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I. Introduction

Securities regulation in the European Union (EU) has entered into a new phase with the enactment of new Directives such as the Prospectus Directive, Market Abuse Directive, Markets in Financial Instruments Directive, and the Transparency Directive from 2003–05 (collectively the Directives). Regulation by mandatory disclosure has taken on an expanded role under these new Directives, as the continuous disclosure of publicly traded corporations and price transparency of markets are now made subject to mandatory disclosure by law. Prior to the Directives, continuous disclosure of price-sensitive information by publicly traded corporations in the EU was largely governed by stock exchange rules, and price transparency of markets was left to the self-regulation of exchanges.

This article argues that mandatory disclosure of continuous corporate information and price transparency of markets under the new Directives are quite different in nature from traditional mandatory disclosure regulation. This article describes the difference in terms of the extent of regulatory prescription for how the mandatory disclosure should be delivered. It is argued that the EU regulations of mandatory disclosure for continuous corporate information and price transparency incorporate a larger than usual extent of co-opting of the regulated in achieving the delivery of information. As the regulated takes on significant responsibility in the regulatory administration of mandatory disclosure, this article describes this phenomenon as a form of delegated or privatized regulatory administration by the regulated.

The European Commission (the Commission) has the power to provide for Level Two measures, supplementary to the securities regulation the Directives mentioned, and that such measures may provide the regulatory details currently lacking in the Directives.[1] Level

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Two measures have not been enacted for the regulation of mandatory continuing disclosure of issuer information, but the Committee of European Securities Regulators (CESR), which assists the Commission in drafting legislative initiatives, has submitted a final report on the refinement of EU regulation in this area.[2] A Commission Regulation has however been passed to deal with the regulation of price transparency, but this Regulation adopts the delegation model of regulatory administration to a large extent.[3] This article discusses how the delegation model of regulatory administration works in EU securities regulations, its benefits and drawbacks, and provides normative observations on how the delegation model of regulatory administration may serve as an effective part of the EU securities regulatory framework.

This article begins by exploring the meaning of delegated or privatized administration of securities regulation in the aspects of continuous disclosure and price transparency. The regulatory rationale and framework for continuous disclosure and price transparency is discussed and it is suggested that regulation in these two areas is to be regarded as delegated or privatized. Part III then argues that there are benefits and drawbacks to the delegated or privatized manner of administration. Part IV examines how the EU should deal with delegated or privatized administration in securities disclosure regulation. Additionally, Part IV discusses to what extent regulatory competition amongst regulators or verticalization in the EU may provide for a sound regulatory framework that incorporates the delegation or privatization phenomenon. Part V draws a number of conclusions.

II. Delegated or Privatized Administration of Continuous Disclosure and Price Transparency Regulation

A. The Meaning of Delegated or Privatized Administration of Regulatory Outcome

In seeking to define the meaning of delegated or privatized administration, the context is based on continuous disclosure obligations imposed under the EU Prospectus,[4] Market

1. Securities regulation in the EU has been reformed since the Lamfalussy Report of 2001. *See Final Report of the Committee of Wise Men on the Regulation of European Securities Markets* (Feb. 15, 2001), *available at* http://ec.europa.eu/internal_market/securities/docs/lamfalussy/wisemen/final-report-wise-men_en.pdf (allowing legislation to be made in a fast-tracked manner). The normal law-making procedures involving co-decision will be followed for Directives which contain general principles, and details will be added by Commission legislation at Level Two. For normal law-making in the EU, *see generally* A.M. Arnull et al, Wyatt and Dashwood's European Union Law (4th ed. 2000). For commentary on the Lamfalussy procedure, see Gerard Hertig & Ruben Lee, *Four Predictions about the Future of EU Securities Regulation*, 3 J. Comp. L. Stud. 359 (2003), and Niamh Moloney, *The Lamfalussy Legislative Model: A New Era for the EC Securities and Investment Services Regime*, 52 Int'l & Comp. L.Q. 499, 509 (2003).

2. CESR's Final Technical Advice on Possible Implementing Measures Concerning the Transparency Directive: Storage of Regulated Information and Filing of Regulated Information, CESR 06/292, June 2006 [hereinafter CESR Final Technical Advice].

3. Commission Regulation (EC) No. 1287/2006 of 10 Aug. 2006, implementing Directive 2004/39/EC of the European Parliament and of the Council as regards recordkeeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of the Directive [hereinafter MIFID Commission Regulation].

4. Council Directive 2003/71, art. 10, 2003 O.J. (L 345) 64 (EC).

Abuse,[5] and Transparency Directives,[6] and price transparency reporting obligations imposed under the Markets in Financial Instruments Directive (MIFID).[7]

There are two types of continuous disclosure—periodic continuous disclosure and ad hoc continuous disclosure. Article 10 of the Prospectus Directive provides that issuers of securities traded on a regulated market of the EU have to disclose changes made to the information in their original prospectuses issued when their securities were first floated, on a yearly basis.[8] This is a form of periodic disclosure. Further, periodic continuous disclosure consists of yearly and half-yearly financial and non-financial information on the issuer's performance and operations specified in Articles 4, 5, and 6 of the Transparency Directive. Under Article 6 of the Market Abuse Directive, issuers also must disclose, on an ad hoc basis, specific information about the issuer or its securities that may materially affect the price of those securities in the market (i.e., inside information).

Although the continuous disclosure of information is mandatory, this article suggests that the administration of continuous disclosure under the Directives is delegated because the regulated is given the responsibility of designing systems for dissemination of and access to the information. This is rather different from the familiar mandatory disclosure regulation of prospectuses for initial public offers.

The mandatory disclosure regulation for public offers is a foundational form of securities regulation, whether in the United States or in the EU. Although the EU only standardized its disclosure regulation for prospectuses in 1989,[9] federal regulation of prospectus disclosure has been administered by the U.S. Securities and Exchange Commission (SEC) since 1934. Mandatory disclosure for public offers is required via the publication of a prospectus, and regulation often prescribes details for the contents, filing, approval, and delivery of the prospectus.[10] Although there are many benefits[11] of and critiques[12] against mandatory disclosure regulation of public offers, this is a system of regulation that, flanked by administrative and civil enforcement, seems to be foundational for the growth and development of

5. Council Directive 2003/6, art. 6, 2003 O.J. (L 96) 16 (EC).

6. Council Directive 2004/109, 2004 O.J. (L 390) 38 (EC).

7. Council Directive 2004/39, arts. 28–30, 44–45, 2004 O.J. (L 145) 1 (EC).

8. Council Directive 2003/71, art. 10, 2003 O.J. (L 345) 64 (EC).

9. Council Directive 89/298, 1989 O.J. (L 124) 8 (EEC) (coordinating the requirements for the drawing up, scrutiny, and distribution of the prospectus to be published when transferable securities are offered to the public).

10. *See, e.g.*, Council Directive 2003/71, arts. 3, 7, 13, 14, 2003 O.J. (L 345) 64 (EC).

11. For example, Professor Coffee argues that mandatory disclosure corrects the market failure of underproduction of voluntary disclosure and is crucial for investor confidence. *See* John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717, 725 (1984) ; David J. *Disclosure Regulation*, 13 J. CORP. L. 535 (1988) (discussing the benefits and drawbacks of mandatory disclosure regulation and arguing that the case still comes down for mandatory disclosure, as there is empirical evidence showing that price dispersions for stocks after mandatory disclosure are reduced and showing improved efficiency in allocation of resources).

12. Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 681 (1984). Behavioral theorists also suggest that mandatory disclosure does not aid investors in making investment decisions. *See* Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics about Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627 (1996); Stephen M. Bainbridge, *Mandatory Disclosure: A Behavioral Analysis*, 68 U. CIN. L. REV. 1023 (2000); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J.L. & PUB. POL'Y 199 (2005).

capital markets.[13] Mandatory disclosure regulation for public offers often specifies that only one document is to be regarded as the prospectus, as legal distinctions are made between documents that are merely advertisements and supplements to the prospectus.[14] There are also prescribed methods for delivery.[15] Although the regulator is not the one responsible for the actual dissemination of the prospectus, sufficiently prescribed controls in the methodology of presentation and delivery, such as those mentioned above, ensure that access to the prospectus by any investor is streamlined. Where the regulation of continuous disclosure and price transparency are concerned, it is submitted that the extent of legal control over the dissemination of information is less stringent and prescriptive, resulting in a phenomenon of "delegated regulatory administration" by the regulated.

Under Article 10 of the Prospectus Directive, it is provided that annual updates to the original prospectus need to be filed with the competent authority who approved the issuer in the first place, and such updates should also be made publicly available. This is a form of periodic continuous disclosure, which, to this author's knowledge, does not exist elsewhere. Articles 4, 5, and 6 of the Transparency Directive provide for interim earnings reporting and also provide that the periodic continuous disclosure is to be made publicly available, but the information does not have to be filed with the competent authority concerned. The regulation of periodic continuous disclosure does not place the burden on the competent authority to receive the mandatory disclosure or provide a centralized form of access to such information by all. Level Two measures may prescribe mechanisms as to how the information may be made available to the public; however, it does not seem that the Commission is currently looking into delivery methods. If the Commission deems it unnecessary to provide supplementary legislation on how the information is to be delivered, then clearly the design of dissemination systems would be up to the regulated. It is envisaged that, even if the Commission undertakes to look into Level Two measures, the nature of continuous disclosure, as discussed below, may mean that any prescription may be non-exhaustive. Article 6 of the Market Abuse Directive provides for ad hoc price-sensitive information to be made publicly available, and there is again no obligation placed on competent authorities to receive or disseminate the information.

Ad hoc continuous disclosure of price-sensitive information takes place at undesignated times. Such information is also likely to be price-sensitive for a relatively short period and may be obsolete quickly. Hence, the sporadic and voluminous nature of ad hoc continuous disclosure makes it difficult for regulations to prescribe an exhaustive list of effective delivery methods. Although periodic continuous disclosure is more predictable in terms of when disclosures would occur, the nature of periodic disclosure is similar to ad hoc disclosure in that the lifespan of such information is relatively short.[16] Hence, a centrally administered

13. Rafael La Porta, Florencio Lopez-de-Silanes, & Andrei Shleifer, *What Works in Securities Laws?*, 61 J. Fin. 1 (2006), Ann J. Gellis, *Mandatory Disclosure for Municipal Securities: Issues in Implementation*, 13 J. Corp. L. 65 (1987).

14. In some jurisdictions such as the United States, a distinction is also made between the prospectus and bookbuilding documents. Bookbuilding is not provided for in the EU's Prospectus Directive. *See* Council Directive 2003/71, 2003 O.J. (L 345) 64 (EC).

15. *See* Council Directive 2003/71, arts. 14–16, 2003 O.J. (L 345) 64 (EC).

16. Jason Lee & Chul W. Park, *Intraday Stock Price Reactions to Interim-Quarter versus Fourth-Quarter Earnings Announcements*, 27 J. Bus. Fin. & Acct. 1027 (2000) (arguing that price reactions to earnings reports are significant, especially for interim results); Jean-François Gajewski, *Earnings Announcements, Asymmetric Information, Trades and Quotes*, 5 Eur. Fin. Mgmt. 411(1999) (explaining through empirical research on a number of Paris Bourse listed companies how share price reacts immediately to earnings reports in the announcement days).

or prescribed system of delivery may be unsuitable. On the other hand, co-opting the regulated to design systems that are technologically advanced and innovative may better serve market needs. Co-opting the regulated in arranging the dissemination of mandatory disclosure in these areas may more efficiently achieve effective and quick dissemination than relying on legal prescriptions that may not keep up with technological developments. This co-opting of the regulated to provide for dissemination and delivery to investors may arguably be regarded as a form of delegation of responsibility to the regulated to achieve the ultimate regulatory outcome (i.e., that investors receive the information).

In terms of price transparency regulation, a similar phenomenon exists. Investment firms that carry out systematic internalization for securities that have liquid markets, alternative trading systems, which are defined as Multi-lateral Trading Facilities (MTFs), and regulated exchanges need to provide pre-trade transparency information in terms of current bids or offers and trading depths at the offers concerned,[17] as well as post-trade transparency information of concluded transactions in terms of volume, price, and time.[18] Such pre-trade and post-trade transparency information is not obliged to be received by the regulator. The regulated has the responsibility to make them available to the public. The MIFID Commission Regulation specifies that "making available to the public" means publication of updated information (within 3 minutes of close of trade),[19] over a market's facilities, a third party's facilities or proprietary facilities.[20] The publication duty includes a duty to monitor the publication and ensure its accuracy, and a duty to consolidate comparable information, and to make available to the public on a commercial non-discriminating basis at a reasonable cost.[21] Hence, the Commission has endorsed the delegation model of regulatory administration of price transparency disclosure, which allows commercial disseminators, including the markets themselves to provide such information as an information product. Although there are duties attached to the publication duty to maintain the accuracy and veracity of the information, and to consolidate other comparable information, a point revisited below, the model of regulatory administration in price transparency is arguably delegated.

The delegation of dissemination responsibility to the regulated may arguably be based on the following rationales: 1) the nature of the information; 2) cost-benefit analysis in delegated administration; and 3) the benefits of co-opting the regulated to introduce market forces in administering the disclosure.

The first rationale, mentioned earlier, is that the information mandated to be disclosed pursuant to continuous disclosure or price transparency is frequently information with a short lifespan and is often therefore of immediate time relevance to investors. Hence, rigidly prescribed methods for delivery in law may not keep up with technological innovations that can help deliver the information more effectively. This leads to the second point that rigid legal prescriptions may cause social losses in inefficiencies and innovation loss, as dissemination would be confined to methods that may no longer be innovative or effective.[22]

17. Council Directive 2004/39, arts. 29, 44, 2004 O.J. (L 145) 1 (EC); MIFID Commission Regulation, *supra* note 3, art. 24.

18. Council Directive 2004/39, arts. 30, 45, 2004 O.J. (L 145) 1 (EC); MIFID Commission Regulation, *supra* note 3, art. 27.

19. MIFID Commission Regulation, *supra* note 3, art. 29.

20. *Id.* art. 30.

21. *Id.* art. 32.

22. For a discussion on the role of technological advancement and disclosure regulation, see MARY GRAHAM, DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM (2002).

Further, continuous disclosure and price transparency information come from disparate sources and may be generated in great amounts over short periods of time. Central administration of such information, in terms of regulator collection and dissemination, may prove way more costly than the benefits that investors may reap. Finally, as will be discussed, co-opting the regulated to share in the design of dissemination may bring about benefits in terms of innovation in information delivery, as delegation can create market incentives for the regulated to provide certain enhanced information services such as consolidated information.[23]

It may be argued that there is nothing unusual about the delegation or privatization of the administration of continuous disclosure or price transparency reporting. The essence of disclosure regulation is to prescribe that certain information be made available and then to ensure that all mandatory disclosure is evenly disseminated and made available to the public. Since the information is in the possession of the regulated, it is not possible for the regulator to assume to be the central recipient of all information mandated to be disclosed. Disclosure regulation is essentially a form of light-handed regulation that allows the public to choose in their best interests[24] and is usually used for regulatory needs that are not too socially costly, which would otherwise warrant a more command-and-control approach.[25] Therefore, it is counter-productive if the regulator has to incur centralized administrative costs to receive all the information and provide a public portal for access. Further, it could be argued that information is by nature capable of dissemination, especially in this day and age of technological possibilities, and thus, it is normal for regulators to assume that the production and dissemination of the required information could be easily undertaken by the regulated in a cost-effective manner.[26] In other words, it could be argued that all disclosure regulation involves some form of delegation anyway.

This article does not intend to argue that there should not be such delegation or privatization of the administration of mandatory disclosure to the regulated. However, this article argues that the extent of delegation in the EU regulation of continuous disclosure and price transparency is more significant and has certain implications for the substantive regulation of these areas, as well as for EU-level governance in these areas.

Delegation in the regulatory administration of mandatory disclosure raises implications about whether the regulatory outcome—that the intended recipients receive the mandatory disclosure—is likely to be achieved. Where mandatory disclosure of risks in a consumer product is made, the disclosure may be made on the packaging, on a leaflet enclosed within the packaging, or in some way attached to the product. Perhaps one method may be more effective than another to bring a consumer's attention to the disclosure;[27] however, where securities are concerned, the product is an intangible interest, and thus disclosure cannot physically be affixed to anything. Therefore, perhaps the channels of communication,

23. *See infra* Part III.

24. Sylvia L. Sironi, *Securities Regulation: Information Initiative on the Internet*, 50 ADMIN. L. REV. 255 (1998).

25. ROBERT BALDWIN & MARTIN CAVE UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE (1999).

26. Chris Hilson, *Information Disclosure and the Regulation of Traded Product Risks*, 17 J. ENVTL. L. 305 (2005) (discussing why mandatory disclosure, an informational approach to regulation, is increasingly popular, especially in the area of environmental regulation).

27. Forms and methods of disclosure affect the effectiveness of disclosure. *See, e.g.*, Stephanie E. Dreyer & Peter G. Weinstock, *Less is More: Changing the Regulator's Role to Prevent Excess in Consumer Disclosure*, 123 Banking L.J. 99 (2006); Charlotte Villiers, *Disclosure Obligations in Company Law*, 1 J. CORP. L. STUD. 181 (2001).

dissemination, and access would become more important in considering how the mandatory disclosure is to be administered. This is perhaps why mandatory disclosure regulation for public offers is controlled by prescribing a single document, the prospectus, and prescribing methods for delivery. By turning over the administration of dissemination, publication, and access to the regulated in terms of continuous disclosure and price transparency disclosure, it is important to examine the benefits and drawbacks of such delegation and the implications of such delegation.

B. The Role of Private Actors in Regulation

The role of private actors in public regulation is increasingly being commented on by public and administrative law researchers and accepted as an important phenomenon that has implications on how the role of the public regulator may be rethought. Jody Freeman, in the United States, describes this as a form of shared governance,[28] while UK commentators, such as Colin Scott, describe the role of private actors in public governance as a necessary consequence of diverse actors having diverse resources to contribute to the governance of a regulatory space.[29] Julia Black also discusses decentered forms of regulation, that modern regulation enrolls various actors in the total governance process.[30] One commentator also suggests that all public regulation essentially has a private counterpart, as private parties may be called in to administer or apply the regulation, and in these "second order" arrangements, the regulatory outcome may be affected.[31]

Private actors may take on various roles in contributing to the landscape of public regulation. Some regulatory aspects may be outsourced or contracted out to private actors.[32] In our discussion, continuous disclosure and price transparency are mandated to be disclosed to the public, and the regulated is tasked with the actual dissemination and publication of the information. However, continuous disclosure of information may be made more meaningful to investors if it is consolidated with all the relevant previous disclosures made by the same issuer. Further, information produced at periodic intervals may be made comparable between different issuers after some organization and collation of the information.

For price transparency information, it is also acknowledged that individual price transparency may not achieve much for investors, unless price transparency can be consolidated across different markets.[33] These value-added services, even if not mandated by law, can be supplied by the free market to investors. Perhaps the regulators already see that there are many beneficial possibilities of value-adding to the mandatory disclosure that is imposed,

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28. Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 Admin. L. Rev. 813 (2000).

29. Colin Scott, *Analyzing Regulatory Space: Fragmented Resources and Institutional Design*, 2001 Pub. L. 329 (2001).

30. Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a 'Post-Regulatory' World*, *in* Current Legal Problems 2001 103 (M.D.A. Freeman ed., 2001); Julia Black, *Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation*, 2003 Pub. L. 63 (2003).

31. Michael P. Vandenbergh, *The Private Life of Public Law*, 105 Colum. L. Rev. 2029 (2005).

32. Mark R. Freedland, *Government by Contract and Public Law*, 1994 Pub. L. 86 (1994) (discussing the constitutionality of such contracting out); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 Duke L.J. 389 (2003) (discussing the drawbacks of contracting out, especially if the costs of monitoring agency drift may outweigh the benefits).

33. John Board, Charles Sutcliffe, & Stephen Wells, Transparency and Fragmentation: Financial Market Regulation in a Dynamic Environment (2002).

and thus, delegation of the administration of the basic layer of mandatory disclosure to the regulated also allows market innovation to provide for private services in relation to the information.[34] The delegation is thus related to a form of privatization, where services may be better provided by commercial providers in the market than by the regulator.

C. Rationale for Regulating Continuous Disclosure and Price Transparency

1. *Continuous Disclosure*

The main rationale for regulating continuous disclosure lies in the relationship between information and the price of securities on the open market. The well-known Efficient Capital Markets Hypothesis posits that if information regarding a corporation that may affect stock prices is released promptly into the market, then stock prices would accurately reflect the value of the stock, and this facilitates investor resource allocation in order to achieve an efficient capital market.[35] Stock price accuracy in the market encourages investor confidence, and investor confidence is important both to the liquidity of the market, as well as to the sufficiency of investor base for the primary market where issuers make their initial public offers.

Professor Merritt Fox points out that stock price accuracy enhancement brings about other economic benefits in the allocation of investment resources.[36] First, stock price accuracy improves efficiency in the takeover and acquisitions market, and potential acquirers could make more informed decisions about their intended targets. Second, stock price accuracy may also persuade managers to accept stock remuneration as part of managerial compensation. Third, stock price accuracy may affect financing options for corporations, such as the possibility that a project may be financed more readily by a stock sale or that intermediaries may be willing to extend external financing through equity participation, or other equity-based consideration, so that corporations need not rely excessively on debt finance.

A further query is whether disclosure alone would ensure stock price accuracy,[37] as it is not yet clearly established that information disclosed by corporations certainly influences investor behavior in share purchase or sale.[38] Furthermore, optimum disclosure does not necessarily achieve stock price accuracy, as access to information on the investors' end may be imperfect.[39] An eminent economist has, however, identified the possibility that capital

34. Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 10 Ind. J. Global Legal Stud. 125 (2003).

35. Marcel Kahan, *Securities Law and the Social Costs of "Inaccurate" Stock Prices*, 41 Duke L.J. 977 (1992). *But see* Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. Rev. 761 (1985) (discussing that the efficient markets hypothesis has been rendered simplistic by later economic theories). However, Professors Gilson and Kraakman have defended the thesis of information affecting price. *See* Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549 (1984).

36. Merritt B. Fox, *Rethinking Disclosure Liability in the Modern Era*, 75 Wash. U. L.Q. 903 (1997).

37. *See* Gordon & Kornhauser, *supra* note 35.

38. *But see* George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 Am. Econ. Rev. 132 (1973) (suggesting that mandatory periodic disclosure does not benefit investors); Irwin Friend & Randolph Westerfield, *Required Disclosure and the Stock Market: Comment*, 65 Am. Econ. Rev. 467 (1975) (challenging Benston's analysis).

39. There are two Australian cases that highlight the interesting situation where information was recently released overseas, but the investing public in Australia would have no access to it immediately. *See* R v. Firns (2001) 38 A.C.S.R. 223; R v. Kruse, New South Wales District Court, Dec. 2, 1999 (unpublished).

market efficiency could be found in a strong form, a semi-strong form, or a weak form (i.e., that price adjustment to information disclosure may take place in various degrees and over different periods of time). But that does not negate the policy objective of achieving stock price accuracy. Even though perfect competition remains an ideal in a microeconomic world, and there are various interests that may be met in imperfectly competitive markets of varying degrees, it does not mean that any regulation of competition in order to edge toward that ideal is useless.

In the United States, it has also been held that withholding information to the secondary market may give rise to fraud-on-the-market liability, meaning that such non-disclosure is tantamount to committing fraud on the investing public, and the liability of the corporation may be sustained even if investor decisions resulting in losses may not be proved to have been made in reliance on the non-disclosure.[40] Disclosure of information to secondary markets thus serves the purpose of preventing corporate abuse. Therefore, to what extent should corporate disclosure be corporate responsibility?[41] Information dissemination could arguably come from anyone, and much information is actually produced by the work of analysts. The rationale for making corporations responsible is that corporations are in possession of much information pertaining to themselves, and it would be economically efficient that the corporations should be asked to subsidize external efforts by analysts.[42]

The social and economic desirability of disclosure also need not entail the imposition of disclosure as a mandatory obligation. If corporations voluntarily make disclosure in their own interests, then the amount of information released to the market may be sufficient.

It has been argued that mandatory disclosure is necessary, as information would not otherwise be disclosed if left to the initiatives of private corporations.[43] Disclosure of information was argued to be a "public good" that could only be provided by public regulation.[44] Mandatory disclosure also allows information to be disseminated in a standardized fashion[45] and levels the playing field for different investors with varying degrees of sophistication where access to information is concerned. Another commentator has argued that mandatory disclosure needs to be regulated, as disclosure of firm-specific information is a credence good which cannot easily be verified by outsiders of the corporation. Thus, regulatory oversight in the veracity of credence goods is essential.[46]

40. Basic Inc. v. Levinson, 485 U.S. 224 (1988). *See also* Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945 (1991).

41. Donald C. Langevoort, *Commentary: Stakeholder Values, Disclosure, and Materiality*, 48 CATH. U.L. REV. 93 (1998) (suggesting that there may be some room to consider if disclosure is a responsibility-based action).

42. *See* Coffee, *supra* note 11.

43. Easterbrook & Fischel, *supra* note 12 (arguing that private corporations have no incentive to make disclosure voluntarily that may allow other corporations to free-ride on that corporation's expenditure in its efforts).

44. Coffee, *supra* note 11. *See also* Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983).

45. *See* Easterbrook & Fischel, *supra* note 12. *See also* Joseph A. Franco, *Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosure*, 2002 COLUM. BUS. L. REV. 223 (2002).

46. Arthur R. Pinto, *The Third Abraham L. Pomerantz Lecture, the First Amendment and Government Regulation of Economic Markets: The Nature of the Capital Markets Allows a Greater Role for the Government*, 55 BROOK. L. REV. 77 (1989).

The rationales for regulating continuous disclosure are to facilitate an efficient capital market and to prevent fraud on the market. Continuous disclosure of information is viewed as a public good that provides the two regulatory outcomes mentioned. However, the public good analogy is not exactly complete. A public good is provided because the market cannot be left to provide it because of "free-rider" concerns, leading to sub-optimal provision by the market.[47] Examples of public goods are roads, security, and defense. These goods are directly delivered to constituents. Where information in continuous disclosure is concerned, there is no "direct delivery," as the nature of information requires the beneficiaries to receive access themselves. The issue of access involves intermediaries who administer or control the access. It is this added layer of access managed by the regulated that this article regards as delegation in the achievement of the regulatory outcome (i.e., the delivery of the public good to the beneficiary investor). In particular, individual issuers may make announcements of continuous disclosure in disparate ways, and even if investors may find most information on the Internet, access is fragmented, and there is no guarantee that investors' own efforts will necessarily result in retrieving the relevant information.[48]

The delegation aspect is important to the achievement of the regulatory goal. If investors do not actually access or retrieve the information which is the subject of the public good, then there is regulatory waste[49] in the sum of private and social costs. The social cost in not achieving the regulatory outcome may be represented by loss of efficiency in the capital market and may result in the reduction in market integrity, loss of investor confidence, and reduction in capital flotation by issuers. As mandatory disclosure has often been acknowledged to impose regulatory cost on issuers, the private cost refers to the cost involved in preparing the disclosure, including costs of auditing and administrative and publication processes.[50] Such an amount of regulatory waste is huge indeed if the regulatory benefits desired are not at all achieved, which is the worst case scenario. Thus, the extent and mechanics of such delegation in the regulatory process becomes key to understanding the regulatory efficacy of continuous disclosure.

2. *Price Transparency*

There are a number of rationales for regulating market transparency. Market transparency refers to the visibility of pre-trade and post-trade information.[51] Pre-trade information refers to information regarding offer prices and volumes on markets and includes those offered by market makers. Such information can take a variety of forms: information on the current bids or firm quotes for a security; trading depth; the best five offers at different depths; or even the whole limit order book as constantly updated. Market makers are dealer-brokers who trade on their own account to provide liquidity quickly to the market. Post-trade information refers to information on concluded transactions, perhaps including

47. BALDWIN & CAVE, *supra* note 25, at 13.

48. Paul D. Cohen, *Securities Trading Via the Internet*, 4 STAN. J.L. BUS. & FIN. 1 (1999).

49. Dreyer & Weinstock, *supra* note 27 (discussing regulatory waste in terms of information that is not processed by consumers in banking disclosure).

50. Brian J. Bushee & Christian Leuz, *Economic Consequences of SEC Disclosure Regulation: Evidence from the OTC Bulletin Board*, 39 J. ACCT. & ECON. 233 (2005) (showing the extent of increased cost imposed on firms that need to comply with disclosure). *See also* Anat R. Admati & Paul Pfleiderer, *Forcing Firms to Talk: Financial Disclosure Regulation and Externalities*, 13 REV. FIN. STUD. 479 (2000) (explaining that it is always very difficult to match the private cost firms suffer to the benefits that can be achieved).

51. *See generally* BOARD, SUTCLIFFE, & WELLS, *supra* note 33 (discussing the nature of transparency).

price and volume of securities transacted, and may include time, venue, and counterparties to transactions.

Markets will normally generate a certain level of pre-trade transparency as part of the business of attracting trade. Post-trade transparency also helps investors evaluate the movement of stocks and trading patterns to make their own prospective investment decisions. Besides facilitating investment decisions, market transparency is important in the prevention and detection of market abuse, such as insider trading or market manipulation. In the present landscape, an increase in electronic trading platforms and the multiplication of markets on a global scale mean that market fragmentation is becoming a reality[52] Transparency across fragmented markets is increasingly important as, without regulation, some markets may remain opaque, serve dedicated users, and become fertile ground for market abuse.[53] Market transparency may also serve the purpose of evaluating intermediary performance in serving clients' interests, as concluded transactions are visible to clients, and they may be able to assess the quality of intermediaries' execution.

However, critics have argued that the disclosure of prices may be detrimental to the activities of market makers.[54] This is because if market makers provide liquidity for a large trade, then their long positions may become exposed under pre-trade transparency, and they could suffer losses if rivals drive down bids for the security concerned. Market makers provide a useful service of continuous liquidity, and there seems to be some justification in keeping their positions secret. Although investors would consequently be deprived of some information for their investment decisions, it has been argued that there is nothing really unfair in some investors getting a better deal, as broker-dealers may favor long-term customers and customers who wish to move large volumes. It is accepted in retail transactions that larger volumes of purchases may merit discounts, or familiar customers may have privileges, so why not in securities transactions?[55] The U.S. and London exchanges are quote-driven, as are the exchanges in most Nordic countries and Germany, while France and the "Club Med" group of countries are transaction-driven. Quote-driven markets depend on market making to provide fast liquidity, and thus, these markets may be more adversely affected.[56] However, recent comprehensive surveys indicate that regulating price transparency does not have an adverse effect on market making, especially since a limited deferral[57] of reporting is allowed in many exchanges, and that such regulation also does not adversely affect liquidity or attractiveness of the regulated market concerned.[58]

52. Jonathan R. Macey & Maureen O'Hara, *Regulating Exchanges and Alternative Trading Systems: A Law and Economics Perspective*, 28 J. LEGAL STUD.17 (1999).

53. BOARD, SUTCLIFFE, & WELLS, *supra* note 33, at 145 (discussing the relationship between fragmented markets and need for transparency regulation).

54. Richard K. Lyons, *Optimal Transparency in a Dealer Market with an Application to Foreign Exchange*, 5 J. FIN. INTERMEDIATION 225 (1996).

55. *See* G. Keating, *Ethics and Regulation in Securities Market -Making*, *in* FINANCIAL DECISION-MAKING AND MORAL RESPONSIBILITY 96 (Stephen F. Frowen & Francis P. McHugh eds., 1994).

56. Kerry J. Houghton, *The Economic and Political Debate Over the Regulation of Off-Exchange Securities Trading in the European Community's Single Financial Market*, 32 VA. J. INT'L L.747 (1992).

57. Although the MIFID regulates price transparency, deferral of reporting is allowed for large size trades, and the determination of what may be large is done in accordance with a table classifying shares into different categories by turnover, and determining large relative to those turnovers. *See* MIFID Commission Regulation, *supra* note 3, arts. 28, 33 and annex II, tables 2, 3, and 4.

58. BOARD, SUTCLIFFE, & WELLS, *supra* note 33, at 214–38.

For regulation of market transparency to achieve its regulatory outcome, that is to provide increased information for investors over fragmented markets to achieve the best execution and to prevent market abuse, such transparency needs to be accessible. The accessibility of transparency information is again a delegated aspect of regulation. Separate publications of market data will result in a multitude of sources of information with fragmented access.[59] Further, the usefulness of market transparency information also depends on the consolidation of such information across fragmented markets so that the best deals may be ascertained, execution quality may be evaluated, and market abuse patterns, if any, can be detected. The MIFID Commission Regulation makes it mandatory that publication of price transparency information includes a duty to consolidate comparable information. However, there is no further provision on how and to what extent such consolidation should be done and provided. Thus, how the consolidated information is delivered still depends on the initiatives of information providers, whether they be markets themselves or otherwise.

III. Benefits and Drawbacks of Delegation or Privatization in Regulating Continuous Disclosure and Price Transparency

A. Reliance on Intermediaries to Achieve the Regulatory Goal

Investors in securities markets often rely on intermediaries to decide on their transactions, whether such investors are professional or retail investors.[60] Securities intermediaries provide a bundle of services, from advice to execution of transactions on behalf of investors. Such intermediaries also engage professionally in the searching for and retrieval of information in order to service their clients. Thus, it could be argued that the delegation aspect of administering the mandatory disclosure in continuous disclosure and price transparency will not adversely affect the ultimate ability of investors to retrieve the information because their intermediaries could be relied on to retrieve it even if the access points are disparate or sometimes remote. A further benefit of intermediary processing of such information is that intermediaries are professionals and are thus able to comprehend the technical aspects of the information and advise their clients accordingly. Stephen Plass, writing in another context of disclosure regulation, opines that disclosure is frequently only meaningful to the intelligent and resourceful, and thus, even if the mandatory disclosure were made easily accessible to all, the benefit of general comprehension may not be achieved.[61] There is thus no need to incur further regulatory cost in setting up an infrastructure to ensure ultimate delivery to the investor. As long as the regulated can use the least-cost channels and still effectively deliver information to intermediaries, it is arguable that this should suffice for investors. Empirical researchers have also found, in studies on the effectiveness of disclosure, that mandatory disclosure in financial regulation is largely successful because of

59. Cohen, *supra* note 49.

60. Langevoort, *supra* note 12; William M. Sage, *Regulating Through Information: Disclosure Laws and American Healthcare*, 99 Colum. L. Rev. 1701, 1711,1827 (1999) (discussing mandatory disclosure regulation in healthcare and likening the role of healthcare intermediaries to financial intermediaries who play a key role in advising the ultimate users or consumers).

61. Stephen A. Plass, *Bargain Avoidance in a Competitive Bargain Market: The Car Sales Conundrum*, 2 Wyo. L. Rev.1 (2002). *See also* Sage, *supra* note 60, at1827 (discussing financial regulation as an area where sophisticated beneficiaries of regulation are involved, and thus, disclosure regulation is eminently appropriate).

information embeddedness in intermediaries. Information embeddedness means that the information is collected and used by intermediaries and becomes part of the cycle of their processes and decisions. This embeddedness in intermediaries translates to investor decisions through intermediary service and advice and achieves the practical utility of disclosure regulation for investors.[62]

The classic problem with reliance on intermediaries, however, is that there is a principal-agent problem. Intermediaries may tell investors only such information that is also beneficial to their own interests. For example, during the dot.com boom, intermediaries issued buy advices partly because they were themselves heavily committed to underwriting dot.com flotations.[63] Such buy advices were issued in spite of a lack of financial information supporting prospects and profitability for some dot.coms.[64]

However, MIFID's regulation of intermediary conduct may be able to curb agent excesses like that mentioned above. The MIFID Commission Directive contains detailed prescriptions on how to identify and prevent conflicts of interest in an investment firm.[65] The rules of information provision, "know-your-client"[66] and "best execution"[67] would also help alleviate the likely principal-agent problems. The MIFID Commission Directive regulates a copious amount of information provision to clients, such as information on investment products, client services, charges, conflict of interest policy, execution policy, and custodianship polices.[68] Information provision duties are less onerous for clients classified as professional clients.[69] Know-your-client is a rule that requires intermediaries to ascertain certain key information from their clients, such as financial situation, knowledge, experience, and investment objectives, in order to recommend the most suitable investments. It is however arguable that information provision coupled with know-your-client, allows a client to be sufficiently empowered with information before engaging the services of an intermediary. Although an intermediary is regulated to provide copious information to clients, the information disclosure relates more to general matters than a specific ad hoc disclosure made by an issuer, and reliance upon intermediaries is no guarantee that any specific piece of information is conveyed to an investor. Further, it could be argued that

62. David Weil, Archon Fung, Mary Graham, & Elena Fagotto, *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT.155 (2006).

63. ROBERT J. SHILLER, IRRATIONAL EXUBERANCE (2000); TECHNICAL COMMITTEE OF THE INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, STRENGTHENING CAPITAL MARKETS AGAINST FINANCIAL FRAUD (2005), *available at* http://www.iosco.org/library/ pubdocs/pdf/IOSCOPD192.pdf.

64. Elizabeth K. Keating, Thomas Z. Lys, & Robert P. Magee, *Internet Downturn: Finding Valuation Factors in Spring 2000*, 34 J. ACCT. & ECON. 189 (2003); Carol M. Graham, Mark V. Cannice, & Todd L. Sayre, *The Value -Relevance of Financial and Non-financial Information for Internet Companies*, 44 THUNDERBIRD INT'L BUS. REV. 47 (2002). In both articles, financial and non-financial information by Internet companies were analyzed, and persistent under-reliance on financial information artificially boosted share prices of Internet companies until the crash.

65. Commission Directive 2006/73/EC, arts. 21–25, August 2006, implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organizational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive [hereinafter MIFID Commission Directive].

66. Council Directive 2004/39, art. 19(4), 2004 O.J. (L 145) 1 (EC); MIFID Commission Directive, *supra* note 67, arts. 35–37.

67. Council Directive 2004/39, art. 21, 2004 O.J. (L 145) 1 (EC); MIFID Commission Directive, *supra* note 67, arts. 44–46.

68. MIFID Commission Directive, *supra* note 67, arts. 27–33.

69. *Id.* art. 28.

an intermediary's recommendation to a client is an information bundle that aggregates the intermediary's knowledge, and hence, clients ultimately receive information from receiving such a recommendation. However, a recommendation is ultimately a discretionary form of communication, and is not the same as impartation of specific information in a neutral and objective way. Such information implicitly conveys influence upon a client, and such influence could be considerable.[70] Hence if the regulatory administration of information dissemination is delegated to the regulated, and the client depends heavily on intermediaries to retrieve necessary information for them, clients may not obtain all of the information, in the way they need it, from their intermediaries.

As to best execution, this means that an intermediary should, as far as possible, conduct transactions for his clients on the most favorable terms possible. The relevant factors to ascertain best execution include price, speed, likelihood of execution, and settlement size. The MIFID Commission Directive also provides that best execution for retail investors is ascertained mainly by price, and comparisons between execution venues serve the basis for determining best execution as a legal fact.[71] With these regulatory controls on intermediary behavior, it is arguable that relying on intermediaries to provide investors with the information that is disseminated from the regulated should be sufficient. However, there are a few caveats. Ideally, intermediaries should trawl through all market information to select the best execution for his client, bearing in mind the client's particular concerns. However, retrieval of information from a range of disparate sources may take time and is therefore costly. Intermediaries may rely on particular sources or linkages for information and not access smaller markets. In fragmented markets where information is disparate and there is no detailed regulation on the extent of information consolidation that the regulated must undertake, and if there should be an argument about execution quality, it would not be easy to pin the intermediary down so long as some reasonable information retrieval has been done regarding trade information.[72]

It is arguable that existing regulation on intermediary conduct may not be sufficient to address the principal-agent risk between intermediaries and clients where reliance on intermediaries to retrieve continuous disclosure and price transparency information is concerned. However, the delegation could still arguably achieve the regulatory goal by harnessing private market forces for public regulation. By leveraging on competition between markets, it could be argued that competition would help provide good access to continuous disclosure and price transparency information, which can be supplied with value-added services, for investor choice.

B. Competition between Markets and Value-Added Services

It could be argued that delegation or privatization of the administration of publishing or disseminating mandatory disclosure is a more cost-effective method of achieving the regulatory outcome of empowering investors with information. The other benefit of the delegation model is that it also provides investors with greater choice as to the value-added services that the free market can provide on top of the mandatory disclosure.

70. Robert Prentice, *Whither Securities Regulation? Some Behavioural Observations Regarding Proposals for its Future*, 51 Duke L.J. 1397 (2002); *see also* Langevoort, *supra* note 12.

71. *Id.* art. 44.

72. Board, Sutcliffe, & Wells, *supra* note 33.

First, in terms of cost-effectiveness, imagine the scenario where the regulator sets up an infrastructure to collect and disseminate the mandatory disclosure, whether for continuous disclosure or price transparency. This entails regulatory cost in both installing and maintaining the infrastructure. The regulator also may face potential liability costs should infrastructure failures or problems result in financial losses for investors who rely on the service. As continuous disclosure and price transparency information are both susceptible to time sensitivity, the burden on regulators and cost of potential liability (although legislation may provide statutory exemption for liability) may be a significant regulatory cost. The centralization of information may bring about the benefit of easy access and retrieval, and also the benefit of consolidation of information in one portal. Consolidation also makes for greater comparability of price transparency information between markets, of past and current issuer information, and of issuer information between issuers. One drawback may be that mandatory disclosure would overtake and stultify any other information services that the free market may provide. Additionally, the beneficiary recipients would only obtain the minimum level of mandatory disclosure and no more. Investors may therefore lose out on the potential innovation that firms and markets may carry out in providing information services. Firms could arguably be unwilling to spend resources to innovate and provide value-added information services as they would likely be paying for the regulatory cost of the centralized information portal run by the regulator.

If there is delegation or privatization of the administration of publishing or disseminating the disclosure, then fewer regulatory costs will be incurred, and firms and markets will be responsible for disseminating the information. It may be argued that firms and markets will try spend the least amount of resources possible in discharging this administrative burden. However, it is in the interest of firms to disseminate some aspects of continuous disclosure and for markets to disseminate some aspects of price transparency. Continuous disclosure can boost an issuer's market presence and generate more investor interest.[73] Price transparency can provide investors with more confidence and possibly lower bid-ask spreads, attracting investors to that market.

Competition between issuers could ensure that issuers would be sufficiently self-interested in disseminating the mandatory information for continuous disclosure. Professor Fox has argued that, as the private cost of disclosure always exceeds the social cost of non-disclosure, and the social benefits of disclosure always exceed the private benefit of such disclosure to the firm, relying solely on firm initiatives to provide an optimal level of disclosure for the efficient working of capital markets is illusory.[74] As the Directives have made continuous disclosure mandatory, the regulated does not decide the contents of the disclosure, but is delegated to decide the administration of publishing or disseminating the information. The contents of mandatory disclosure include both information that firms would voluntarily disclose and bring to the attention of investors and information that firms are, left on their own, not so keen to disclose. For information that issuers wish to let investors know, they probably have existing communications infrastructure to achieve the publishing and dissemination of the information. These channels should arguably be effective,

73. Voluntary disclosure by firms is often for that purpose. *See* Philip Brown, Stephen L. Taylor, & Terry S. Walter, *The Impact of Statutory Sanctions on the Level and Information Content of Voluntary Corporate Disclosure*, 35 ABACUS 138 (1999). *See generally* Frank Fehle, Sergey Tsyplakov, & Vladimir Zdorovtsov, *Can Companies Influence Investor Behavior Through Advertising? Super Bowl Commercials and Stock Returns*, 11 EUR. FIN. MGMT. 625 (2005) (discussing the effects on investors of marketing or other means that may increase an issuer's presence).

74. Fox, *supra* note 36.

as they serve the issuer's interest. For the rest of the mandatory disclosure, it would be conceivable that issuers would use the same channels of communication to publish and disseminate the information, as it may be too costly to segregate the information and set up a separate infrastructure for dissemination. Thus, the self-interest of issuers is already likely to entail provisions of sufficiently effective channels of communication to investors.

Competition between markets also generates a natural amount of pre-trade price transparency, as observed by expert researchers.[75] Such pre-trade transparency attracts order flow to the markets. The MIFID's mandated minimum amount of pre-trade transparency is that of current firm offers or quotes. up to the best five bids and offers, and in auction-driven markets, the best bids and offers that the price discovery mechanism allows it to retrieve.[76] This is arguably already surpassed by many exchanges, which make known a greater level of pre-trade transparency to attract trade.[77] Demand from investors also drives competition for post-trade transparency. Post-trade transparency standards are diverse among markets and arguably generally higher than the statutory minimum under the MIFID. For example, the London Stock Exchange (LSE) provides comprehensive post-trade data that could be customized for investors and bundles up issuer announcements on daily post-trade data. The Euronext allows subscriber access to comprehensive post-trade data, including concluded trade data and relevant best bids/offers on the stock. The Deutsche Börse provides for post-trade transparency at the level demanded by the MIFID. It is arguable that market forces are sufficient to ensure that the regulated perform the information delivery to investors under the delegation model, and in many cases, markets surpass what is required under the legislation.[78]

Next, the delegation model allows the regulated to make business opportunities out of their statutory responsibilities. This is the kind of innovation that can be supplied in a free market. It is arguable that market forces will provide value-added services to investors to freely choose from. The provision of such services stimulates innovation in the market for better information products and services for investors and generates private benefits to investors that are beyond the realm of "public goods."[79] Such value-added services may generally take three forms. The first is value-added in terms of making available high-end communication technology to deliver information. The second is bundling other information services on the mandatory disclosure. Finally, the third is establishing linkages and providing consolidation or comprehensiveness of information.

Delegated administration of information services allows the regulated to develop technological products to communicate information to subscribers. For example, the LSE[80] and

75. Board, Sutcliffe, & Wells, *supra* note 33.

76. MIFID Commission Regulation, *supra* note 3, art. 17.

77. For example, the entire limit order book is available for the Financial Times Stock Exchange 100 most liquid stocks traded on the LSE, and different levels of sophistication of data may be made available under three levels of subscription. The Deutsche Börse provides dedicated data feeds, which include pre-trade and post-trade transparency. In terms of pre-trade transparency, subscribers have a choice of purchasing current best asks/bids and level of trading or top ten best asks/bids at Level Two.

78. Eric C. Otness, *Balancing the Interests of Retail and Institutional Investors: The Continued Quest for Transparency in Today's Fragmented Equity Markets*, 96 Nw. U. L. Rev. 1607 (2002).

79. Mahmood Bagheri & Chizu Nakajima, *Optimal Level of Financial Regulation under the Gats: A Regulatory Competition and Cooperation Framework for Capital Adequacy and Disclosure of Information*, 5 J. Int'l Econ. L. 507 (2002) (arguing that competition will provide an optimal level of services).

80. *See* London Stock Exchange, Infolect, http://www.londonstockexchange.com/en-gb/products/marketdata/ (last visited Sept. 27, 2006).

Deutsche Börse have each developed a dedicated data stream feed system for subscribers to install and receive real-time data feeds on the market transparency information provided.[81] The Euronext also has a dedicated software package that allows its data to be retrieved by subscribers over the Internet.[82] These innovative products are necessary in order to enhance the speed of retrieval because real-time continuous disclosure and price transparency information are time-sensitive in nature.

The second type of value-added service that market forces can offer investors is extra, non-mandatory information that is also useful to investors. In terms of continuous disclosure, issuers can offer mandatory disclosure, as well as voluntary disclosure and disclosure of non-financial information. The regulation of non-financial types of disclosure is relatively young in the regulatory landscape. The Transparency Directive provides that non-financial disclosure may be made in half-yearly interim management statements where companies are not obliged to make quarterly financial reports by their listed exchanges. These interim management statements only provide for explanations to material events and transactions in the business during the period for reporting and a general description of the financial performance and position of the issuer. This is a rather low level of non-financial disclosure, as non-financial information can include many more aspects such as governance information, non-financial performance measures, innovation, operations, and even corporate social responsibility policies and information.[83] Thus, firms can voluntarily provide such other non-financial information that they believe is in their interests to do so. Examples of voluntary disclosure that firms make and investors crave include projections and forecasts,[84] although objective evidence suggests that forecasts are, more often than not, not that accurate.[85] However, projections and forecasts have a tremendous ability to affect share price.[86]

In terms of market transparency, markets may provide value-added services to the mandatory minimum levels of pre-trade and post-trade data. A few examples may be given.

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81. The Deutsche Börse Group, CEF-The High Speed Data Feed, http://deutsche-boerse.com/dbag/dispatch/en/kir/gdb_navigation/market_data_analytics/25_realtime_market_data/60_cef_data_feed (last visited Sept. 27, 2006).

82. *See* Euronext, ListQuote, http://www.euronext.com/editorial/anchors/wide/0,5371,1732_201068548,00.html (last visited Sept. 27, 2006).

83. *See* Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123, 175 (2004) (discussing types of non-financial information); Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433 (2002); Edmund L. Jenkins, *The AICPA Special Committee on Financial Reporting: Meeting the Information Needs of Users*, 7 INSIGHTS 8 (1993) (summarizing the Jenkins Report mentioned above). *See also* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, IMPROVING BUSINESS REPORTING—A CUSTOMER FOCUS: MEETING THE INFORMATION NEEDS OF INVESTORS AND CREDITORS (1994), *available at* http://www.aicpa.org/members/div/acctstd/ibr/chap2.htm; Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1237 (1999) (discussing corporate social disclosure).

84. Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 931 (2005).

85. 90% of U.K. forecasts done in an old survey were below actual results. *See* Ferris, *Profit Forecast Disclosure: The Effect on Managerial Behaviour*, 5 ACCT. & BUS. RES. 133, 133,136 (1975). In the last five years in Hong Kong, the trend was towards being overly pessimistic as well. PAUL. B. MCGUINNESS, A RE-EXAMINATION OF THE DISCLOSURE OF DISCRETIONARY EARNINGS FORECASTS: THE CASE OF INITIAL PUBLIC OFFERINGS IN HONG KONG (2005), http://www.sfc.hk/sfc/doc/TC/research/research/extpaper06%20(eng).pdf.

86. Bong-Soo Lee & Nairong Allen Yan, *The Market's Differential Reactions to Forward-Looking and Backward-Looking Dividend Changes*, 26 J. FIN. RES. 449 (2003).

Pre-trade transparency may be provided, not only for the best asks, offers, and corresponding trading depth, as under the MIFID, but could be enhanced to provide more asks or offers at different trading depths for a selection of stocks that may be traded with greater liquidity. Combinations of information may also be provided in a convenient bundle. For example, the Deutsche Börse provides comparability for its pre-trade data by including post-trade data of last done price and volume in the same feed. The LSE provides the Regulatory News Service, which is a data service consolidating the day's issuer announcements together with the day's post-trade historical data.[87] The LSE also provides customized data organization for post-trade data feeds to its customers.

Many exchanges[88] also provide information on benchmarking the performance of securities against main indices, and even analytical data may be supplied as part of the bundle. Thus, mandatory disclosure is value-added in that it could be reorganized in an intelligent way to help investors evaluate past and present investment decisions and to inform investors of trends in the market.

Finally, another form of value-added service in information delivery that can be provided to investors is consolidation and comprehensiveness of information. It has been noted that one of the main purposes of disclosure regulation is to allow comparison of information.[89] Comparison can be made easier if information is delivered in a consolidated manner. For example, issuers can consolidate all issuer announcements on a daily basis of related companies in the group and provide a comprehensive bulletin of information for delivery.[90] More frequently, issuers sell consolidated data to information service providers who can then provide subscribers with such information.[91] These information service providers are further able to consolidate different issuer sources and provide comprehensive issuer information to recipients.

In terms of market transparency data, the MIFID Commission Regulation mandates consolidation of data from similar sources. However the provision is sparsely worded and little prescriptive detail is provided. Hence, how information may be consolidated, how much information must be consolidated, and what information must be consolidated are arguably left to the regulated. Thus, the regulatory administration of consolidation is delegated to the regulated, in terms of how and what to consolidate, the mechanics of delivery, and the quality of consolidation. This conceivably allows the regulated to provide tiers of consolidated information services at different prices. Further, as the law does not provide facilitative regulation for the regulated to access the market data of comparable markets, how are the regulated to discharge the consolidation duty effectively? A market can argue that it is sufficient to consolidate only the transparency data of various markets that are linked to it. For example, Euronext is a merger of the Paris, Amsterdam, and Brussels exchanges, as well as the London International Financial Futures and Options Exchange, and can provide consolidated data for all four markets. The Deutsche Börse also provides

87. London Stock Exchange, Information Products and Services, http://www.londonstockexchange.com/en-gb/products/informationproducts/infoproducts.htm (last visited Sept. 27, 2006).

88. Euronext, LSE, and Deutsche Börse all provide benchmarking against selected indices.

89. GRAHAM, *supra* note 22, at 3.

90. The HSBC Group consolidates all announcements pertaining to the Group on its website. *See* HSBCnet, Announcements, http://www.hsbcnet.com/hsbc/home/announcements (last visited Sept. 27, 2006).

91. For example, the HSBC Group sells consolidated data to Bloomberg, Thomson ONE, and Reuters Research. The Prudential Group sells consolidated data to Interactive Data, which is the main information service provider in dissemination.

market data from its main Frankfurt exchange and subsidiaries, such as Eurex, and its partner exchanges, such as the Irish Stock Exchange. Exchanges may also sell data to licensed vendors who can then supply to their own subscribers.

By delegation, regulators could allow competition between markets and market forces to provide investors with more choices, enhanced information products, and services that are built upon the mandated level of minimum disclosure. However, there are some drawbacks.

1. *Implications of the Sophistication of Information Products*

The delegation or privatization of regulatory administration of mandatory disclosure allows the co-opting of the regulated and of market forces to provide a minimum layer of mandatory disclosure, as well as enhanced products and services for investors to choose from. This seems to be a perfect balance, as issuers and firms are forced to disclose certain mandatory key information that may not otherwise be disclosed on their own initiatives, supplying the public good aspect of information needs. Furthermore, regulation does not stifle other voluntary information products and services that could be available to investors.

One of the drawbacks in this delegation model is that the regulated, being responsible for the ultimate delivery of both mandatory and voluntary information, have total discretion on the mechanics of delivery. This allows the regulated to bundle up the basic mandatory disclosure with enhanced products in packages and charge subscription from users. Subscription would also limit access to the bundle of information to paying customers. Even if the basic information is available for free, would-be users would likely be led by marketing efforts towards the bundled packages, which would entail charges. The regulated may also bundle complex or sophisticated information products to sell to information vendors, and information vendors may set up another layer of access restriction. For example, where U.S. investors are concerned, Bloomberg and Reuters Research, both of whom purchase information from regulated issuers, provide comprehensive issuers continuous disclosure updates over their news files. A subscription to Reuters is necessary, whereas for Bloomberg, although access is free, investors need to incur a one-off cost in installing specialist software to read the files. In both the United States and the United Kingdom, regulatory efforts have ensured that the minimum regulatory information is available free of charge. The United States provides a regulator-maintained centralized information search and retrieval system, EDGAR,[92] for issuer disclosure. The United Kingdom authorizes primary information providers to collect regulatory information from listed companies, which must provide the regulated information free of charge to investors.[93] CESR therefore recommended a similar model for EU-wide regulation of issuer continuous disclosure information, that there should be an Officially Annointed Mechanism (OAM) in each Member State that collects and allows access to issuer continuous disclosure information of issuers for which the Member State is responsible, and a centralized database at the EU level, maintaining a list of EU issuers with links to their national OAMs.[94] This will be discussed in greater detail below.

92. *See infra* Part IV.

93. The list of primary information providers are found in the U.K. Listing Rules Schedule 12, *available at* http://www.fsa.gov.uk/pubs/ukla/schedule12-3.pdf (last visited Sept. 27, 2006).

94. *See* CESR Final Technical Advice, *supra* note 2.

Left on its own, the market may create barriers to access to bundled information as part of the competitive business of information packaging and delivery. The part of the bundle that is required to be disclosed and therefore should be a public good available to all investors, may be hijacked by the market. It may also be argued that bundling increases the sophistication of the information product or service. Therefore, these sophisticated products and services may not appeal to retail-type investors who may not wish to buy subscriptions or software and who may not understand how the bundle works for them. Even sophisticated investors may not wish to engage with the complexities of the sophisticated products and services. One of the consequences is that investors are arguably reinforced in their reliance on intermediaries who are plugged in to the matrix of the information business. As argued earlier, although intermediaries are regulated in their conduct of business, such regulation cannot totally replace the empowerment of investors by information as intended under the Directives. The co-opting of the regulated in the regulatory administration of mandatory disclosure could arguably eclipse the original regulatory goal in mandatory disclosure, to provide a minimum level of information as public good to all, so that all investors may be empowered to choose in their investment decisions.

2. *Insufficient Consolidation of Information for Regulatory Purposes*

Another drawback in the delegation of regulatory administration of mandatory disclosure is that consolidation of information may not be sufficiently provided by the market after all. Consolidation of information is practically beneficial as investors can have greater ease of access to the regulated information. Without consolidation of information, there would likely be many disparate sources of information. If these disparate sources elude the investor, then mandatory disclosure is ultimately not delivered into investors' hands. The MIFID Commission Regulation compels the regulated to consolidate information as part of their publication duty with respect to trade transparency information, but there is no regulation to compel consolidation of issuer continuous disclosure information as yet. Left to the market, it is highly arguable whether the regulated will provide consolidation. Lack of consolidation arguably reduces the likelihood that investors can make meaningful comparisons of information and thus make better-informed investment decisions.

Where issuer information is concerned, regulatory intervention has been necessary in both the United Kingdom and the United States to consolidate such information. In the United Kingdom, the Financial Services Authority (FSA) recognizes several primary information providers to collect regulatory information and provide them free of charge to users. As the number of primary providers is limited, users can be directed to a few sources for information, which establishes a type of consolidation of access.[95] The United States provides for consolidation of issuer information through its centralized system, EDGAR.[96] Other commercial information providers, like Bloomberg and Reuters, are able to repackage, organize, and deliver the information with enhanced services for fees. Established

95. *See* Financial Services Authority, Review of the UK Mechanism for Disseminating Regulatory Information by Listed Companies (2001), *at* http://www.fsa.gov.uk/pubs/cp/cp92.pdf; Financial Services Authority, Proposed Changes to the UK Mechanism for Disseminating Regulatory Information by Listed Companies (2001), *at* http://www.fsa.gov.uk/pubs/policy/ps92.pdf; Eilis Ferran, Building an EU Securities Market 193 (2004).

96. This may be phased out by the XBRL, which allows even more enhanced investor access features such as searching across like companies. *See* Jeremy Grant, *SEC's Cox to Revolutionise Disclosure*, Fin. Times, Oct. 3, 2006, at 1.

consolidators, like Bloomberg and Reuters, also operate in the United Kingdom and will likely provide similar consolidated information to U.K. investors, even though consolidation is not mandatory. Hence, the FSA's efforts and the activities of international financial information providers, like Bloomberg and Reuters, are likely to help achieve issuer information consolidation in U.K. securities regulation. There is a need to look at the level of EU securities regulation to see if consolidation may be achieved by a mix of regulatory intervention and free market forces.

The Committee of European Securities Regulators studied this issue and reported in June 2006[97] that it recommended national consolidation of issue disclosure by OAMs and also EU-wide consolidation by way of a centralized database that is independent of any Member State, that lists all issuers in the EU, and that maintains links to the relevant OAM for each issuer. The proposal for some form of national consolidation is consistent with the US and the UK, but it is uncertain if the OAM regime is more restrictive than is currently practiced in the UK. The UK allows several authorized primary information providers, and allows them to provide enhanced information services on top of the minimum consolidation of information that allows free access. Would the OAM be a monopoly of information, and to what extent would the OAM co-exist with commercial innovation? The more serious query is how the EU-wide consolidation project known as "Model C" may be achieved. Model C implies that a separate supranational EU agency must be instituted, funded, and endowed with functions to keep the database up to date, verified, running smoothly, and reliable. Such an institution requires political backing, as well. As this recommendation is now being considered by the European Commission, it is uncertain if the EU would be looking forward to this extent of issuer disclosure consolidation in due course.

On the other hand, market transparency information is compelled to be consolidated under the MIFID Commission Regulation, as part of the publication duty with respect to trade transparency. The provision mandating consolidation is brief and sparse in detail,[98] and reads more like an afterthought than a prescriptive regime that the Commission has considered sufficiently. This leaves the mechanics of consolidation to the regulated, and it is also arguable that the regulated may thus set the standards of sufficiency of consolidation. The large exchanges all provide market transparency for their own markets and partner markets. Additionally, the MTFs, such as Instinet and Virt-X, also provide their own market data. Such market data may also be provided as a package from proprietary systems offered by the market. It is uncertain how the law that compels consolidation also facilitates access to comparable market information from other sources, and how much comparable information from other sources, when provided, would be regarded as sufficient to discharge the duty to consolidate. In the absence of facilitative regulation to enable consolidation to take place, the blanket delegation of consolidation to the regulated may achieve the effect of the regulated providing an assemblage of information as it may reasonably retrieve with the lowest cost. This may mean that the delivery of the type of consolidation good could fall below the expectation of what investors actually need or demand. The regulated may also offer enhanced consolidation services at additional charges, thus making the minimum layer of consolidation a very basic service. If investors are not willing to pay for enhanced consolidation services, investors have to either assemble the information themselves or rely on intermediaries to assemble the information. The comprehensiveness of assemblage may

97. *See* CESR Final Technical Advice, *supra* note 2.

98. MIFID Commission Regulation, *supra* note 3, art. 32(b).

also be affected by barriers to access caused by enhanced information products and services, and proprietary technological systems as discussed earlier. The MIFID's sparse regulation of consolidation is almost tantamount to no regulation.

The consolidation of market information was regarded in the United States as a public good; thus the United States provided for twin regulatory products, the Consolidated Tape and the Consolidated Quotation. The Consolidated Quotation refers to consolidation of information on the best bids or offers, (i.e., consolidated pre-trade transparency information), and the Consolidated Tape refers to consolidation of historical trade information. All exchanges are to submit market data on the best quotes and last-done transactions to a central collector in the SEC. The SEC then consolidates all the information and sells the consolidated information to subscribers, either to information vendors or to investors directly.[99] These steps were taken pursuant to the Congressional mandate to the SEC in 1976 to create a national market system[100] to facilitate competition for best execution and to create informational linkages between markets to achieve that.[101] In 2004, the SEC proposed the Regulation NMS to improve on consolidation of information by capping the price at which information can be sold, and to improve the quality of the consolidated information by allocating information revenue based on the quality of information.[102]

The Seligman Committee (the Committee), tasked to look into whether any reform may be necessary to the Consolidated Tape and Quotation, recommended in 2002 that it was time for their abolition.[103] It recommended that competing consolidators be allowed to collect, organize, and sell consolidated data. The Committee believed that market forces and competition would compel information consolidators to develop better information products and services than the centralized consolidated data. Dean Seligman argued that market data is not the proprietary information of the regulator anyway and that it is time for liberalization of the information market to allow private information providers to compete and provide enhanced value-added information that is beyond the level of mandatory disclosure.

This recommendation has not been carried out by the SEC.[104] The SEC emphasized that the consolidation model provides easy access to retail investors of price transparency data and that feature should be preserved. Although Dean Seligman believes in the market,

99. Joel Seligman, *Rethinking Securities Markets: The SEC Advisory Committee on Market Information and the Future of the National Market System*, 57 Bus. Law. 637 (2002).

100. Securities Acts Amendments of 1975, Pub. L. No. 94–29, § 7, 89 Stat. 11 (codified as amended in scattered sections of 15 U.S.C. § 78k (1976)).

101. The National Market System has been implemented in many steps, including the Consolidated Tape and Quotation. It also consists of Inter-Market Trading, which allows brokers to route orders to the market where the best prices can be found, and the Nasdaq OTC trading system. But many criticize the steps as falling short of a truly national market system. *See* Joel Seligman, *The Future of the National Market System*, 10 J. Corp. L. 79 (1984); Jonathan R. Macey & David D. Haddock, *Shirking at the SEC: The Failure of the National Market System*, 1985 U. Ill. L. Rev. 315 (1985). Regulation NMS was then promulgated in 2004 to remove some of the limitations of Inter-Market Trading by allowing better access to trade on competing markets. *See* Joel Seligman, *Cautious Evolution or Perennial Irresolution: Stock Market Self-Regulation During the First Seventy Years of the Securities and Exchange Commission*, 59 Bus. Law. 1347 (2004).

102. *See* Regulation NMS, 70 Fed. Reg. 124 (June 29, 2005) (to be codified at 17 C.F.R. pts. 200, 201, 230, 240, 242, 249, 270).

103. Reliance is placed on Joel Seligman's article discussing the Committee's recommendations and rationales. *See* Seligman, *supra* note 99.

104. *See* Regulation NMS, 70 Fed. Reg. 124 (June 29, 2005) (to be codified at 17 C.F.R. pts. 200, 201, 230, 240, 242, 249, 270).

would he approve of the current delegation model in the EU if consolidation of information is hardly regulated?

There are a number of market obstacles to achieving satisfactory consolidation by pure market forces. First, bundled information products and services could arguably be proprietary in character, and exchanges and MTFs can be protected in maintaining exclusive rights to sell.[105] Exchanges and markets would be keen to press the proprietary point, as they generate much revenue from information sale. Now that exchanges face competition in terms of liquidity provision, trade,[106] and global competition for listing,[107] selling price-discovery information is an essential business for exchanges. Hence, it may be difficult for the regulated to obtain wide access to needed information without incurring much cost. The alternative is that the regulated would provide pared-down and basic services that do not consolidate enough information to be truly useful. Second, using the public good analysis, consolidated information is the kind of information product that can be free-ridden on by others, and thus, any market or information provider may be slow to be the first to provide such a good. Thus, consolidated information, not just market transparency information, may itself be a separate public good that needs to be provided. This explains why the SEC has administered the Consolidated Tape and Quotation to date.

Further, even if a market for competing consolidators may be created, there are regulatory issues with respect to these information providers that the MIFID has not addressed. Should the operational processes of competing consolidators be regulated? It may be necessary to create an approval or licensing system for competing consolidators so that there is some minimum regulatory oversight over the competence and integrity of operational processes. Also, should the products and conduct of the business of competing consolidators be regulated as well? Other regulatory issues include: product regulation; whether bundling mandatory disclosure with enhanced products may be allowed; and in conduct of business regulation, how competing consolidators may market themselves, anti-competitive regulation of consolidators' practices in monopoly of technology or bundling of products and services, and the liability of competing consolidators for failures in delivery and civil losses.

In sum, although the delegation model of regulatory administration of mandatory disclosure may bring about benefits in information products and services that the free market can provide, there are potential drawbacks, including: whether access to the basic mandatory information would be compromised; whether investors may become more confused by the enhanced information products and services, take the path of least resistance, and rely on

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105. Bundled information products could be protected as databases under Article 7(1) of the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases. *See* Council Directive 96/9, art. 7(1), 1996 O.J. (L 077) 20 (EC). *See also* Case C-203/02, The British Horseracing Bd. Ltd. v. William Hill Org. Ltd., 2004 E.C.R. I-10415 (discussing the scope of a protected database). Even if bundled information products may not be regarded as databases, there is a residual copyright protection for compilations of information that need not be creative, as long as the arrangement is of some intelligibility. *See* Rachel Boothroyd, *Database Protection: Solutions in the Post-William Hill Era*, 3 World Sports L. Rep. 14 (2005); George Wei, *Telephone Directories and Databases: The Policy at the Helm of Copyright Law and a Tale of Two Cities*, 3 Intell. Prop. Q. 316 (2004).

106. The rise of electronic trading networks have threatened the traditional roles of the exchange in trade and liquidity. For changes to the business model of exchanges, *see* Andreas M. Fleckner, *Stock Exchanges at the Crossroads*, 74 Fordham L. Rev. 2541 (2006); Jonathan R. Macey & Maureen O'Hara, *From Markets to Venues: Securities Regulation in an Evolving World*, 58 Stan. L. Rev. 563 (2005).

107. *See* Uri Geiger, *The Case for the Harmonization of Securities Disclosure Rules in the Global Market*, 1997 Colum. Bus. L. Rev. 241 (1997).

intermediaries; and whether the market can be relied on to provide sufficient consolidation of information, such consolidation itself being arguably a public good to achieve the regulatory purpose of discerning best execution.

In the next Part, this article discusses the role of EU level governance in dealing with the delegation model of regulatory administration of mandatory disclosure. The delegation model no doubt is a useful model as it leverages on useful features that may be provided only under market conditions. Thus, in principle, it is highly arguable that the delegation model should be retained as a methodology in regulatory administration of regulated disclosure. However, the delegation model needs to be managed at an EU level, to ascertain the wider effects upon the Internal Market for capital and investments as a whole. In particular, the delegation model may foster regulatory competition between Member States. The benefits and drawbacks of such regulatory competition will also be discussed.

IV. EU Level Governance and Regulatory Competition

As there are both benefits and drawbacks in a delegation model of regulatory administration, the challenge for the EU is to design a regulatory framework at the EU level that is able to balance the benefits of the delegation model while minimizing the drawbacks.

A. Provision of Public Good

First, the minimum level of mandatory disclosure that ought to be provided as a public good should be provided in a manner that promotes easy access and retrieval by investors. If the delivery of the public good is flawed or impeded because of the delegated administration of mandatory disclosure, then such delegation could arguably amount to "shirking," and there would be a need for regulators to control the shirking so that investors would be able to receive the public good.[108] In the United States, issuer continuous disclosure is collected and retrievable via the EDGAR system, a real-time filing, search, and retrieval system maintained by the SEC.[109] EDGAR is organized by company filings, and thus, all mandatory disclosures are available to investors in the form in which they were filed. EDGAR even provides for simple categorization of filings by type, company name, and recent filings for easier searching. Thus, users who do not wish to pay for any enhanced services can always fall back on EDGAR, which is readily accessible and provides regulated information free of charge. Users who desire enhanced information products or services could sign up to purchase specialist software to receive Bloomberg reports or subscribe to Reuters.

In the United Kingdom, the pre-Market Abuse Directive position is that continuous disclosure is required as part of the Listing Rules, not by law as such.[110] However, the Listing Rules have been adopted into law since the Financial Services and Markets Act 2001 provided for their legal enforcement.[111] Thus, continuous disclosure has a quasi-legal

108. Jeffrey Stacey & Berthold Rittberger, *Dynamics of Formal and Informal Institutional Change in the EU*, 10 J. Eur. Pub. Pol'y 858 (2003).

109. U.S. Securities and Exchange Commission, How Do I Use EDGAR?, http://www.sec.gov/edgar/quickedgar.htm (last visited Sept. 27, 2006).

110. Financial Services Authority, UK Listing Rules, Chapter 9 (2001), *available at* www.fsa.gov.uk/Pages/Handbook/ (last visited Sept. 27, 2006).

111. Financial Services and Markets Act, 2000, c. 98 § 91 (Eng.).

character and is enforced by administrative sanctions.[112] The quasi-legal continuous disclosure obligation was owed to the LSE, which means that reporting had to be made to the LSE. Continuous disclosure used to be notified to the Listing Authority, which was the LSE until it demutualized in 2000, and the role was taken over by the FSA. The FSA does not intend to be a repository of continuous disclosure. However, to ensure that regulatory information is still supplied, the FSA has provided authorization for primary information providers to be notified of mandatory continuous disclosure since 2002. Such primary information providers have to supply the regulatory information free of charge, thus allowing the disclosure obligation to become a public one and not just an exchange reporting obligation. Primary information providers may consolidate issuer disclosure information and sell them to other licensees, who may also bundle information with other products and edit such information.[113] The United Kingdom adopted a delegation model to primary service providers to administer continuous disclosure but maintains some oversight in setting approval criteria for the primary service providers. The use of delegation to primary service providers ensures a certain amount of consolidation of information. However, market forces are free to create other innovations in information products, and the FSA does not regulate products or prices. To a larger extent in the United States, and to a smaller extent in the United Kingdom, some form of regulatory control has been necessary to direct a consolidated stream of information to be made available to investors. CESR has also recommended national and EU-wide consolidation of issuer information, presumably based on this type of a public good analysis. Another rationale in the eyes of CESR, is that EU-wide access to any issuer's information is a one-stop shop service that facilitates investor mobility across the Internal Market, and that is essential to the fostering and growth of the Internal Capital Market. Thus, regulation mandating a minimum form of consolidation of issuer information may serve the regulatory purpose, not only of investor protection, but of building up the Internal Capital Market.

Next, for market transparency information, the minimum amount of pre-trade and post-trade transparency information provided in the MIFID Commission Regulation is available at a reasonable cost.[114] This is intended to provide a minimum level of access to the public good of price transparency. However, the existing large exchanges, such as the Euronext, LSE, and Deutsche Börse, already provide good amounts of market data, exceeding the MIFID's minimum, at subscription prices for bundled products, including technological infrastructure. As these products may bring in more revenue, it is likely that marketing efforts may focus on these enhanced and more costly information products than the basic layer of mandatory information provided under the MIFID. As such, investors may be obscured from obtaining the public good of minimum price transparency information by the marketing emphases adopted by information product providers. Further, as consolidation of information is mandated but hardly regulated in the MIFID and the supplemental Commission Regulation, it is conceivable that information product providers may provide different tiers of consolidation service at different prices. It is uncertain if the delegation model of regulatory administration of price transparency disclosure may be able to achieve the objective of delivering the basic public good of price information for empowering investors.

112. Iris H-Y Chiu, *Examining the Justifications for Mandatory Ongoing Disclosure in Securities Regulation*, 26 COMPANY LAW. 67 (2005).

113. FINANCIAL SERVICES AUTHORITY, *supra* note 95.

114. MIFID Commission Regulation, *supra* note 3, art. 32(c).

Researchers[115] have identified a few models of consolidation that may be considered for market transparency data:

(a) mandatory central market, meaning that all markets are to provide transparency data to a central order book, which essentially functions like a single central market. This option potentially also provides for price-time priority in execution and furthers the integration of EU markets.[116] However, this option would mean the centralized regulation of market transparency data and trading, and the EU level infrastructure needs to achieve this. Although CESR is not an EU Securities Commission with administrative capabilities, there is potential for CESR to develop EU level regulatory administration because it has a permanent secretariat and has the technical expertise to take on regulatory administration;

(b) consolidated information systems; short of providing a central market, a centrally maintained system could be installed to collect transparency information, which could afterwards be disseminated free of charge by the centrally maintained system or on-sold to other information providers, who could also sell bundled and enhanced information products. This is similar to the U.S. Consolidated Quotation and Tape systems. This, again, may need to be administered on an EU level by a suitable agency. If there is no EU level infrastructure to manage this, individual regulators of Member States could also administer such systems for each Member State, but this would still mean disparate sources of market information across the EU;

(c) a centralized information system in each Member State combined with EU-wide competing consolidators that are commercial providers. The commercial providers can provide consolidated information by purchasing data off each regulator and making them available to investors. However, there may need to be EU level standards and regulation with respect to the operational integrity and conduct of business of these information providers;

(d) a reliance on linkages between markets to provide for more consolidated information, a totally free market model, as status quo.

In both continuous disclosure and price transparency, the delegation model provided in the Directives may not deliver the public goods intended to be delivered by the Directives. Thus, at the EU level, there is a need to consider further governance of the delegation model so that the benefits of delegation may be achieved and the drawbacks may be minimized. A few options are discussed below.

B. Centralization of Administration

One of the regulatory frameworks that could be designed at EU level is the centralization of administration. The SEC provides centralized issuer disclosure information through the EDGAR and XBRL systems and centralized price transparency information through the Consolidated Quotations and Tape systems. It may be argued that centralization is the best way to achieve the regulatory outcome of mandatory disclosure. Mandatory disclosure attempts to redress information asymmetry between investors, issuers, and the markets so that investors can achieve the best possible investment and execution. If information is required to be disclosed, but the means of information delivery are disparate, then information asymmetry may not be redressed because investors may find it too inconvenient and difficult to retrieve the information. Centralization of information may improve retrieval and access, but it entails regulatory cost. On a cost-benefit analysis, it has to be ascertained whether the

115. Board, Sutcliffe, & Wells, *supra* note 33, at 145.

116. Morris Mendelson & Junius W. Peake, *Intermediaries' or Investors': Whose Market is it Anyway?*, 19 J. Corp. L. 443 (1994).

regulatory cost would be matched by the benefits of investors receiving information easily. If information access improves the attractiveness of the securities markets and attracts more issuers and investors, then perhaps the regulatory cost would be more than paid off. For EU securities regulation, however, there are a number of issues with respect to centralization. First, who could centrally administer such information systems? Second, would such centralization diminish the market for private enhanced information services?

First, the key to the centralization framework is a dedicated agency for securities regulation that can carry out administration on a federal or pan-European basis. The CESR is not exactly such an agency because it has no administrative powers or apparatus. It is a committee formed to assist and to be accountable to the Commission.[117] However, the CESR seems to enjoy a certain amount of autonomy, as compared to a directorate under the Commission.[118] Many writers have championed for the centralization of administration of EU securities regulation as a whole in order to truly reform EU securities regulation and create integrated markets.[119]

Centralization has not been totally ruled out of the Lamfalussy Report, but its implications are far beyond consolidation of information. CESR in its report has acknowledged that a centrally run database for issuer disclosure needs an independent management, presumably, an agency with specified functions.[120] However, this still means channeling resources to the EU level for that issue-specific administration, and such a proposal could be met with political resistance from individual Member States.

Second, the information goods of issuer disclosure and price transparency have both a public and commercial aspect, the commercial aspect being that investors could be willing to pay for enhanced and non-compulsory services. Centralization may deprive investors of the market for value-added services and innovations that could be provided by commercial information providers. With the political and financial uncertainty that surrounds any prospect of centralization, we should regard the default governance position at the EU level as a network of national regulators dealing with the delegation model. In such a network, the possibilities for coordination and regulatory competition exist.

C. Centralization of Minimum Convergence Guidelines with Some Regulatory Competition (or Vertical Regulatory Competition)

In this model, EU level governance may be provided in terms of common standards or guidelines as to how each national regulator may deal with the delegation model of

117. CESR's role is one of facilitating convergence in regulation and supervision across Member States. *See* The Committee of European Securities Regulators, Preliminary Progress Report: Which Supervisory Tools for the EU Securities Markets? (Oct. 25, 2004), *available at* http://www.cesr.eu/index.php?docid=2541.

118. *See* Michael McKee, *The Committee of European Securities Regulators: Is it Working?*, 4 J. Int'l. Fin. Markets 111 (2002).

119. *See* Roberta S. Karmel, *The Case for a European Securities Commission*, 38 Colum. J. Transnat'l L. 9 (1999); Eric J. Pan, *Harmonization of U.S.-EU Securities Regulation: The Case for a Single European Securities Regulator*, 34 L. & Pol'y Int'l Bus. 499 (2003); Yannis V. Avgerinos, *EU Financial Market Supervision Revisited: The European Securities Regulator* (N.Y. Sch. Law, Jean Monnet Working Paper No. 7/03, 2003), *available at* http://www.jeanmonnetprogram.org/papers/03/030701.pdf. *See generally* Financial Markets in Europe: Towards a Single Regulator? (Mads Andenas & Yannis Avgerinos eds., 2003).

120. *See* CESR Final Technical Advice, *supra* note 2.

administration of mandatory disclosure so that the regulatory objective of public good delivery may be achieved without compromising the encouragement to develop innovative and commercial information products. For example, EU level governance may provide for Member States to facilitate commercial dissemination and to regulate commercial disseminators by a common set of standards. The Commission Regulation prescribes certain basic minimum standards such as the updating and verification of the information,[121] but lacks further prescription on issues such as how the minimum level of mandatory information may be accessible, what consolidation means, how market information from other sources may be accessed, and how consolidated information should be presented. However, would a common code of governance at the EU level be more desirable than leaving each national regulator to govern this issue? If each regulator is left to govern this issue, perhaps they could provide divergent approaches or engage in regulatory competition, and such regulatory competition may bring about healthy effects in governing the delegation model.

Regulatory competition allows states to produce national regulation to compete against each other, so that regulatory regimes could review and adapt themselves to provide better regulation for investors and meet industry needs. Regulatory competition also allows market forces to signal the level of optimal regulation so that regulation would not be carried out in a vacuum and the costs imposed in regulation would not be excessive or wasteful.[122] Regulatory competition also avoids the unhealthy effects of centralized regulation actually performing the role of legitimizing monopolistic practices and preventing innovation.[123]

It is also suggested that the four fundamental economic freedoms in the Treaty of Rome should give rise to a positive attitude towards regulatory competition, as competition could be relied on to pave the way for the liberalization of markets. Dr. Kerber argues that regulatory diversity is a necessary feature of the EU, as no amount of regulatory harmonization could remove all regulatory differences, especially in the areas of tax regimes, labor regulation, environmental regulation, and differences pertaining to cost of infrastructure in different Member States. In other words, as Member States cannot have identical regulatory regimes in all areas, it would be undue to seek total convergence for the internal market. Thus, it may be better to view the differences positively and see how these differences create variety for business choices and whether market forces may indicate regulatory lessons. Uniform rules on any particular issue may be optimal and efficient for one Member State but may not be so for another, and diversity allows each Member State to find its equilibrium. Some also have argued that regulatory diversity is part of the framework envisaged under the overarching principle of subsidiarity and that healthy forms of it ought to be maintained.[124]

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121. MIFID Commission Regulation, *supra* note 3, arts. 29, 30, 33.

122. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998); Roberta Romano, *The Need for Competition in International Securities Regulation*, 2 THEORETICAL INQUIRIES L. 387 (2001). *See also* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L REV 903 (1998).

123. Frank H. Easterbrook, *Federalism and European Business Law*, 14 INT'L REV. L. & ECON. 125 (1994) (discussing that it is doubted that centralized European regulation in business is good for EU Member States).

124. Horatia Muir Watt, *Experiences From Europe: Legal Diversity and the Internal Market*, 39 TEX. INT'L L.J. 429 (2004). It is also argued that economic principles could be applied to interpret subsidiarity, and if that is the case, any economic rationale for centralizing an aspect of EU governance may at the same time arguably be economically unsound for another Member State. *See* Christian Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 TUL. J. INT'L & COMP. L. 291 (1998).

However, there are also limits or drawbacks to regulatory competition. In terms of limits, regulatory competition would produce beneficial results if the regulatory outcomes are aligned with the preferences of the constituents. Some commentators have opined that unless constituents can threaten migration easily, regulatory regimes may not be incentivized to innovate and realign.[125] Further, it has been suggested that where regulatory agencies have a cooperative as well as competitive relationship, such as between EU national regulators, regulatory competition does not produce optimal outcomes for constituents because agencies may collude to achieve what they view is in their best interests.[126] Where regulatory competition does not take place in an idealized perfect competition-type landscape, there may be a lack of resources for some regulators to compete,[127] and consequences such as race to the bottom[128] or eventual monopolies may occur.[129] It has been suggested that even where regulated firms may wish to migrate to more favorable regulatory regimes, the discipline of regulatory competition may not occur because the cost of reincorporation and migration may be higher than remaining in the original jurisdiction.[130] This would mean that, even if there is theoretical regulatory competition, the competing regulators would not feel practical incentives from competition.

The drawbacks of regulatory competition not only stem from its limitations as discussed above but also from the fact that, even if competition may occur, the competition between regulators is not necessarily geared towards achieving regulation that is most optimal for the beneficiaries of the regulation. The competition may be geared towards firm preferences and responses. Research has revealed that regulatory competition may be carried out in response to firm preferences and not constituent preferences.[131] It has been suggested that regulatory competition may result in a race to the bottom in situations where firms seek lowest operating cost, such as in manufacturing. Where regulators seek to protect and benefit domestic firms, regulatory standards may be high in order to keep out competing firms. Where firms have highly mobile assets, regulatory

125. William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997); Frederick Tung, *Lost in Translation: From U.S. Corporate Charter Competition to Issuer Choice in International Securities Regulation*, 39 GA. L. REV. 525, 590–91 (2005) (discussing that the competing regulator may not wish to out-compete if the benefits to be secured are not high enough).

126. John C. Coffee, Jr., *Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation*, 50 BUS. LAW. 447 (1995); Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (discussing administrative agency behavior with regulatory theories such as public choice and regulatory capture).

127. Daniel B. Rodriguez, *Turning Federalism Inside Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE J. ON REG. 149 (1996).

128. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974); Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1437 (1992); Robert A. Prentice, *Regulatory Competition In Securities Law: A Dream (That Should Be) Deferred*, 66 OHIO ST. L.J. 1155 (2005).

129. Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004).

130. Jeanne-Mey Sun & Jacques Pelkmans, *Regulatory Competition in the Single Market*, 33 J. COMMON MKT. STUD. 67 (1995); Eva -Maria Kieninger, *The Legal Framework of Regulatory Competition Based on Company Mobility: the EU and U.S. Compared*, 6 GERMAN L.J. 741 (2005).

131. DALE D. MURPHY, THE STRUCTURE OF REGULATORY COMPETITION: CORPORATIONS AND PUBLIC POLICIES IN A GLOBAL ECONOMY (2004).

competition may take place to align regulators to firm needs in order to keep the firms and their direct investment.[132]

A model of vertical regulatory competition has been suggested as suitable for the EU. Wolfgang Schön[133] argues that the landscape for perfect regulatory competition does not exist in the EU in many issue areas, and hence, there is room for some verticalization. Verticalization refers to the provision of standards at the EU level, in order to provide a combined governance of minimum standards with an amount of healthy competition. He proposes the vertical competition model, which allows certain minimum standards to be set at the EU level, or provision of pan-European regimes, such as the Societas Europaea (SE), that serve as an alternative to national regimes. This may prevent a race to the bottom, and such minimum harmonization still allows national regulators to innovate and compete amongst themselves to maintain diversity for the needs of their different constituents.

In vertical regulatory competition, guidelines for the consolidation of issuer and price transparency information could be set at the EU level, such as by CESR.[134] Such guidelines and standards need not be hard law and may be able to achieve certain practically binding effects. CESR's governance is a topic that deserves special treatment on its own, but for now it is arguable that CESR's standards and guidelines, supported by the strength of consensus within its networked governance,[135] may achieve practically binding effects in Member States, which will achieve a form of verticalization.

The benefits and drawbacks of vertical regulatory competition have to be explored in comparison with horizontal regulatory competition, that is leaving Member States to govern the delegation model on their own. The following Part discusses the consequences of horizontal regulatory competition in comparison with the vertical model.

D. Horizontal Regulatory Competition

If the delegation model in the Directives is left as it is, then national regulators may be able to engage in regulatory divergences and competition in respect of whether any further regulation should be provided. The key issues are whether any such regulatory competition may occur, bring benefits to investors, and be close to achieving the regulatory goal of investor empowerment.

E. Issuer Disclosure

Where issuer disclosure is concerned, it will be argued that national regulators are unlikely to be incentivized to engage in regulatory competition in order to align towards

132. *Id.*

133. Wolfgang Schön, *Playing Different Games? Regulatory Competition in Tax and Company Law Compared,* 42 Common Mkt. L. Rev. 331 (2005).

134. *See* CESR Final Technical Advice, *supra* note 2.

135. Networked governance is a form of governance provided by a network of regulators in a specific issue area. This form of governance is increasingly influential as the issues faced by regulators in the network are increasingly cross-border and similar in nature, and the relative flexibility of the network allows learning from each other and mutual support. *See* Anne-Marie Slaughter, A New World Order (2004); Colin Scott, *Agencies for European Regulatory Governance: A Regimes Approach, and* Pierre Larouche, *Coordination of European and Member State Regulatory Policy: Horizontal, Vertical and Transversal Aspects, in* Regulation Through Agencies in the EU: A New Paradigm of European Governance 67, 164 (Damien Geradin, Rodolphe Munoz, & Nicolas Petit eds., 2006).

investor needs. This is because there are no incentives on the supply side of regulation and insufficient incentives on the demand side. As such, national regulators may choose not to provide for more regulation, such as regulated consolidation, than the delegation model that is present in the Directives already.

First, there are unlikely to be incentives for regulators to supply further regulation in respect of continuous disclosure. Regulators would possibly like to attract issuers into the market to generate general economic benefit for the jurisdiction or even just to generate regulatory rent. If regulators are not competitive, would the regulated issuers choose to move out of the regulator's jurisdiction?[136]

Issuers of securities are largely attracted to markets based on considerations of investor preferences, such as for strong disclosure laws, market depth, and liquidity.[137] They may be concerned with regulatory cost, but higher standards of public offer disclosure that impose high regulatory costs have not deterred issuers because of the potential gains from a larger and stronger market. Thus, issuers may happily absorb regulatory costs associated with continuous disclosure. Even if a firm may be affected by the regulatory costs of continuous disclosure, the scope for regulatory competition in this issue in EU Member States is very small. Continuous disclosure imposes regulatory costs. If a jurisdiction does not impose continuous disclosure, as compared to a jurisdiction that does, then the savings in regulatory costs may be attractive to issuers, although subject to markets themselves imposing continuous disclosure and having other forms of attractive qualities. Since the Directives already impose continuous disclosure, then regulatory competition in whether disclosure is regulated to be consolidated or not is not going to significantly distinguish one jurisdiction from another. The imposition of central and consolidated issuer disclosure is not likely to add that much cost to the issuer or affect an issuer's decision whether or not to incorporate in a jurisdiction. Further, as the Directives provide for home state control, the regulator responsible for supervising and enforcing continuous disclosure is the home regulator of the issuer. Many issuers would already have home ties based on original incorporation and are unlikely to choose to reincorporate just because the home state imposes consolidation of continuous disclosure. However, for would-be corporations that could choose the incorporation venue for the first time, the attractiveness of the regulatory regime will be crucial, as seen in the *Centros* case.[138] However, factors such as tax regimes and corporate governance regimes may be more crucial to an incorporation decision than whether a regulator imposes consolidated continuous disclosure.[139]

It may be argued that a regulator may be incentivized to provide consolidated continuous disclosure as investors may demand. Such an investor-friendly jurisdiction could attract a larger and stronger investor base and, in turn, make markets in that jurisdiction more attractive. This argument works in the United States as the SEC is a federal agency and consolidates all issuer disclosure in one place. It also leverages on the electronic filing system for issuers and in providing for investor searches; thus, the service for investors may not cost

136. *See* Bratton & McCahery, *supra* note 125; Kieninger, *supra* note 130.

137. Howell E. Jackson & Eric J. Pan, *Regulatory Competition in International Securities Markets: Evidence from Europe in 1999—Part I*, 56 Bus. Law. 653 (2001); Marc I. Steinberg, *Emerging Capital Markets: Proposals and Recommendations for Implementation*, 30 Int'l Law. 715 (1996); La Porta, Lopez-de-Silanes & Shleifer, *supra* note 13.

138. Case C-212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-459.

139. Schön, *supra* note 133.

the SEC that much.[140] Where the EU is concerned, as there is no central EU agency for securities regulation, and twenty-five home regulators exist to deal with the corporations they are responsible for, any consolidated information held by national regulators is still disparate to investors. Investors have to first find out which home regulator is responsible for the issuer they wish to look into before they may be able to retrieve any information. Hence, there may not be many incentives for investors to demand that national regulators keep consolidated information of the issuers they are responsible for.

It is suggested that regulators are unlikely to engage in active regulatory competition at all over the issue of consolidating issuer disclosure. By default, the delegation model of administration is likely to prevail, and investors will have to depend on the regulated's efforts in delivery and dissemination of regulated information. The free market in issuer disclosure allows for commercial disseminators to provide any value-added information service, such as consolidation. The issue then becomes whether the EU should regulate these commercial disseminators.

The regulation of commercial disseminators may provide another opportunity for regulatory competition among national regulators. If the Commission does not adopt CESR's recommendation for national and EU-wide issuer information consolidation, then there is much room for Member States to compete on the regulation of information providers. Developing jurisdictions may choose not to regulate and indeed give incentives to commercial disseminators to report on their markets' stocks in order to increase exposure. More developed jurisdictions may choose to regulate in order to provide more convenience to investors. For example, the U.K. Listing Authority, which is the FSA, authorizes primary information service providers to provide consolidated information free of charge. Other terms, such as sale charges to secondary disseminators and terms of contract, are left to the market. In this author's view, the differences in national regulation may arise out of management of commercial disseminators, and the Directives are silent on this.

As there may not be sufficient conditions for beneficial regulatory competition to take place over issuer disclosure, the bottom line is that investors may not easily access continuous disclosure information unless they subscribe to Bloomberg or Reuters services. Perhaps there is an argument for some form of vertical model in the EU. The EU may need to prescribe some minimum facilitation of information consolidation, or it can take after the U.K. model in that Member States should be directed to regulate primary disseminators to provide a consolidated service. This at least ensures a consolidated source of regulated information while allowing the market to provide enhanced services and products for those who are inclined.

F. Price Transparency

For price transparency, it will be argued that there will be incentives for national regulators to engage in regulatory competition, and regulators may have to tread a fine balance between jeopardizing exchanges' business models and regulating how exchanges are to

140. The gross operating cost of the Department of Corporate Finance running the EDGAR system was $127,000 in 2005 and $92,000 in 2004, and if EDGAR is a portion only of that cost, then the regulatory cost to the SEC is not very significant compared to the benefits it brings to investors. *See* U.S. Securities and Exchange Commission, *Performance and Accountability Annual Reports* (2004, 2005), *available at* http://www.sec.gov/about/annrep.shtml.

provide information consolidation for investors. There are incentives for national regulators to engage regulatory competition that does not drive away exchanges from their jurisdiction. It is arguable that exchanges have a certain amount of mobility and may be incentivized to reincorporate should the need arise. Thus, national regulators keen to attract or keep exchanges within their jurisdiction could be attracted to a race to the bottom-type of behavior.

As most EU exchanges are corporations, exchanges can choose to be incorporated in the most favorable home jurisdiction and provide services across the EU.[141] The MIFID also dismantles barriers to access to regulated markets, and hence, wherever a market is incorporated, its provision of services across the EU is not supposed to be impeded. Although it has been argued that reincorporation is not a real option for many firms, and thus, regulatory competition is not a really active phenomenon in the EU,[142] this article suggests that reincorporation incentives may be rather strong for exchanges. First, as mentioned, exchanges rely on information sale to generate a lot of revenue, and hence, if regulation affects its key business, then it would not be inconceivable for exchanges to choose to reincorporate. Second, the European Company structure[143] could arguably help exchanges because an exchange could reincorporate as an SE and choose its registered office in a Member State whose regulatory regime it prefers. Third, exchanges are undergoing a wave of internationalization by merging with each other. Nasdaq has acquired almost 19 percent of the LSE by May 2006, and the Euronext is in merger talks with either the Deutsche Börse or the New York Stock Exchange by the same time—not to mention that Euronext itself is a merger of Paris, Brussels, and Amsterdam national exchanges. Another example is Norex, a merger of the Scandinavian, Icelandic, and Latvian exchanges. The mergers of exchanges allow opportunities for new identities to be created. That could also mean reincorporation where appropriate. As reincorporation may be a viable alternative for exchanges, there may be incentives for regulators to align their regulation towards not jeopardizing their relationships with the exchanges. This may not be the best scenario for investors, as regulatory competition may not take place on investors' terms.

In order to balance regulatory interests in investor protection and in keeping exchanges within the jurisdiction, national regulators and exchanges may enter into negotiated regulation processes. Administrative law researchers write of co-opting the regulated and private actors in the provision of regulatory services. Such co-opting may allow the use of a variety of regulatory methodology and cooperation with the regulated to achieve outcomes that may need to be constantly adjusted.[144] Thus, imposing a vertical model as mentioned above may not be ideal as minimum EU standards may be rigid and difficult to adjust when the need arises. Allowing national regulators to deal with their regulated markets as the need

141. *See* Council Directive 2004/39, art. 42(6), 2004 O.J. (L 145) 1 (EC).

142. Sun & Pelkmans, *supra* note 130; Kieninger, *supra* note 130.

143. Council Regulation 2157/2001, 2001 O.J. (L 294) 1 (EC). *See also* Frank Wooldridge, *The European Company: The Successful Conclusion of Protracted Negotiations*, 25 COMPANY LAW. INT'L121 (2004); Erik Werlauff, *The SE Company: A New Common European Company from 8 October 2004*, 14 EUR. BUS. L. REV. 85 (2003).

144. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479 (1995); KAREN YEUNG, SECURING COMPLIANCE: A PRINCIPLED APPROACH (2004); William F. Pedersen, *Contracting With the Regulated for Better Regulations*, 53 ADMIN. L. REV. 1067 (2001).

arises may be a preferred model. However, if regulators engage in regulatory competition to align themselves with the markets' interests, then the likelihood may be that regulators will refrain from regulating consolidation too heavily and keep price transparency regulation to the minimum in order to preserve exchanges' business in information sale. Thus, a vertical model may yet ensure that there is no race to the bottom.

A vertical model may also be able to deal with certain issues that have been left open in the MIFID but bears on the issue of investor best execution. A vertical model could address the issue of how much access each regulated entity should grant each other in order to provide meaningful consolidation of information. A vertical model could further deal with the issue of market linkages, whether competing markets may display the best offers or quotes from other markets (similar to the proposed Regulation NMS in the United States) and even provide for execution. The former Chairman of the SEC has remarked that, without market linkages, investors' freedom to access an integrated market is still far from reality.[145] A vertical model may also be able to regulate any anti-competitive practices by markets in their business of information sale.

It is arguable that in the absence of a vertical model, consolidation of price transparency information may be highly regulated, and national regulators may be inclined to leave the state of consolidation to market forces. As argued earlier, it is unlikely that market forces will provide sufficient consolidation, as it is costly for the regulated to do so, and such consolidation information is akin to a public good. A vertical model may also avoid the less healthy effects of regulatory competition where regulators may be motivated by the mobility of exchanges to reincorporate and not motivated by investors' needs. Thus, CESR's attention to the issue of consolidated issuer information is a step in the right direction. It is hoped that there may be some recommendations for a form of a vertical model to provide price transparency across the EU in due course.

A vertical model could follow in the steps of the United States' Consolidated Tape and Quotation systems. However, in the United States, reliance on the federal SEC as an agency is key to the administration of consolidated information. In a decentralized network of administrators in the EU, how should consolidation be regulated? If consolidation is regulated by every national regulator, then, again, investors would be subject to disparate standards of price transparency disclosure, and not benefit from the maximum harmonization exercise that is intended in the MIFID.[146] An alternative is for vertical standards to be set on national regulators, to allow national regulators to collect consolidated information in a uniform way, and sell them for a flat fee to EU-wide approved commercial disseminators to provide consolidated transparency information. CESR guidelines may be set so that approved commercial disseminators must at least report the data of all EU markets of a certain size, so that the consolidation of information across the main EU markets in a few sources may be achieved for the convenience of investors. Competition between disseminators may then drive down the price that investors have to pay for the consolidated information. However, the drawback is that exchanges are also selling enhanced information such

145. Arthur Levitt, *Best Execution, Price Transparency, and Linkages: Protecting the Investor Interest*, 78 WASH. U.L.Q. 513 (2000). *See also* Mendelson & Peake, *supra* note 116 (arguing that there should be automatic centralization of trades in price-time priority in order to secure best execution).

146. Jean-Pierre Casey & Karen Lannoo, *The MIFID Implementing Measures: Excessive Detail or Level Playing Field?*, CEPS Working Paper No. 1, May 2006, *available at* http://www.ceps.be (last visited October 2006).

as the top ten best bids or offers or the entire limit order book for selected stocks with possibly dedicated software or data feeds. Thus, investors may be faced with too many information products in the market. If commercial disseminators for consolidated regulated information become out-competed by exchanges or merge with exchanges,[147] then investors may be back to square one.

This author is of the view that some vertical standards are necessary in order to regulate consolidation of price transparency information. This is necessary as the delegation model is not likely to make markets produce the optimal product of consolidated information, which is key to empowering investors. Regulatory competition may not force regulators to provide optimal regulation of sufficient consolidation as exchanges feel undercut by regulation, and may exert pressures of potential reincorporation on regulators. Where the forces of horizontal regulatory competition may not provide optimal regulation, some verticalization may be necessary to achieve the regulatory objectives.

V. Conclusion

This article examines the phenomenon of delegation or privatization of the regulatory administration of mandatory disclosure in continuous issuer disclosure and price transparency, and questions whether this model is sound. It is argued that the extent of prescriptive legal control over the dissemination of mandatory disclosure for continuous disclosure and price transparency regulation is weaker compared to mandatory disclosure for public offers. This arguably amounts to a form of "delegated regulatory administration" to the regulated. The benefits and drawbacks of the delegation model are also examined. The chief benefit is that there is room for the market to provide enhanced information services and products. But the chief drawback is that markets may not provide sufficient consolidation of information, which is key to achieving investor empowerment.

As the regulation of continuous disclosure and price transparency appears to benefit from a mixed public-private approach in regulation, the delegation model is basically sound. However, there may be a need for EU level governance to control the drawbacks from the delegation model and provide for the sufficient consolidation of information. Various options for EU level governance are examined. A centralization model is not likely to provide the benefits of private innovation and value-added services as discussed. Additionally, a centralized model is not possible without an EU agency for securities regulation. In the decentralized network of national regulators being responsible for securities regulation under the principle of home country control, national regulators may engage in regulatory competition in the governance of the delegation model, and an optimal model of regulation may emerge. This article has discussed the conditions for regulatory competition between national regulators and argues that, for continuous disclosure, regulatory competition in governing the delegation model is unlikely to occur as there are insufficient incentives to compete. Thus, national regulators are likely to leave continuous disclosure as delegated to the regulated to administer. Hence, there may be a need to provide vertical standards at the EU level, such as in relation to the provision of consolidated information by commercial

147. For example, the Reuters merger with the Chicago Mercantile Exchange to provide a joint trading platform with information services for foreign exchange trading. *See* Jennifer Hughes, *CME and Reuters Launch New Platform*, FIN. TIMES, May 5, 2006.

providers. This is already recommended by CESR for issuer disclosure. For price transparency, it is argued that regulatory competition may take place over the governance of the delegation model, but it may cause a race to the bottom as regulators may be affected by the potential mobility of exchanges to move out of a jurisdiction. Thus, a vertical model of regulation at the EU level may again be necessary to secure some minimum governance standards. In sum, Level Two measures and CESR's work are needed to fill a gap in EU governance so that the delegation model may achieve the regulatory benefits in co-opting the regulated and avoid the drawback of not achieving the regulatory outcome for investors.