STANDARDS ON TRANSPARENCY OF PUBLICLY LISTED CORPORATIONS: INFORMATION OWED TO THE PUBLIC?

Dimitrij Euler*

Abstract

The paper is about domestic laws' response to the greater need of publicly listed corporation to be accountable to the public in accordance with international law. The paper is dedicated to the transparency of multinational corporations listed and incorporated in Germany, the United Kingdom, the United States and Switzerland. Under these applicable laws, transparency of publicly listed corporations has significantly changed in the last decade. Some countries oblige corporations to disclose non-financial and financial information immediately; others merely require periodic reporting of financial information. In particular, the connection between Impact Investor, an investor that invests based on social or environmental criteria in addition to the financial performance, and the investment target, publicly listed corporations contributed to some change.
The applicable law provides a minimum standard of transparency. This minimum standard defines how the reasonable investor invests in the publicly listed corporation. Depending on this standard, the responsibility owed by the publicly listed corporation extends from the shareholder, several stakeholders to the public. Reasons for these differences lie in the greater accountability of publicly listed corporations from shareholders, to stakeholders or even the public. The OECD's different standard on Corporate Governance, the Ruggie principles and other recommendations of non-governmental organisations (NGO) keep shaping the accountability under the applicable law. These standards provide guidance to corporations to voluntarily implement greater responsibilities beyond the minimum standard in the form of Corporate Governance. However, once publicly listed corporations implement these standards, the applicable law seem to not adequately impose duties on publicly listed corporations to disclose the information under its self-imposed standard to stakeholders or even the public.
The paper researches the problem of transparency of publicly listed corporations in European Union, in particular Germany and the United Kingdom, as well as the United States and Switzerland wither regard to impact investors. Its hypotheses is that the applicable law lacks clear wording that transfers voluntary standards into binding law.
The paper will not focus on obligations of corporation established under contracts with groups of shareholders. It will also not focus on stock market programmes to audit corporations based on environmental and social criteria. The paper excludes inter partes obligations because they give the contracting party merely a right to rely on the disclosure. The paper will also not look at methods for evaluation of non-financial information with regard to publicly listed corporations.

Keywords: Transparency, Publicly Listed Corporation, Financial Information

** PhD candidate at the University of Basle;*
Visiting Fellow at the British Institute of Comparative and International Law (BIICL), December 2013 and January 2014;
Visiting Scholar at the Lauterpacht Centre for International Law at University of Cambridge, 2012/2013.
Email: dimitrij@euler.ch

1. Impact Investors and transparency of public listed corporations

Corporations disclose information to provide knowledge of their conduct based on the corporation's purpose defined in the Corporate Charter. The funding shareholders ultimately determine the purpose of this corporation. Firstly, they determine the applicable law by choosing the place of incorporation. Secondly, they determine the field of operation by establishing the Corporate Charter. In this sense, they establish their rights within the limits of the applicable law and applicable laws if the corporation operates transnational. The disclosure of information serves the accountability of the corporation. Publicly listed corporation have a higher obligation of transparency because they benefit of the stock markets in which the public has an access to trade the shares. This higher duty of transparency is imposed by the market abuse statutes under the applicable law. Moreover, corporations may have a higher obligation of transparency depending on the

applicable law to their stakeholders, namely the employees, customers, or public. Such duty may be imposed for various reasons, *e.g.* based on the underlying argument that corporations serve the benefits of all stakeholders or the public and not just the shareholders.

In the late twenties, investment market emerged in which investors invested based on social or environmental performance and not just financial performance. The investor's aim was to create a social or environmental impact. In this regard, corporations shifted their purpose while changing voluntarily the Corporate Charter, implementing Corporate Governance and implementing other regulations under the applicable laws in order to attract additional capital. The higher standard may encompass stakeholders or public even if the corporation is not required under the applicable law. The World Economics Forum (WEF) Report of 2013 highlighted the requirements: the investment approach, the impact of the investment, and the activity to measure the impact in accordance with the investment approach (WEF, 2013).

Firstly, investment impact is an investment approach and not an asset class. It depends on the investment strategy of the investor if he or she qualifies as an Impact Investor. Every asset may have an impact of some sort. The mere fact that the impact is favourable for the environment or socially does not suffice for the Impact Investor. The Impact Investor needs to implement a strategy on which the non-financial impact is based. Secondly, the investments need to have an impact in accordance with the investor's intention to create a social or environmental good. If the impact of the investment lies outside the investor's strategy, the investor is not allowed to include it in his portfolio. A strict application of the approach leads to an immediate sale if the investor reveals that an original impact investment in his portfolio lacks the elements under this strategy. Lastly, the outcomes of impact investing are actively measured and the outcome includes both, on the one hand, the financial return and, on the other hand, the social and environmental impact. Information is required to measure if the approach of the investor and the impact of the investment fit. In an ideal world, the investment strategy of the investor covers the environmental and social responsibilities implemented in the Corporate Governance of the investment target, *e.g.* a publicly listed corporation. In other words, the transparency fits with the measurement mechanism of the Impact Investor if the investment target, publicly listed corporation, is accountable to the Impact Investor.

Investors' strategies may differ even if they invest in the same publicly listed corporation together as an investment target. Therefore, the publicly listed corporation's transparency may not respond to all investor appropriate. The publicly listed corporation's acceptance of funds imposes no general duty per se on the publicly listed corporation to disclose information in accordance with the investors' strategy. In other words, no additional duties arise for a publicly listed corporation beyond the duties established under the Corporate Charter, its Corporate Governance under the applicable laws. In other words, a change lies in discretion of the publicly listed corporation.

A large investor has at least two avenues to exert influence: firstly, company engagement and, secondly, dialogue with standard setting bodies, i.e. regulators and stock markets (Gjessing and Syse, 2007: 427-37, 432-7). The latter dialogue will not be considered in this paper. The bargaining power of large investors may convince publicly listed corporations to change. Large investors may persuade the publicly listed corporation to change its Corporate Charter, Corporate Governance and additionally impose obligations so that disclosure obligations of the publicly listed corporation and the large investor fit together. The investment target or publicly listed corporation may be willing to implement Corporate Social Responsibility (CSR) compatible to the investor's impact strategy in consideration for below market rate capital.

Indeed, large investors have appetite for impact investment. The WEF report states that pension funds, insurance and Sovereign Wealth Funds (SWF) accrue in relation to one another at 48%, 39% and 9% respectively (WEF, 2013: 2). Although SWF are in fact number three in this list, they are a major investors considering that only a few SWFs worldwide exist. In March 2013, the top three SWF managed USD $1.91 billion in assets whereas the government pension fund of Norway alone managed USD $715.9 billion (SWF Institute, 2013). To compare it to the largest Pension Fund of the US, CalPERS, owned assets totalling USD $260.9 billion in August 2013 (CalPERS). To give the figure a value, the Cyprus bailout cost creditor states USD $10 billion in March 2013 (*The Economist*, 2013).

SWFs and Pension Funds invest the capital of the public under supervision of the respective government. The fact that the public owns a large amount of assets through SWFs and Pension Funds requires of the large investor and the investment target a greater transparency and accountability to the public (Truman, 2007; Guay, Doh and Sinclair, 2004: 125-39, 358). The working group of SWFs in the framework of the International Monetary Fund (IMF) regularly meets to identify the generally accepted practices and principles of SWFs. The working group assesses the impact of SWF in the global market and recalled that SWFs should clearly define and publicly disclose its underlying policy (International Working Group of Sovereign Wealth Funds, 2008: Principle 2). On the assumption that a SWF invests according to financial and economical consideration, decisions subject to other than economic considerations should be clearly set out and disclosed publicly (International Working Group of Sovereign Wealth Funds, 2008:

Principle 19.1). SWFs are allowed to follow an investment strategy that creates social, ethical, environmental or religious impact and on the other hand, excludes certain markets and type of investments. The role of SWF as impact investors is criticised (Clark and Monk, 2010; Gilson and Milhaupt: 1345, 1368). Hereby, the SWF's disclosure of its investment strategy and policy helps the public to understand how the SWF operates and invests the capital of the public (International Working Group of Sovereign Wealth Funds, 2008: Principle 2). Similarly, the Organisation for Economic Co-operation and Development (OECD) has mentioned that SWF highlighted the bargaining power of SWFs in the context of financial crisis (OECD, 2008). Hereby, the OECD highlights that transparency and accountability forms part of its best practice (OECD, 2008: 6).

The Government Pension Fund of Norway, the number one in the world in March 2013, invests its capital in world markets in accordance with its ethical principles. This excludes weapons manufacturer or investment target that violates human rights (Ministry of Defence, 2010: Section 2).

2. Conflicts between the interests of shareholder's, stakeholders and public

Funding shareholders, Hedge Funds and Impact Investor may have different views on the corporates accountability and legitimacy. Similarly, conflicts may occur among different stakeholders with regard to accountability and transparency. The attempt of publicly listed corporations to implement rights and obligations by use of Corporate Governance that complies with strategies of several investors entails a risk of conflicting interest. Corporate Governance may anticipate some of the conflicts.

By implementing CSR guidelines into corporations' Corporate Governance, the public may hold a corporation accountable for its conduct. The public may require of its corporation to require decisions of the management that are legitimate in accordance with its CSR. The OECD standards, Ruggie's Principles, Global Reporting Initiative (GRI)s and similar soft law standards may provide guidance in this regard. These principles help a publicly listed corporation to deal with conflict among investors, among stakeholders due to voluntary self-imposed higher standards.

To create a higher standard beyond the minimum standard, corporations implement Corporate Governance. It defines the accountability of the corporation towards its addressee and implements the rights, obligations and procedures that help the corporation to be accountable under its Corporate Charter. In both cases, Corporate Governance determines the information to be disclosed in order to held the corporation be accountable. In particular, Corporate Social Responsibility (CSR) imposes a socially responsible conduct of the corporation above the minimal standard established under the applicable law.

Four groups of CSR theory exist that reflect the responsibilities of business in the public in the following areas: economics, politics, social integration, and ethics. Shareholder value theory or economic responsibility is linked to the first group to some extent. Stakeholder theory is a normative perspective of the enterprise based on ethical perspectives. Finally, the roots of the corporate citizenship approach are in political studies (Crane, 2009: 49).

Traditionally, investors have required an increase in the shareholder value of the enterprise. This may include compliance with other rules, like care for the environment or tackling corruption (Friedman, 1970). The consideration of reputational damage or legal risk may form part of the theory of shareholder value.

Another theory refers to the stakeholders. Various groups have proposed principles of stakeholder management. These principles propose a normative approach for managers. An enterprise is accountable to all the stakeholders and not just the shareholders. Stakeholders are groups with a claim on the enterprise. Stakeholders contribute to the success or failure of an enterprise. However, the success or failure of the enterprise has a direct impact on a stakeholder, thus creating a responsibility for the actors, but the interest may be conflicting for the stakeholders. An enterprise following stakeholder value is more difficult to manage and may be less efficient (Crane, 2009: 66-7).

Regarding the last two approaches concerning global citizenship, the corporation is understood as a citizen of the public with duties towards the public. In the minimalist view, global citizens are residents of a common jurisdiction that recognize obligations and rights. In the communitarian view, citizens exist in a certain social context and share the rules, traditions and culture of communities. The universal approach bases the duty of citizens on a general recognition of human dignity (Crane, 2009: 71-3). Especially in countries in which the government fails to recognise the rights of the citizens, the enterprise steps into the position of the government to a certain extent as a provider of social rights, an enabler of civil rights and an enterprise channel for political rights. This proposal is descriptive (Crane, 2009: 73). The concept of global citizen overcomes the narrow functionalist vision of business and sets up the enterprise as a citizen the public.

Publicly listed corporation implement their approaches in the form of Corporate Social Responsibility in their Corporate Governance if they intend to go beyond a required shareholder or stakeholder value approach. CSR implemented by

Corporate Governance extends the content and adds additional targets beyond the minimum standard.

Even if a publicly listed corporation is accountable to the public, does it impose a duty to inform the public about its conduct? One argument may be that transparency may not be owed to everyone. It excludes all persons to which the corporation is not accountable. Another argument may be that the accountability may only impose legal obligations to the extent of the purpose of a corporation under the applicable law. For example, even if the corporation follows a global citizen approach, only information with regard to a shareholder value needs to be disclosed. These conflicts need to be resolved under the applicable laws, namely, the applicable law at the place of incorporation, at the place of operation, administration, stock markets, court, arbitral tribunal, contracting partner or other relevant places.

3. Voluntary standards as response to stakeholders and the public

International organisations and other associations provide guidance to corporations that are willing to voluntary apply a higher standard of transparency. The OECD proposed its Principles of Corporate Governance in 2004. The basis of the framework is to “promote transparent and efficient markets, be consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory, regulatory and enforcement authorities” (OECDb: Principle I). It points to the overall impact that Corporate Governance serves, that is, an “… overall economic performance, market integrity and the incentives it creates for market participants and the promotion of transparent and efficient markets” (OECDb: Principle I A). Furthermore, the framework should be in accordance with the applicable law and it should serve the public interest (OECDb: Principle I A-D). Recalling the theory above, the rules mirror a theory of stakeholder value (OECDb: Principle II, Principle IV).

The 2004 Principles of Corporate Governance highlight transparency, together with efficiency, as essential principles. They expect corporations to disclose information in a timely way. This includes information concerning the financial status of the enterprise, but also policies, foreseeable risk factors and stakeholders’ issues (OECDb: Principle V). Its commentary outlines that transparency is a central feature for the monitoring of the enterprise and for the shareholders to execute their rights. With regard to large and active equity markets, the commentary points out that “disclosure can also be a powerful tool for influencing the behaviour of companies and investors” and “[b]y contrast, weak disclosure and non-transparent practices can contribute to unethical behaviour and to a loss of market integrity at great cost, not just to the company and its shareholders but also to the economy as a whole… Insufficient or unclear information may hamper the ability of the markets to function, increase the cost of capital and result in a poor allocation of resources” (OECDb: Principle V). For a better understanding, the principle points to the application of the OECD Guidelines for Multinational Enterprises (OECDb: Principle V).

The OECD Guidelines for Multinational Enterprises list stakeholder interest as well as “economic, environmental and social progress with a view to achieving sustainable development” and for the corporation to “[r]espect the internationally recognised human rights of those affected by their activities” (OECDa: Principle II; OECD: Principle IV, Principle VI). The activities of multinational enterprises should be in line with sustainable development (OECDa: Principle II). Moreover, in these guidelines, the Declaration on International Investment and Multinational Enterprises recalls the important role of these players in the world of foreign direct investment and their ability to contribute positively to economic, social and environmental progress (Declaration on International Investment and Multinational Enterprises, 2011 cited in OECDa). Recalling the theory, these guidelines follow a global citizen approach for multinational enterprises. These guidelines require timely disclosure of information in relation to the multinational enterprise. While the guidelines restate the list mentioned in the Principles of Corporate Governance, they point to the application of a high standard with regard to disclosure of financial and non-financial information (Declaration on International Investment and Multinational Enterprises, 2011: Principle III cited in OECDa).

Recalling the question, if self-imposed accountability to the public imposes a duty to inform the stakeholders or the public about its conduct? Both standards, the 2004 Principles of Corporate Governance and OECD Guidelines for Multinational Enterprises, establish a higher standard of transparency. The standards do not explicitly shift the discretion to determine the information to be disclosed away from the corporation. Since the standard addresses the corporations themselves, it imposes no duty on stock markets or other controlling entities to control the publication of information.

The Guiding Principles on Business and Human Rights provide guidance and establish the broadest approach. Under the umbrella of the UN, the Council for Human Rights endorsed “Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework” as proposed by the Special Representative Professor Ruggie (Business and Human Rights Resource Centre, 2011). These principles require companies to better engage in responsible business in respect of human rights, and require a degree of transparency. The requirements of host states are set out in principle 1: “States must

protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication" (Human Rights Council and Ruggie: Principle 1). Furthermore, the commentary provides that "[…] States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency". The states have to conduct arbitral proceedings in a manner that does not violate third persons. It is the primary duty of states to engage in a manner, as a party to a treaty and as a disputing party, whereby they allow access to the proceedings.

Businesses have an obligation to assess their effects while doing business, "[i]n order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence" (Human Rights Council and Ruggie: Principle 17). The results have to be disclosed and the public should participate in this process (Human Rights Council and Ruggie: Principle 18, Principle 19). "In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should: (a) Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences; (b) Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved; (c) In turn, not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality" (Human Rights Council and Ruggie: Principle 21). The requirements of the Ruggie Principles are far-reaching and entail information having an impact on the environment, including civil participation.

Recalling the question above and recalling the global citizen approach, the Ruggie principles establish a duty of a corporation to include the public. Additionally, the principles keep underlying the importance of transparency. Following the principles of transparency and the requirement of including the public, it is difficult to argue how corporations may have both, be accountable to the public and still have discretion to determine the information to be disclosed to the public.

4. Corporate Social Responsibility and Corporate Governance under domestic law

The applicable law transfers a self-imposed obligation into a legally binding obligation. How publicly listed corporations treat transparency is under most applicable law regulated in the market abuse regulations. This paper suggests here to use the mechanism of inside information in the light of publicly listed corporations CSR and in favour of an impact investor and hereby compares the applicable laws of UK, Germany, US and Switzerland. If publicly listed corporations are legally obliged to disclose information in accordance with their voluntary CSR approaches, such as Stakeholder Value or Global Citizen, depends on the applicable law. The information under the scope of inside information is for the investor of concern with regard to his or her investment decision. Impact Investors that invest due to policies other than financial performance have other needs with regard to the information. SWFs and pension funds need information beyond the shareholder value that justifies their investment to the public.

Under European Union (EU) law, publicly traded corporations have to disclose information if the information qualifies as inside information. Inside information needs to be disclosed immediately (Ling Lee, 2004: 661, 670-89). The market abuse regulation defines "inside information":

"information of a precise nature which has not been made public, relating, directly or indirectly, to one or more issuers of financial instruments or to one or more financial instruments and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments" (Commission Directive 2003/124/EC).

The Committee of European Securities Regulators (CESR) and regulation 2004/124/EC clarify:

"information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or may reasonably be expected to come into existence or an event which has occurred or may reasonably be expected to do so and if it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments or related derivative financial instruments." (Commission Directive 2003/124/EC).

Thereto, the CESR provides a list of events that directly affect the issuer and mentions inter-legal disputes and liabilities. It also mentions that the information shall be published as soon as possible. The objective standard interpretation is that a reasonable person means someone holding a position as a market trader. There is no general rule to decide disclosure, and the decision has to be taken on a case-

by-case basis (Commission Directive 2003/124/EC, Article 1(2)). Thus, information that causes a sale of shares owned by an impact investor may have a significant effect on the shares. Without the significant effect, an impact investor may not rely on the disclosure of the information.

Similarly, the United Kingdom (UK) sets out requirements:

"In determining the likely price significance of the information an issuer should assess whether the information in question would be likely to be used by a reasonable investor as part of the basis of his investment decisions and would therefore be likely to have a significant effect on the price of the issuer's financial instruments (the reasonable investor test)." (Financial Services Authority, 2013: 2.2.4(1))

Additionally, "[i]n determining whether information would be likely to have a significant effect on the price of financial instruments, an issuer should be mindful that there is no figure (percentage change or otherwise) that can be set for any issuer when determining what constitutes a significant effect on the price of the financial instruments as this will vary from issuer to issuer" (Financial Services Authority, 2013: 2.2.4.2). The test to be applied is this of a reasonable investor and that "… a reasonable investor will make investment decisions relating to the relevant financial instrument to maximise his economic self interest" (Financial Services Authority, 2013: 2.2.5.2). Inside information has to meet the aforementioned criteria of the European Union (Financial Services Authority, 2013: 2.2.3-2.2.4).

In addition, the German approach follows the EU: Publicly listed corporations have a duty to disclose information in public. The *Wertpapierhandelsgesetz, WpHG* (Statute for Securities Exchange) establishes the conditions to disclose insider information (Statute for Securities Exchange (Germany) 1998 (BGBl. I S. 2708) as amended 2013 (BGBl. I S. 174): §1). The corporation has to inform the public immediately about inside information (Ringleb, Kremer, Lutter and von Werder, 2010: 1204-05). An issuer has to provide information about the corporation regardless of whether or not it is traded on the German stock market (German Securites Exchange Act (*WpHG*): §§12&5). Inside information refers to the issuer or their securities and has the potential, in cases of disclosure to considerably influence the stock market price. The standard of interpretation is a reasonable person that trades on the stock market. Information includes events that are reasonably likely to occur in the future (German Securites Exchange Act (*WpHG*): §13). If information has to be published, it needs to be evaluated case by case (Assmann, H-D and Schneider, U. 2012: 13 Rn 23 et seq, BaFin, 2013: 30-35). The non-binding Corporate Governance stipulation simply restates that "[t]he Management Board must disclose insider information directly relating to the company without delay unless it is exempted from the disclosure requirement in an individual case" (Government Commission, 2012: Art 6(1)). The requirement that inside information needs to have a considerable influence on the stock market price is less impact investment friendly.

Under United States (US) federal law, the Securities Exchange Act provides a list of information that needs to be disclosed under the heading of financial information (US Securites Exchange Act: S-K §229.300). A definition as such is not found in the statute. However, the Securities Exchange Act provides the following obligation:

"Every issuer of a security registered [under this law] shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security" (US Securities Exchange Act: §78m(a)).

The commission in charge requires various financial and non-financial information (US Securities Exchange Act: §229.303&§229.503). The information has to be disclosed as early as possible (Ling Lee, 2004: 661, 673). Publicly listed corporations should disclose all information that has a material effect on the value of the enterprise (Painter, 1961: 91, 114; Ling Lee, 2004: 662; Hancock: 233, 236; Lewis: 1045-46). The test applied is, a reasonable investor based on the facts in the light of policy (Ling Lee, 2004: 665). The policy of a US state may play a role in determining the materiality of the information (Ling Lee, 2004: 662). The majority of states set their policy based on shareholder value (Millon, 2012: 71-4).

Under Swiss law, publicly listed corporations have a duty to disclose information in public under the statute of the stock market (Swiss Stock Exchange Act: sec 1). The statute establishes that the issuer has a duty to inform its client (Swiss Stock Exchange Act: sec 11(1)(a)), in particular, periodically with data concerning the monetary success of the publicly listed corporation (Swiss Code of Obligations: sec 663b et seqq). No rule exists concerning immediate publication of inside information in this statute (Daeniker and Waller). However, a broader duty of publication is imposed by the stock market rules, a self-regulated regime (Swiss Securities Exchange Act: sec 4). The stock market establishes an obligation to disclose potentially price-sensitive facts in the sphere of activity of the publicly listed corporation (SIX and SWX: Article 53). However, not every piece of information may be disclosed; information about an event has to be disclosed if the disclosure has a significant impact on the price of the security. The standard of interpretation is an average stock market trader (SIX and SWX: Article 3). The information qualifies as significant if, in case of disclosure, it has a considerably greater impact on the price compared with the usual price fluctuation. The evaluation has to be done on a case-by-case basis (SIX and SWX:

Article 4). Time of disclosure is as soon as possible (SIX and SWX: Article 5). The purpose of informing the public aims to ensure that the public has true, clear and complete information about significant events arising out of corporation's course of business (SWX, 2008: Art 1).

To conclude, the disclosure requirements in the EU, in particular Germany and England, the disclosure obligation is linked to the entailed financial value of the information from the perspective of a reasonable investor. There may not be sufficient room to establish an increased transparency based on a self-imposed higher standard of Corporate Governance. Similar, Swiss law lacks this link.

To conclude, the disclosure obligations under US law are very far reaching but ultimately narrowed based on the shareholder value that prevails in most of the states. There might be sufficient room in the materiality test to increase the binding transparency obligation based on a self-imposed higher standard of Corporate Governance.

5. Exceptions from disclosure under domestic law

Even if information qualifies as inside information, some applicable laws provide exemptions from immediate disclosure. The argument may be that a publicly listed corporation is not required to disclose information immediately if confidentiality is guaranteed because if no one trades any damage occurs to the shareholders. All the investors have equal information and therefore the information has no positive or negative impact on any investor's investment.

Under EU law, the issuer may delay disclosure of inside information on his own responsibility. "… such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information. …" (Council Directive 2003/6/EC: Article 6(2)). Holding the information secret is allowed as long as none of the information holders' trade, the issuer guarantees the secrecy and omission is not likely to mislead the public. Legitimate interest is needed to justify the delay, *e.g.* on-going negotiations (Council Directive 2003/124/EC: art 3(1)). Similarly, under the laws of the UK, the disclosure of inside information may be delayed. Issuers may, on their own responsibility, delay the proceedings of disclosure, firstly, if such omission would not be likely to mislead the public, secondly, if any person receiving the information owes the issuer a duty of confidentiality, regardless of whether such duty is based on law, regulations, articles of association or contract, and, thirdly, if the issuer is able to ensure the confidentiality of that information (Financial Services Authority, 2013: 2.5.1). Similarly, German law allows the withholding of insider information. An issuer may withhold the disclosure information as long as a legitimate interest in secrecy exists, omission of information will not mislead the market, and confidentiality is guaranteed. (German Securities Exchange Act: §15a(3)).

Under the EU law, the laws of Germany and England in particular, it is not that clear if this exception of confidentiality be applied on corporations that self-impose a higher standard of Corporate Social Responsibility and therein transparency. Under a global citizen approach, it is difficult to argue why the information that qualifies as inside information may not mislead the public or how legitimate interest in confidentiality exists if the corporation declares to be transparent in accordance with the OECD Guidelines for Multinational Enterprises.

Similarly, the Swiss rules applied in the stock market contain limitation to continuous disclosure requirements. The disclosure may be delayed based on a plan or decision of the issuer and in case of legitimate interest in confidentiality. The issuer must ensure that the relevant information remains confidential (SIX and SWX: Article 54).

The US law, inside information may not be delayed due to guaranteed confidentiality. The approach taken under EU law and Swiss law is foreign to the US.

On the one hand, to give corporations a freedom to determine their own rules beyond a minimum standard under the applicable laws creates an incentive to corporations to implement Corporate Social Responsibility, a higher standard, without losing control. To allow a corporation not to disclose information if it may guarantee confidentiality is favourable if no one bears damage. Under a shareholder value, no one bears damage under other approaches it depends. An impact investor may have a reputational damage if its investment target declared its willingness to comply with OECD Guidelines or Ruggie principles but failed to do so. Impact Investors largely provide below market rates to the investment target because the investment target acts in accordance with the principle of the investor. If an event occurs that shifts the investment target, the publicly listed corporation, from the investment strategy of the Impact Investor outside the investment strategy, the event needs to be disclosed immediately. The fact that the investment target lacks the criteria an investor expects needs to be disclosed and may hardly be justified by guaranteed confidentiality; otherwise the publicly listed corporation enjoys unjustified below market rates. Similarly, stakeholders may have a right to get informed immediately if the corporation lacks a self-imposed criterion. Some employees are willing to work to less-favourable financial working condition for corporations that doing well. The publicly listed corporation employee's experts below market rates. The fact that the employer lacks the criteria an employee expects needs to be disclosed immediately; otherwise the publicly listed

corporations profits unjustified below market rates. Other scenarios are possible considering below market concession contracts, leasing contracts, rent contracts, grants for establishing a project, support of non-governmental organisation … etc. Following this examples, no room exists for an event that caused direct or indirect damage to stakeholders or the public if the publicly listed corporation follows a stakeholder or global citizen approach. However, if no damage occurs, there may be reasons to justify the confidentiality of the information.

On the other hand, under the shareholder value approach, all information is relevant that affects the shareholder, it is relevant to the stakeholders under the stakeholder approach, and the information is relevant to the public under the global citizen approach. The fact that the corporation follows a voluntary approach may impose a duty to provide the information that it acts legitimate in accordance with its own principles. There may be room for confidentiality of information for information that lies beyond the approach taken by the corporation.

To conclude, if publicly listed corporations self-impose a higher standard of Corporate Governance, it depends from the drafting of their standard if they have to disclose all the information or information may be kept confidential if no damage occurs to its shareholders, stakeholders or the public. However, if the publicly listed corporation implements a standard of Corporate Governance, it is very favourable that these publicly listed corporations disclose all the information immediately in accordance with the standard and the corporation may not rely on exception provided by the stock market regulators.

Conclusion

That self-imposed accountability to the public imposes a duty to inform the stakeholders or the public about its conduct is unlikely under these laws. In order to respond to the needs of Impact Investors, the system of governing market abuses needs to be improved under all applicable law. Under EU, German, UK, US and Swiss law, it is not clear if an Impact Investor may require immediate disclosure of information that is essential for measuring the impact even if the publicly listed corporation was originally willing to comply with this strategy. In these circumstances, the test of a reasonable person needs to be shifted into the light to the publicly listed corporation's willingness to comply voluntarily with a higher standard of Corporate Governance.

Moreover, inside information needs to be redefined. Inside information needs to reflect the rules in Corporate Governance and CSR. Information that falls outside the minimum standard provided by the applicable law but inside voluntary self-imposed standard needs to be disclosed. In this regard, the requirement of price sensitive information may not sustain in an environment of impact investment.

Furthermore, circumstances exist in which inside information may be withhold based on guaranteed confidentiality under a shareholder approach. Under any other approach of a publicly listed corporation, such confidentiality may be tolerable so long as confidentiality prevents damage to all persons for which the publicly listed corporation is accountable.

In any case, the implementation of the OECD Guidelines for Multinational Enterprise or the Ruggie principles should trump the regime of market abuse while favouring greater accountability and transparency.

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