and that market actors expected it to apply, generally in all Member States. In her view, variations in the rules would create uncertainty among market actors and preclude the effective functioning of the internal market.[95] Furthermore, the design of the provision, with an effective, far-reaching prohibition and clearly specified exemptions indicated that there was neither any need, nor scope, for stricter national rules.[96] Finally, the fact that the directive employs terms that are not well defined (such as 'using') does not mean that the Member States enjoy broad discretion in specifying the terms. Rather, if the other factors discussed suggest that the provision in question aims at full harmonization,[97] the term must be treated as an autonomous concept of EU law that is to be given a uniform definition for all Member States.[98]

The reach and significance of these considerations of the Advocate General should not be underestimated. Some of the arguments advanced by her are, of course, debatable. Notably, it is not clear why the purpose of the Directive to increase investor confidence in the integrity of the financial markets implies that market participants expect the rules to apply 'uniformly' throughout the EU. They may expect that 'some' protection against insider trading and market manipulation exists, but not necessarily that the level of protection is identical in all Member States. Legal certainty and the effective functioning of the internal market are not compromised because the national legal systems differ in some respects. This would only be the case if the legal differences could not be ascertained by some (most likely foreign) market actors or if free movement as such was impeded. However, the Advocate General does not undertake any inquiry to answer 'these' questions.

Notwithstanding the criticism that can be levelled against the Advocate General's line of argument in *Spector Photo Group*, several important insights can be derived from her opinion. First, the question of maximum or minimum harmonization has to be assessed at the level of the individual provision, not the legislative measure as a whole. Second, it is a question of interpretation, ie failing any express statement in the measure,[99] it is appropriate to employ general rules of statutory construction. The answer will then depend on the wording of the provision, the context in which it is used, and its spirit and purpose. Third, these considerations are not restricted to the Market Abuse Directive, or indeed the field of securities regulation, but can be generalized. Provided that the Court of Justice follows the Advocate General's opinion, the legitimacy of super-equivalent implementing measures can be assessed rationally by means of the test developed in *Spector Photo Group*.

95 *Spector Photo Group* (n 85), Opinion of AG Kokott, paras 82–84 (referring to recital 11 of the Directive).

96 ibid para 86.

97 AG Kokott does not mention this caveat, see ibid paras 91–92, but it must be inferred from her other considerations.

98 ibid para 92.

99 Such as Insider Dealing Directive (n 71), art 6.

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The permissibility of the UK's super-equivalent market abuse provisions is questionable in light of this test.[100] Section 118(4) of the Financial Services and Markets Act 2000 concerns the provisions of the Market Abuse Directive establishing the insider dealing prohibition, as did *Spector Photo Group*.[101] However, the UK provision is much wider than the Belgian law at issue in *Spector Photo Group*. It applies to 'information which is not generally available to those using the market but which, if available to a regular user of the market, would be . . . regarded by him as relevant when deciding the terms on which transactions in qualifying investments should be effected'.[102] Thus, as opposed to the definition of inside information by the Market Abuse Directive, such information does not need to be specific or precise. In addition, the provision refers to behaviour generally not in line with the expectations of the market place, not only to dealing in securities.[103] Therefore, section 118(4) goes clearly beyond the Directive. Applying Advocate General Kokott's assessment of maximum harmonization, the UK provision would be in violation of EU law.

The second super-equivalent provision, section 118(8) Financial Services and Markets Act 2000 (FSMA), specifies a case of market manipulation. It captures behaviour that gives a misleading impression as to the supply, demand or price of qualifying investments. Again, the FSMA requires that the behaviour is in violation of the standards of behaviour expected by the market, but not that it corresponds to one of the types of behaviour that market manipulation consists of according to the Directive.[104] In this case, the application of Advocate General Kokott's test leads to more ambivalent results. On the one hand, the Market Abuse Directive defines clearly and in a detailed manner the types of behaviour that constitute market manipulation, namely transactions or orders to trade and the dissemination of information.[105] This definition is further amplified by an implementing Directive[106] and a regulation providing for specific exemptions and safe-harbours.[107] On the other hand, the Market Abuse Directive takes account of the necessity to allow for flexibility 'so as to ensure that new patterns of activity that in practice constitute market manipulation can be included' in the definition.[108] The implementing Directive makes it clear that the signals that it requires the supervisory authority to take into account when examining transactions or orders to trade are 'non-exhaustive'.[109] However, the UK provision does not only introduce flexibility, it disassociates itself entirely from the reference in the Market Abuse Directive to

100 See (n 81) above.
101 Market Abuse Directive (n 78), arts 2, 3.
102 So-called RINGA: 'relevant information not generally available'.
103 For further details, see Paul Davies, *Gower and Davies' Principles of Modern Company Law* (8th edn, Sweet & Maxwell 2008) para 30–31.
104 For an analysis of the UK provision see Davies (n 103) para 30–34.
105 Market Abuse Directive (n 78), art 1(2).
106 Directive 2003/124/EC (n 84), arts 4, 5.
107 Commission Regulation (EC) No 2273/2003 (n 84).
108 Market Abuse Directive (n 78), art 1(2).
109 Directive 2003/124/EC (n 84), arts 4, 5.

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transactions, orders to trade, and the dissemination of information.[110] In addition, if we accept Advocate General Kokott's interpretation of the purpose of the prohibition of insider dealing, the same must apply to market manipulation.[111] Consequently, super-equivalence in the form of a provision such as section 118(8) FSMA is problematic.

Not least because of this lack of clarity with respect to the scope and the maximum or minimum-harmonization nature of the Directive, the Commission adopted proposals for a comprehensive overhaul of the market abuse regime in late 2011.[112] The reform takes the shape of two measures, a regulation and a directive. The Market Abuse Regulation intends to close gaps in the regulation of commodities, over the counter instruments, and new market forms (multilateral trading facilities and other new types of organized trading facilities). It also introduces a proportionate regime to reduce the administrative burdens on issuers with shares listed on SME growth markets.[113] In addition, the proposal is a response to the problems identified by the Committee of European Securities Regulators (CESR) and the European Securities Markets Expert Group (ESME) that were created by the large number of options, discretions and open-ended definitions under the Market Abuse Directive.[114] ESME criticized the persistence of cross-border differences in the implementation of the regime and the widespread adoption of super-equivalent provisions. It concluded that a directive may not be the ideal legal instrument and that the minimum harmonization approach may be inappropriate.[115] Accordingly, the Commission decided to make use of a regulation to provide for greater legal certainty, produce a single rulebook for market abuse, and ensure that a level playing field exists throughout the EU.[116] With the adoption of the regulation, uniform rules will apply in all Member States. They will fully harmonize the market abuse regime within the scope of application of the regulation.[117]

In contrast to the substantive rules contained in the proposed Market Abuse Regulation, the Regulation will only lay down minimum requirements regarding the administrative measures, sanctions and fines applicable to insider dealing and market manipulation.[118] This is one of the areas where national rules differ

110 For example, according to the FSA Code of Market Conduct (MAR 1), FSMA, s 118(8), applies to the movement of physical commodity stocks or the movement of an empty cargo ship, which might create a false or misleading impression as to the supply of, or the demand for, or the price of a commodity, see MAR 1.9.2E.

111 The Market Abuse Directive itself declares that the objective of legislation against insider dealing is the same as that of legislation against market manipulation, see Market Abuse Directive (n 78), recital 12.

112 Proposal for a Regulation of the European Parliament and of the Council on insider dealing and market manipulation (market abuse), COM(2011) 651 final; Proposal for a Directive of the European Parliament and of the Council on criminal sanctions for insider dealing and market manipulation, COM(2011) 654 final.

113 Proposal for a Regulation (n 112) 2–3.

114 For an assessment of the use of options in all Member States, see CESR, *Review Panel report: MAD Options and Discretions* (CESR/09-1120).

115 ESME (n 81) 3–4.

116 Proposal for a Regulation (n 112), 5. See also the Commission Impact Assessment accompanying the reform proposals, SEC(2011) 1217 final, 28–29, 68–69.

117 Proposal for a Regulation (n 112), arts 2–4.

118 ibid arts 24–30. Comparable to the Market Abuse Directive, the Regulation requires that the sanctions are 'effective, proportionate and dissuasive', ibid art 24(1). Member States have discretion in determining the detailed sanctions regime. They can go beyond the Regulation in fixing the sanctioning powers of the competent authority, art 26(2). However, the Regulation specifies

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most.[119] It was felt that complete harmonization was difficult to realize given existing differences in market conditions and legal traditions.[120] The same considerations apply to the harmonization of criminal sanctions. National rules differ widely, and the Commission believed that some harmonization was necessary in order to reinforce the deterrent effect of the sanctions regime and reduce the risk of regulatory arbitrage.[121] In the field of criminal offences and sanctions, harmonization is restricted to the establishment of minimum rules.[122] The Commission, accordingly, decided to use the legal form of a directive. Notwithstanding this mix of maximum and minimum harmonization, the trend towards federalization of securities regulation in the EU is evident. Under the proposed regime, harmonization by means of uniform rules only stops where the issues are particularly sensitive (administrative sanctions) or where the Treaty restricts the types of legal instrument available to the institutions (criminal sanctions).

4. Assessing the benefits of harmonization

It is submitted that the usefulness of minimum or maximum harmonization is a question that can only be assessed empirically.[123] However, legal analysis can help in identifying areas where harmonization is helpful in overcoming problems resulting from multiple applicable regimes. In other words, legal analysis can help to make a *prima facie* case in favour of or against harmonization, which may serve as a basis for the empirical analysis. This is often not appreciated in the literature, where the beneficial and detrimental effects of harmonization are discussed theoretically, without examining whether the wider legal framework renders the risks posed by potentially conflicting legal regimes acute.

It may be argued that the case in favour of harmonization is particularly strong where business activity that is conducted in more than one regulatory environment requires the cumulative compliance with all regulatory regimes. Whether this is the case depends generally on three legal determinants: the (usually public) law that regulates cross-border economic activity; the conflict of law rules that determine whether the substantive laws of a particular jurisdiction, and whose jurisdiction's laws, are applicable; and the character of the substantive laws. In the following Sections, these determinants will be applied to activities in the capital markets. In order to put the problems into context, the discussion starts with a brief examination of the product markets and markets for investment services.

the circumstances in which sanctions shall be imposed, art 25. Consequently, if adopted, it will result in a convergence of national regimes in spite of the minimum harmonization approach.

119 See CESR, *Report on Administrative Measures and Sanctions as well as the Criminal Sanctions available in Member States under the Market Abuse Directive* (CESR/ 07-693).

120 Commission Impact Assessment (n 116) 52.

121 Proposal for a Directive (n 112) 3.

122 TFEU, art 83(2).

123 See text to notes 10–11 above.

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Harmonization in product markets and markets for investment services

An investment firm that offers financial services may be subject to authorization, disclosure obligations and requirements with respect to the quality of the services. An industrial corporation that sells goods in more than one Member State may face comparable obstacles to accessing a foreign market. In the EU, corporations can benefit from the Treaty freedoms that prohibit customs duties, quantitative restrictions on imports and exports, and measures having equivalent effect.[124] In the same way, discriminatory and non-discriminatory restrictions on the freedom to provide services are prohibited.[125] The Treaty provisions generally concern public law measures that impede free movement.[126] European law is conducive to cross-border trade by establishing the presumption that goods that have been produced and marketed lawfully, and services that have been authorized and can be offered without restrictions in one Member State, should not be subject to further requirements in the other Member States (principle of mutual recognition).[127]

The conflict of law rules, the second of the three determinants identified above, usually point to one particular law that is applicable to the issues at hand. In the EU, the law applicable to the transactions that the corporation enters into will often be determined by the Rome I Regulation, which applies to contractual obligations in civil and commercial matters.[128] According to the Regulation, in the absence of a choice of law by the parties,[129] the general rule is that the transaction is governed by the law of the country where the corporation effecting the characteristic performance has its habitual residence.[130] Habitual residence is defined as the place of central administration of the corporation.[131] In specified cases, the applicable law may be determined pursuant to an alternative rule that may lead to the application of multiple regimes, for example where the law of the habitual residence of the other party to the contract applies (the party who does not effect the characteristic performance) and the corporation contracts with parties in more than one country. The most relevant such cases are consumer contracts, which

124 TFEU, arts 30, 34, 35.

125 TFEU, art 56.

126 The reach of the Treaty freedoms with respect to non-public law measures, for example a regulatory framework that allows private parties to adopt measures that restrict another party's free movement rights (eg a private employer observes a policy that discriminates against employees from other Member States), is still debated. The Court of Justice has acknowledged that the free movement of workers entails horizontal direct effect at least in some situations (see, eg Case C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139. The issue is more problematic in the case of the other freedoms. For a brief general overview and an analysis of the horizontal reach of free movement of capital, see Carsten Gerner-Beuerle, 'Shareholders between the market and the State. The VW law and other interventions in the market economy' (2012) 49 CML Rev 97, 132–36.

127 See, eg Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis de Dijon*), para 14; Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-4221, para 14. Mutual recognition is a rebuttable presumption, because the host Member State can show that the additional requirements are necessary in order to satisfy so-called mandatory requirements or imperative reasons relating to the public interest (for example consumer protection), see *Cassis de Dijon*, para 8; *Säger*, para 15. For a more detailed discussion see Barnard (n 16) 91–93, 377–85.

128 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art 1(1).

129 ibid, art 3.

130 This is the case for contracts for the sale of goods (art 4(1)(a)), provision of services (art 4(1)(b)), distribution contracts (art 4(1)(f)), and other transactions not covered by the contracts listed in paragraph 1 of art 4 (art 4(2)).

131 ibid, art 19(1).

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are governed by the law of the place where the consumer has her habitual residence.[132] Notwithstanding the exceptions, the important point is that the 'default' rule refers to one legal system, with the consequence that the market actor's compliance costs are correspondingly lower than in an environment where multiple jurisdictions apply.

Finally, the character of the substantive law is important in determining the benefits of harmonization. Harmonization is principally beneficial where the legal regimes that apply to the case are significantly different, but the differences are not a response to different economic or other social conditions. Harmonization is unnecessary where the legal rules are not significantly different to start with, and the benefits of harmonisation are diminished where the legal environment needs to be receptive to local circumstances. Applying the three determinants to our two examples, consumer contracts and commercial transactions (in investment services or goods), we can make the following observations. The case for harmonisation in the realm of consumer contracts is prima facie relatively strong. While the first criterion, the existence or non-existence of public law impediments to cross-border activity, weighs against harmonisation, given that the Treaty freedoms prohibit such measures to a large extent, the other two criteria support the case for harmonisation. Irrespective of their country of residence, consumers are in the same position of informational asymmetry and unequal bargaining power, which may lead to a market failure in the absence of regulatory intervention. In addition, consumers will often have the expectation that their contracts are governed by legal rules providing for equivalent protection throughout the Union, notwithstanding the applicable law or their residence. They may be hesitant to engage in cross-border transactions if their expectations of equivalence are not met. Finally, the conflict of law rules in the EU lead to the cumulative application of different legal regimes, namely those of the consumers' home States. This is the case for consumers in markets for goods as well as in the market for investment services.[133] Therefore, it can be argued that, harmonization would *prima facie* serve a useful role.[134]

The case for harmonization is weakened outside the realm of consumer protection law. The reason is not that informational asymmetries or inequalities in bargaining power are less pronounced.[135] It is also presumably not the case that local differences in the preferences of the non-consumer purchasers of goods or recipients of services require more nuanced regulation. Rather, the producers or providers of services are less exposed to conflicting legal regimes and cumulative regulatory requirements because of the conflict of law rules and economic freedoms in place. Conflict of law rules under the

132 ibid art 6(1).

133 The Rome I Regulation, recital 26, makes it clear that art 6(1) (applicable law is the law of the country where the consumer has her habitual residence) applies to investment services within the meaning of Annex I, Section A of MiFID.

134 Of course, this observation does not answer the question of what level of consumer protection is optimal. If this question is difficult to assess (for an overview of the economic arguments see, for example, Richard Posner, *Economic Analysis of Law* (7th edn, Aspen 2007) 112–14) and, accordingly, the risk that the centralized law-maker fails to identify the efficient solution is high, it may be beneficial not to harmonize fully, but leave room for experimentation by decentralized regulatory authorities. Notwithstanding this problem, compliance costs are, arguably, lower compared to the case where the producer or provider of services has to observe several regulatory regimes that employ variable standards and mechanisms of consumer protection.

135 Although this is true and calls into question the general usefulness of regulatory intervention.

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Rome I Regulation generally result in one applicable legal system, also in cases where economic activity unfolds in more than one country.[136] Where Rome I does not help, notably because a given jurisdiction provides that specified rules shall apply in order to safeguard important public interests notwithstanding the otherwise applicable law,[137] the economic freedoms of the Treaty on the Functioning of the EU impose a heavy burden on the host States to justify any measure that impedes economic activity within their territory. Consequently, the relevant factors for the decision whether or not to harmonize have shifted, compared to the consumer scenario. The benefits in the form of reduced compliance costs are less distinctive, and the risks in the form of regulatory capture, inflexibility, and no room for regulatory experimentation, more pronounced. This does not mean that harmonization is never appropriate, but the burden of proof is heightened and the *prima facie* case militates against harmonization, particularly maximum harmonization.

Harmonization in capital markets

In the capital markets, different considerations apply. The concepts of mutual recognition and home country control that are part of the EU prospectus, transparency and market abuse regimes and that carry into effect the free movement guarantees of the Treaty facilitate cross-border capital raising and investment. Issuers can access the capital markets throughout the EU while, generally, not being subject to more than one regime that determines the requirements for approval of admission and offer documents and the information to be disclosed. Under the Prospectus and Transparency Directives, issuers no longer have the possibility to elect the disclosure regime that should govern the securities issue. Except for issues of debt with a denomination of less than €1,000,[138] the home Member State, and consequently the jurisdiction primarily responsible for approval of the prospectus and supervision of the issuer, is the State where the issuer's registered office is located.[139] This restriction of issuer choice, compared to the legal situation pre-FSAP, was criticized widely because it fails to give supervisors an incentive to develop expertise for particular types of securities, or issuers the opportunity to exploit existing expertise, and hence forgos efficiency gains created by specialization and division of labour.[140] In the latest amendments to the Prospectus Directive, the Commission was asked to undertake a review of the definition of home Member State for debt issues with a view to revoking the EUR 1,000 threshold.[141] In any case, as it stands, the home Member

136 See above n 130.

137 These may be rules of a public law nature that do not fall within the scope of the Rome I Regulation or so-called overriding mandatory provisions, which are not affected by Rome I (see art 9).

138 Prospectus Directive (n 21), art 2(1)(m)(ii): the issuer has the choice between the state where the issuer has its registered office, the regulated market where the securities are admitted to trading, or the market where they are offered to the public.

139 ibid art 2(1)(m)(i).

140 See, for example, European Commission, *Background Document: Review of Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (Prospectus Directive)* (2009), 10 (proposing the removal of the €1,000 threshold laid down in art 2(1)(m)(ii) in order to enable issuers to choose the competent authority that is most appropriate for their purposes in light of the language of the prospectus, the expertise of the competent authority in relation to the securities to be offered, and its knowledge of the issuer). See also CSES (n 42) 37–39.

141 Directive 2010/73/EU, recital 8.

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State regime only allows effective regulatory competition in the wholesale debt market (beyond the EUR 1,000 threshold).[142] Accordingly, it may be argued that harmonization, and certainly full harmonization, is not necessary because multiple regulatory regimes do not apply and the risk of regulatory arbitrage is limited, in particular with respect to equity.[143]

The picture is different with respect to liability for incorrect market disclosure. The liability regimes under the Prospectus and Transparency Directives are not harmonized or tied to one particular jurisdiction.[144] Therefore, it is necessary to analyse whether one or multiple legal regimes will be applicable pursuant to rules of conflict of laws. The statutory liability provisions under UK law apply to misleading statements in prospectuses that are required because securities are offered to the public in the UK or admitted to trading on a regulated market in the UK (prospectus liability)[145] or the disclosure relates to securities that are admitted to trading on a market situated or operating within the UK (secondary market disclosure liability).[146] It does not matter whether the prospectus was approved by the UK competent authority or the UK is the issuer's home Member State. Accordingly, issuers with securities listed in several Member States are subject to the increased risk of being held responsible pursuant to more than one liability regime.[147]

Outside the scope of statutory provisions for prospectus liability or liability for incorrect secondary market disclosure the consequences of incorrect statements are often governed by tort law.[148] The Rome II Regulation on the law applicable to non-contractual obligations[149] determines that the law of the country where the damage occurs shall apply (*lex damni*).[150] This can lead again to multiple applicable liability regimes if investors in different jurisdictions purchase securities in reliance on the incorrect disclosure. In conclusion, *prima facie* good arguments exist in favour of harmonization.

Finally, the case for harmonization is more difficult to make with respect to matters of corporate law. It should be emphasized that, as with above example of the markets for goods and investment services, the relevant consideration is not whether market participants exist that are in need of protection because of instances of market failure.

142 Below the threshold, issuers may incorporate a special purpose vehicle in the desired jurisdiction to effect the bond issue, which has contributed to some specialisation in the EU, for example in Luxembourg for MTN programmes. For data see CSES (n 42) 7–22.

143 Jurisdiction of multiple supervisory authorities may, however, be a problem if the issuer issues different classes of debt securities, some of which exceed and others do not exceed the threshold, and the issuer does not wish to elect the state where its registered office is located for the securities in larger denominations than €1,000.

144 Prospectus Directive (n 21), art 6; Transparency Directive (n 21), art 7.

145 FSMA, s 90.

146 FSMA, s 90A, sch 10A, para 1(1).

147 For a more detailed discussion see Carsten Gerner-Beuerle, and others, 'Private rights of Action in Cases Involving Transnational Securities Fraud: the View from England, France and Germany' [2011] RTDF 66, 69.

148 In the UK, for example, the tort of negligent misrepresentation, *Al-Nakib Investments v Longcroft* [1990] 3 ALL ER 321; *Possfund Custodian Trustees v Diamond* [1996] 2 All ER 774.

149 Regulation (EC) No 864/2007 [2007] OJ L199/40.

150 ibid art 4(1).

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Market failures can indeed be observed. The most prominent are the well-known agency conflicts between the management and the shareholders, majority and minority shareholders, and the company and third parties, such as the creditors.[151] Agency conflicts are a form of informational asymmetry that result from the difficulties of the principal in ensuring that the agent acts in the principal's interests.[152] Therefore, there are good reasons for regulatory intervention to protect the principal in the different agency conflicts, namely the members of the corporation (equity investors), minority shareholders, and the corporation's creditors (notably debt investors). But this is not decisive for the question of who is best placed to address the market failures.

The three determinants identified above establish a *prima facie* case against harmonization. First, corporations lawfully established in one Member State may pursue business activities in other Member States through agencies, branches or subsidiaries.[153] They have to be recognized by the host Member State as legal entities governed by the laws of the home State, even if the host State would not consider the corporation as validly incorporated pursuant to its own private international and substantive company law.[154]

Second, the free movement rights are complemented by conflict of law rules that generally lead to the application of one legal regime, and not multiple regimes, that governs the agency conflict. As far as the power of the corporation's organs and other questions of the internal organization of the corporation are concerned (issues that have a bearing mostly on the first two agency problems[155]), applicable law is, depending on the private international company law of the forum, either the legal system of incorporation or the jurisdiction where the corporation's real seat is located.[156] Strategies to protect debt investors stem either from corporate law (eg personal liability of the company's members, capital requirements and dividend restrictions) or insolvency law (wrongful trading, equitable subordination and similar mechanisms). The corporate law strategies

151 For a discussion see Reinier Kraakman and others, *The Anatomy of Corporate Law* (2nd edn, OUP 2009), 35–53 and passim.

152 Bernard Salanié, *The Economics of Contracts* (2nd edn, MIT Press 2005), 119–21.

153 TFEU, arts 49, 54.

154 Case C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

155 Strategies to address the first agency problem (between the management and the shareholders) include granting the general meeting decision rights, imposing behavioural standards on directors (directors' duties), and requiring part of the board to be composed of independent directors. For a more detailed analysis of these and other strategies see Kraakman and others (n 150) 55–87. Strategies to address the second agency problem (majority and minority shareholders) include majority voting requirements, class voting rights, exit and appraisal rights, duties owed by the majority to the minority, and claims of the minority in case of oppression (eg Companies Act 2006, s 994: protection against unfair prejudice). See Kraakman and others (n 150) 89–99. All of these mechanisms are related to the internal organization of the corporation. Accordingly, the applicable law is determined pursuant to the real seat or incorporation theory, as applicable. See, eg *Konamaneni v Rolls Royce Industrial Power (India) Ltd* [2002] 1 W.L.R. 1269; *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316; [2005] 1 W.L.R. 1157.

156 For UK law see Lawrence Collins and others, *Dicey, Morris and Collins on the Conflict of Laws* (14th edn, Sweet & Maxwell 2006) para 30-010 with references (incorporation theory). The law of the country of incorporation governs in particular issues of internal management, ibid para 30–024. The real seat doctrine was followed, for example, by Germany, see, eg German Federal Court of Justice (BGH), BGHZ 97, 269. After the decision of the European Court of Justice in Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459 and its progeny, the real seat theory is generally no longer applied in the EU context. For a discussion of the legal situation in Germany after *Centros* see Werner F Ebke, 'The ''Real Seat'' Doctrine in the Conflict of Corporate Laws' (2002) 36 Int'l L 1015.

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are again governed by the principles of private international company law.[157] Mechanisms that apply in the course of the insolvency proceeding are commonly treated as insolvency law for purposes of conflict of laws.[158] Within the scope of application of the EC Insolvency Regulation,[159] applicable law is the law of the place where the insolvency proceedings are opened.[160] Jurisdiction to open insolvency proceedings is determined according to the company's centre of main interest (COMI), which, in turn, is presumed to be where the company's registered office is located.[161] While this is a rebuttable presumption[162] and it is possible that insolvency proceedings are opened in more than one jurisdiction,[163] with the consequence that more than one insolvency regime applies, the legal response to the different agency problems will often follow one legal system.[164]

Third, the most effective way to protect debt and equity investors depends on the ownership structure of corporations and the role of the capital markets in the respective jurisdiction.[165] For example, if the corporation's securities are traded on a liquid market, exit and appraisal rights are a potent tool to protect minority shareholders, whereas the lack of an active market calls for alternative mechanisms, such as the possibility to petition the court on grounds of oppression of the minority. Similarly, if the ownership structure is concentrated, the legal system may focus on mechanisms that allow creditors to hold the shareholders who control the corporation personally responsible, while the duties of the management may play a more important role in corporations with widely dispersed owners. Furthermore, in a jurisdiction with many small, family-owned enterprises flexibility is more important than in a jurisdiction characterized by large, publicly held companies, where strict rules regulating the composition and powers of the governing organs may be efficient.[166]

157 See, eg for the personal liability of the shareholders for debts of the corporation: *Risdon Iron and Locomotive Works v Furness* [1906] 1 KB 49; unlawful distributions: *Shaker v Al-Bedrawi* [2002] EWCA Civ 1452; [2003] Ch 350 (CA).

158 This may be debatable from a functional perspective as regards legal instruments that impose personal liability on directors for acts taken before the company went into insolvent liquidation (in the UK notably fraudulent and wrongful trading, Insolvency Act 1986, ss 213, 214). If these instruments apply on the application of the liquidator, they follow private international insolvency law, see Alexander Schall, 'The UK Limited Abroad – How Foreign Creditors Are Protected after *Inspire Art* (Including a Comparison of UK and German Creditor Protection Rules)' (2005) 16 EBLR 1534, 1549–50.

159 Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [2000] OJ L160/1.

160 ibid, art 4(1).

161 ibid, art 3(1).

162 Rebuttal of the presumption is particularly relevant for so-called pseudo-foreign companies, Schall (n 157) 1536.

163 Insolvency Regulation, art 3(2). For the case that two Regulation States concurrently claim jurisdiction to open main insolvency proceedings pursuant to art 3(1), see Collins and others (n 155) 30–176.

164 The most likely divergence will occur with respect to creditor protection, which draws both on substantive corporate law and insolvency law (in theory, instruments of other legal areas may also be relevant, for example tort law, but they commonly play only an ancillary role). In particular, different jurisdictions will apply if the corporation's centre of main interest is different from the state of incorporation and the forum applies the incorporation theory.

165 In Europe, ownership structure and the development of the capital markets differ significantly between Member States. From the large number of studies that analyse ownership structure and capital markets development see, for example, Fabrizio Barca and Marco Becht, *The Control of Corporate Europe* (OUP 2001); Randall K Morck (ed), *A History of Corporate Governance around the World: Family Business Groups to Professional Managers* (University of Chicago Press 2005); Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 'Corporate Ownership Around the World' (1999) 54 J Fin 471.

166 See, e.g., *Bushell v Faith* [1970] A.C. 1099, where the House of Lords stressed, the importance of flexibility in family owned enterprises and allowed multiple voting rights that had the effect of entrenching the managing director.

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Thus, according to the three elements that are suggested to be material in assessing the benefits of harmonization, a clear case in favour of harmonization in corporate law does not exist. The elements indicate that harmonization in capital markets regulation is likely to produce greater efficiency gains than in corporate law. This is not to say that harmonization may not serve a useful purpose outside the field of securities regulation. A full-fledged cost–benefit analysis is necessary in each individual case to judge the effects of harmonization conclusively. Rather, the article seeks to identify legal factors that give a *prima facie* indication of the costs and benefits of harmonization and emphasize that the considerations relied on by the Commission in their drive to harmonize the regulation of the business environment and the capital markets do not always capture all relevant aspects. For example, the objective 'to offer investors [in the capital markets] a high level of protection',[167] build 'sustained investor confidence',[168] or protect 'the interests of third parties'[169] who transact with corporations does not explain why harmonization is necessary, unless it can be shown that the national law-makers are structurally incapable of providing for an adequate level of protection. Even if this was the case and harmonization was efficient from the perspective of the investor, the effects on issuers would need to be taken into account and balanced with those on investors.

5. Conclusion

This article suggests that it can be useful to assess the European instruments regulating the capital markets on the basis of the legal rules governing cross-border mobility and conflict of laws. These rules allow a meaningful *prima facie* distinction between cases where no or minimum harmonization is advantageous and cases where maximum harmonization is beneficial. From the issuer's point of view, given the concepts of mutual recognition and home Member State control that are now well established in EU securities regulation, the maximum harmonization of prospectus disclosure and transparency requirements is not essential. The issuer's main concern, not to be subject to multiple and possibly conflicting disclosure requirements, is met if EU law specifies that one legal system should govern the process of offering securities to the public and listing on a regulated market, as the home Member State control and passport principles do. A system that allows for variations in national rules within these parameters, notably through minimum harmonization, may be advantageous as it encourages experimentation and enables legislatures and supervisors to specialize and acquire knowledge of and expertise in supervising particular types of issuer, for example by providing sets of rules designed for these issuers. The facilitation of choice of home Member State, as

167 MiFID, recital 2.

168 Transparency Directive, recital 1.

169 Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent [2009] OJ L258/11 (formerly First Council Directive 68/151/EEC [1968] OJ L65/8), recital 2. Similarly the Second Company Law Directive, Directive 77/91/EEC [1977] OJ L26/1, which was adopted 'in order to ensure minimum equivalent protection for both shareholders and creditors of public limited liability companies', recital 2.

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currently discussed in the context of the review of the Prospectus Directive,[170] would amplify these *prima facie* positive effects of minimum harmonization.

In the case of liability rules for incorrect or misleading statements in prospectuses and other disclosure documents or for insider trading and market manipulation the analysis leads to a different outcome. Issuers that operate internationally may be held responsible pursuant to a multitude of jurisdictions.[171] Differences in the standards of liability and the definitions or scope of the provisions prohibiting particular types of behaviour lead to increased compliance costs and an increased risk to be found liable. Therefore, it is convincing that the Commission places emphasis on harmonizing the market abuse rules in a way that largely removes the Member States' rule-making discretion. The lack of harmonization with respect to disclosure liability, however, is problematic and impedes the integration of European capital markets.

From the investor's point of view, differences in disclosure obligations complicate the comparison of disclosure documents regulated by different national regimes. In addition, in the light of the home bias of many investors,[172] it is questionable whether they are in a position to deselect a regulatory regime that does not meet their needs and expectations and opt into a foreign jurisdiction. On the other hand, it is not evident that the necessary protection of investors can only be achieved by the adoption of maximum harmonization legislation, as seems to be the trend in the EU. The establishment of minimum standards may ensure that even those investors that cannot easily select and deselect legal regimes (presumably retail, rather than institutional, investors) are adequately protected, without stifling legal invention and experimentation. This is a particularly relevant consideration in the area of disclosure obligations, since it is notoriously difficult to assess what level and intensity of disclosure is optimal in the sense of finding the right balance between alleviating informational asymmetries in the capital markets and keeping the costs of capital for issuers low.[173] Another argument in favour of minimum, rather than maximum, harmonization is the calibration of the liability regime in favour of investor protection. As discussed, investors can generally expect that their home jurisdiction will apply to the question of what type of behaviour is outlawed and under what conditions they can claim redress. Therefore, arguably, the case for maximum harmonization is stronger with respect to disclosure liability and market abuse than the content of the disclosure regime.

170 See text to notes 138–141 above.

171 See the text to notes 143–149 above for a discussion of conflict of law rules regarding disclosure liability. The Member States' prohibitions of insider dealing and market manipulation apply to actions carried out on their territory, notwithstanding where the financial instruments that the actions relate to are admitted to trading on a regulated market, and to actions carried out abroad if the financial instruments are admitted to trading on a regulated market in their territory, see Market Abuse Directive (n 78), art 10.

172 See n 7 above.

173 See the ambivalent results in George J Benston, 'Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934' (1973) 63 Am Econ Rev 132; John C Coffee, 'Market Failure and the Economic Case for a Mandatory Disclosure System' (1984) 70 Virginia L Rev 717; Allen Ferrell, 'The Case for Mandatory Disclosure in Securities Regulation Around the World' (2007) 2 Brooklyn Journal of Business Law 81; Luzi Hail and Christian Leuz, 'International Differences in the Cost of Equity Capital: Do Legal Institutions and Securities Regulation Matter?' (2006) 44 Journal of Accounting Research 485; George J Stigler, 'Public Regulation of the Securities Markets' (1964) 37 J Bus 117.

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These considerations are not intended to settle the debate of maximum versus minimum harmonization in EU securities regulation. Rather, they intend to caution against the uncritical drive towards maximum harmonization and argue in favour of a more comprehensive analysis of the legal environment, before it is concluded that uniform rules, a single rulebook on EU capital markets law, is the panacea for the challenges faced by the integration of the European capital markets.

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