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New SWX Segmentation Concept in the Light of the Recent EU Developments in the Regulation and Supervision of Securities Markets

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At the European level, the Financial Services Action Plan has resulted into the adoption of three new Directives - Prospectus Directive, Transparency Directive and Market Abuse Directive. The first and the last ones are of particular importance for the SWX and especially for virt-x due to its status of "EU-Regulated Market" in the UK. As a consequence of the UK's implementation of these Directives as of July 1, 2005, the SWX launched a new segmentation concept, also of that date. This concept aims at finding a compromise between the goal of strengthening the competitive position of SWX and that of preserving specific characteristics of the Swiss securities market. The author holds that the practical impact of the new SWX segmentation concept is rather limited because of the wide use of "grandfathering" regime.

Summary

1 The author is grateful to lic. iur. *Martin Böckli* for valuable comments on the draft of this article.

I. Introduction

This article serves as an analysis of the emerging new EU framework for the regulation and supervision of capital markets and its influence on the SWX rules.

Three new European Directives regulating securities markets have been recently adopted. These are (i) Directive of the European Parliament and of the Council 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (hereafter "Prospectus Directive"); (ii) Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (hereafter "Transparency Directive"); (iii) Directive of the European Parliament and of the Council 2003/6/EC on insider dealing and market manipulation (market abuse) (hereafter "Market Abuse Directive" or "MAD"). The three Directives are the result of the Financial Services Action Plan (FSAP), which was a wide-ranging set of proposals designed to promote the development of an integrated EU-wide financial market.

The Prospectus Directive and the Market Abuse Directive are particularly important for the SWX and especially for virt-x, due to its status of an "EU-Regulated Market" in the UK. Switzerland does not participate in the free movement of capitals within the EU. However, it has promptly reacted to the new EU Directives in order to allow for the same benefits for issuers of securities listed on the SWX. In the light of the UK's implementation of the Prospectus and Market Abuse Directives as of 1 July 2005, the SWX has launched a new segmented concept, also of that date.

This article will first present the new EU regime (II). Then, the progress made with the new EU regulation will be confronted with its remaining drawbacks (III). Finally, before drawing a conclusion (V), the particular situation of Switzerland will be analysed with a presentation of new rules issued by SWX

for the listing on the SWX "EU-Compatible" Segment entered into force on 1 July 2005 (IV).

II. The New EU Regime

A. In general

The framework of the new securities law disclosure regime within the EU is provided by the Prospectus Directive, the Transparency Directive and the Market Abuse Directive[2]. In short, the Prospectus Directive establishes the regime for initial disclosure when securities are offered to the public or admitted to trading on a securities market. The Transparency Directive establishes the regime for periodic financial disclosure by listed issuers. The MAD concerns disclosure of sensitive information by issuers and insider dealing and market manipulation more generally.

The three Directives constitute "Level 1" legislation. These Directives are supplemented by implementing measures (in EU language, "Level 2" legislation) that contain more detailed technical rules to amplify the basic concepts provided for in the primary (or "Level 1") legislation.[3]

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2 The following analysis of the three European Directives is far from being exhaustive due to the limited scope of this article and rather relates to some particular points. For a more complete analysis ot the EU securities market, see E. Ferrau, Building an EU Securities Market, Cambridge 2004; M. Moloney, EC Securities Regulation, Oxford 2002.

3 This is what is known as "Lamfalussy process" designed to speed-up law making process and allowing to refine the laws (because "Level 2" rules, i.e. regulations, can be changed more easily). The Lamfalussy process creates two

One of the major concerns with the old regulation was that it had been implemented differently in national laws. Unlike Directives, Regulations ("Level 2" legislation), accompanying new Directives, will apply directly in the Member States and will not require any implementation; therefore, there will be no scope for variations in their application and interpretation on national level 1. Furthermore, the Committee of European Securities Regulators (CESR) issues recommendations about the interpretation of EU Regulations;[4] these recommendations are not binding but constitute a reference for the national authorities.

B. The Prospectus Directive

Both under the new and under the old regime, the prospectuses require pre-publication regulatory approval from a competent authority. However, under the new Prospectus Directive, the pre-publication regulatory approval is extended to all market segments and is no longer limited to the officially listed segment of the market, as was the case under the old regime. This extension in scope has prompted some market infrastructure providers to change status (e.g. the London Stock Exchange in respect of AIM[5].

In absence of a pan-European securities regulatory authority, supervisory responsibilities within the EU necessarily remain with the national authorities. Under the Prospectus Directive, EU issuers are tied to their home state (state of registered office) for the purpose of seeking the approval. This regime is more restrictive than the previous one.[6]

It is noteworthy that Switzerland does not have an authority equivalent to the UK Financial Services Authority (FSA), French *Commission des operations de bourses* (COB) or American Securities Exchange Commission (SEC). Thus a prospectus established by a Swiss issuer designated for a public offer of shares or bonds is not subject to a pre-publication regulatory

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approval, a request for admission on SWX being reserved.[7]

For non-EU issuers, Art. 2.1 (m) (iii) gives a one-off opportunity to choose their EU home State but they are then tied irrevocably to the State they have chosen.[8] This rule precludes the non-EU issuers from engaging in securities transactions on the European Market during the transition period, which started on December 31, 2003, with the publication of the Directive in the Official Journal. In fact, the non-EU issuers have certainty neither as to whether the disclosure regime of the chosen State would not exceed the requirements of the Directive, nor as to the competitiveness of the supervisory regime of this State. This problem might be avoided by using different companies of the same group to make offers of securities in different jurisdictions but such schemes involve high transaction costs.

The Prospectus Directive seeks to impose an exhaustive disclosure regime that applies uniformly across the whole of the EU and leaves no room for Member States to impose additional requirements on issuers. This exhaustive approach is in sharp contrast to the previous EU prospectus disclosure regime, which set minimum requirements but left room for Member States to add their own additional disclosure requirements.[9]

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levels of laws:
- "Level 1" is a framework - measures that go through the standard EU law-making process (with involvement of European Commission and Parliament);
- "Level 2" is kind of secondary legislation - made by the European Commission with impact of Securities Committee (i.e. commitology procedure) and with assistance of network of national securities regulators from the Member States. See also E. Ferran, op. cit., p. 5

4 Available at www.cesr-eu.org.

5 Alternative Investment Market. On this market, companies face less stringent entry requirements than on the traditional market in terms of age, size, or the requirement for a record of profitability. On the other hand, the AIM has stricter rules regarding information disclosure and transparency. For instance, in order to gain admission to the main market for listed securities in London, it is necessary to be admitted to the Official List by the UK Listing Authority (UKLA which is a division of the Financial Services Authority) and also to be admitted to trading by the London Stock Exchange. In contrast, companies seeking admission to AIM are not bound by the UKLA's listing rules, and are generally subject to less regulation.

6 Under the old regime, issuers were tied to the State of their registered office for supervisory purposes only where they were listing or offering their securities in that State. Where they were not, they could choose their supervisory authority from amongst the regulatory authorities in the States where they were applying for listing or making offers of their securities.

7 *Aeschlimann/Alber*, Un "passeport européen" unique pour les émetteurs de valeurs mobilières", *Banque & Finance*, Nov-Dec 2003, p. 9 ff.

8 The Transparency Directive broadly followed with the same rules on the identification of issuers' home State.

9 Under the old regime, it was theoretically possible to use a prospectus that had been approved in one Member State for issuance or listing activity in other Member States. However, in practice issuers found that obtaining approval from one State was not in fact sufficient because other relevant Member States could require additional information

However, maximum harmonisation imposed by the new regime is open to the criticism of going far beyond the necessary solution to the existing problems. The Prospectus Directive not only removes the possibility for Member States to impose additional disclosure requirements on issuers whose prospectuses have satisfied the requirements for approval in another Member States, but it goes further by prohibiting also the Member States from imposing their own disclosure requirements beyond those prescribed by the Directive. Thus even for domestic offers or listings that have no cross-border dimension, the disclosure rules are fixed at EU level and there is no scope for the exercise of national discretion to impose additional requirements.

The new disclosure requirements are much more detailed and prescriptive than those they have replaced. An attempt has been made to differentiate between different requirements by reference to the issuer and the type of securities. Three main dividing lines in the disclosure schedules to the Prospectus Regulation[10] are made between: (i) shares; (ii) debt and derivative securities with a denomination per unit of less than € 50,000, and (iii) debt and derivative securities with a denomination per unit of at least € 50,000. There are also separate schedules for special types of securities, such as asset-backed securities, and for certain types of issuers, such as banks, States and other public bodies. The idea of the EU legislator was that wholesale investors should be able to make their investment decisions in different conditions than those necessary for retail investors. There remain some doubts as to whether the new regime is sufficiently differentiated.

The disclosure requirements are based on the International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (IOSCO, 1998). The underlying idea is that moving towards IOSCO standards will facilitate international securities offerings by simplifying the procedure for Community issuers wishing to raise cross-border capital[11].

There is now a definition of "*offer to the public*", which is a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or

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subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries.

Last but not least, the exemptions from disclosure regime have been clarified. According to the new Directive, the obligation to publish a prospectus shall not apply to the following types of offers:

(i) an offer of securities addressed solely to qualified investors;

(ii) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors;

(iii) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50,000 per investor, for each separate offer;

(iv) an offer of securities whose denomination per unit amounts to at least EUR 50,000 and

(v) an offer of securities with a total consideration of less than EUR 100,000 which limit shall be calculated over a period of 12 months.

The Prospectus Directive was adopted in 2003 and was due to be implemented into national laws by 1 July 2005. The new regime was proposed in 2001 and implemented in 2003, which constitutes quite a rapid change for the EU. It is on transposition that the new regime became effective for EU issuers. It is noteworthy that for non-EU issuers some aspects of the regime entered in force on publication in the Official Journal on 31 December 2003.

C. The Transparency Directive

The Directive completes a package of Financial Services Action Plan measures adopted over the last two years - i.e. the IAS Regulation, the Market Abuse Directive, the Prospectus Directive - to establish a common financial disclosure regime across the EU for issuers of listed securities.

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adapted to their national market. This was permitted under the old regime so long as the additional information requested related to local income tax, paying agency arrangements or the mechanisms of publishing notices to investors. Compliance with additional national disclosure and translation requirements of host Member States was a disincentive to the use of the single passport mechanism because of the involvement of extra-costs.

10 Commission Regulation 809/2004/EC implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

11 On the impact of the use of IOSCO standards on offerings on the US market see J.P. Cox/R.W. Hillman/D.C. Langevoort, Securities Regulation: Cases and Materials, 3rd ed, NY 2001, p. 326 ff.

In general, the Directive is expected to improve the European dissemination of information on issuers, removing a barrier to cross-border investment.Under the Directive, all securities issuers will have to provide annual financial reports within four months after the end of the financial year. Investors in shares will receive more complete half-yearly financial reports. Those issuers who do not publish quarterly reports will need to provide quarterly management statements. Bond issuers will also be required to publish half-yearly reports.

Thus, the Directive updates existing EU law on the information provided to shareholders and bondholders in general meetings through proxies and electronic means. Further work on these issues has recently been undertaken by the Commission, to improve shareholders' rights. In January 2006, the Commission presented a proposal for a Directive to facilitate the cross-border exercise of shareholders' rights in listed companies, through the introduction of minimum standards. The proposed Directive seeks to ensure that shareholders, no matter where in the EU they reside, have timely access to complete information and simple means to exercise certain rights - notably voting rights - at a distance.[12]

As to the approach adopted by the Transparency Directive, it can be contrasted to that of the Prospectus Directive. Instead of adopting a maximum harmonisation approach, the Transparency Directive provides that home Member State may impose requirements that are more stringent than the Directive but host Member State may not. For instance the UK Listing Rules impose significant periodic disclosure, which are above the level set by the Transparency Directive.

The Transparency Directive was adopted on 15 December 2004 and is to be implemented into national legislations of the EU Member States by 20 January 2007. It revises and replaces provisions of Directive 2001/34/EC on the admission of securities to official stock exchange listing.

D. The Market Abuse Directive

The Market Abuse Directive ("MAD") replaces a previous Directive on insider dealing and significantly expands the scope of EU regulatory intervention to embrace market manipulation as well as insider dealing. The MAD requires prompt disclosure of inside information defined as *"information a reasonable investor would be likely to use as part of the basis of his investment decisions"*.

The Directive applies to any financial instruments admitted to trading on a regulated market in at least one Member State, or for which a request for admission to trading on such a market has been made, irrespective of whether or not the transaction itself actually takes place on that market. Thus, the MAD does not explicitly link issuers to designated home Member States for supervisory purposes. Instead it is primarily territorial in its approach, requiring each Member State to apply the

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Directive to actions carried out on its territory concerning the financial instruments that are admitted to trading on a regulated market in any Member State or for which a request for admission to trading on such market has been made. But there is also a second requirement for Member States to apply the Directive to actions not only on its territory but also abroad concerning financial instruments that are admitted to trading on a regulated market situated or operating within its territory or for which a request for admission to trading on such market has been made (see Art. 10 (a) MAD).

This approach creates a potential positive conflict of more than one national regulator being competent to act in certain circumstances, e.g. the State where financial instruments are admitted to trading on a regulated market and the State where actions related to these instruments are carried on a regulated market.

The Directive was adopted on 28 January 2003 and it was due to be implemented into the national laws of Member States by 12 October 2004.

III. Evaluation of the New EU Regulation of Securities Markets

A. Maximum Harmonisation vs. Regulatory Competition

At the EU level, the very early Securities Directives were based on the idea of detailed harmonization; later on the EU law switched to the idea of minimum harmonization and mutual recognition, which allowed for greater local diversity.[13] Then, the Commission's 1985 White Paper on the Internal Market promoted

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12 For more detail, visit http://europa.eu.int/comm/internal_market/company/shareholders/index_en.htm.

13 On the pre-FSAP EU law, see Moloney, EC Securities Regulation, Oxford 2002. The author concludes that while the pre-FSAP Securities Directives in principle facilitated the integration of national securities markets, they had not led to the creation of a single integrated European securities market in the sense of a single stock exchange or trading platform for issuers and investors. The regulatory framework established by the pre-FSAP Securities Directives had a more modest reach and was designed to facilitate access by issuers to national stock exchanges. They did not deal with the subsequent trading process.

integration via liberalisation, rather than detailed harmonisation through the use of the *mutual recognition* technique.[14] With the FSAP, the EU returned to the idea of maximum harmonisation.

The theoretical model of worldwide-harmonised securities markets has been contrasted to that of the regulatory competition, which is a situation where issuers have some freedom to choose the law governing their securities offers.[15] The question whether common standards can emerge from regulatory competition is in the centre of academic debates. In the affirmative, it is arguable that it is the best mechanism to discover the needs of the market and to find the best legal mechanisms to satisfy those needs.

However, some doubts remain as to whether the result of regulatory competition would be as positive as described above. On the one hand, legislators might have an incentive to offer good investor protection, which will lower the costs of capital ("*race to the top*"). On the other hand, Governments may consider that less is the regulatory burden imposed on securities' issuers, more the national market appears as attractive to the latter. This vision will necessarily lead to the relaxation of investor protection ("*race to the bottom*"). It is difficult to find any empirical evidence supporting either of these views and both arguments remain more theoretic than pragmatic.[16]

For the present day EU law, Ferran supports a mixed strategy that combines some reliance on

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regulatory competition within the EU alongside judicious use of EU regulatory powers to impose harmonised regulation in certain situations. The author states that this approach is consistent with the EC Treaty presumption about subsidiary and proportionality that, broadly, mean that regulatory intervention should take place at local level wherever necessary. However, she acknowledges that notwithstanding the many limitation of regulatory competition, leaving some room for diversity does offer certain potential advantages, e.g. offering some background for elaboration of harmonised standards. In the European context, harmonisation and competition appear as complementary forces: Harmonisation of core standards can generate trust between Member States on the broad comparability of their requirements which, in turn, may foster a system of mutual recognition of national requirements that may be above the harmonised *"core"*.[17]

In practice, the new approach of the FSAP has clearly reduced room for regulatory competition by (i) use of maximum harmonisation technique in the new prospectus disclosure regime with prescriptive rules at the EU level leaving no possibility to the Member States to add their own additional requirements; and (ii) by firmly tying issuers to their States of incorporation for the purpose of obtaining supervisory approval. However, the latter point should be viewed in the light of establishment of the supervisory network - CESR (Committee of European Securities Regulators) infrastructure - for better communication and closer co-operation between national regulators as well as EU aspiration to make it easier for issuers to change their State of incorporation.

It is arguable that maximum harmonisation goes beyond what is needed for the purpose of opening up the market and thus constitutes a disproportionate response to the needs of the EU securities market, for which maximum harmonisation was not the only option. The EU authorities could have improved the "single passport" regime by prohibiting host States from imposing additional requirements on approved prospectuses but at the same time allowing home States, charged with the task of approving a prospectus, to require additional disclosures as preconditions to the granting of prospectus approval. Such additional disclosures would have been the same for all issuers.

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14 The more flexible harmonisation technique of mutual recognition and home-country control is described as follows. Once a prospectus or listing particulars have been approved in accordance with the relevant Directive's requirements by one Member State (the home State), other Member States (host States) must accept the document although they may impose certain additional information and translation requirements. While mutual recognition requires that Member States do place a considerable degree of trust in each other's standards of supervision, each home authority is subject to the minimum harmonised requirements.

15 On the model of worldwide-harmonised securities markets, see *H. Scott*, "Internationalization of Primary Public Securities Markets", 63 Law and Contemporary Problems 71: *"In fully internationalised securities markets, issuers in public primary markets would be able to issue securities to investors worldwide using one optimal set of disclosure documents acceptable in all jurisdictions where the offer is made. One set of liability standards and remedies would apply in all such jurisdictions; and uniform distribution would be followed"*.

16 Some other doubts also exist as to the efficiency of regulatory competition, in particular as to the investors' ability to collect and process information needed to assess quality of different national regimes and the Governmental responsiveness and willingness to adapt their national regulation to the issuers' and investors' preferences. Also, the risk that Governments will adopt a protectionist attitude favouring local players should not be neglected.

17 *E. Ferran*, Building an EU Securities Market, Cambridge 2004, p. 53.

In conclusion, the benefits of uniformity resulting from maximum harmonisation always necessarily come at a cost of rigidity and loss of possibility to better respond to the needs of issuers and investors identified at national level. It can never be certain whether national interventions will lead to an improvement of the flow of information to investors ("*race to the top*") or whether it will result into national protectionist measures ("*race to the bottom*"). The EU legislator has made its choice in favour of maximum harmonisation and only time will be able to show whether the benefits of this decision will outweigh its drawbacks.

B. The Drawbacks of the New Disclosure Regime

The new disclosure regime is very detailed, lengthy and contains many schedules, particularly in the Prospectus Regulation.

The rigidity created by absence of regulatory competition could have an adverse impact on the quality of supervision because it removes a competitive pressure. The advantages of maximum harmonisation are tainted by the gap, which exists between the rules, which are harmonised, and their enforcement, which still takes place at national level.

The regime that Prospectus and Transparency Directives institute for issuers incorporated in third countries presents an element of uncertainty as to how the mechanisms for determining whether other financial reporting systems are equivalent to IAS/IFRS and are therefore acceptable for EU purposes will actually operate. A large number of issuers could potentially be allowed to report their financial results otherwise than in IAS/IFRS, thereby making significant harm to the effort of standardisation.[18] The Commission is committed to establishing an EU equivalence determination mechanism by 2007.

Finally, removing the choice of issuers to be supervised by the State of trading rather than by the State of incorporation, looks like a step backwards, which is inconsistent with developments elsewhere in the EU market integration process, e.g. the establishment of CESR, and the improvements in information-sharing and general supervisory co-operation.

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C. The Advantages of the New Disclosure Regime

First, prior to the FSAP, there was no common definition of *"offer to the public"*. The broad definition of this concept provided for by the new regime may only be welcomed.

Secondly, the new regime clarifies the exemptions, - i.e. the sorts of offers excluded from the mandatory prospectus requirements. This is not a brand new concept but its explicit inclusion in the text of the Directive constitutes a step forward.

Thirdly, the new regime promotes standardisation of the language of financial and non-financial information. The new regime establishes that language customised in international finance can be used for offerings across EU. Without specification, this rule clearly indicates English and reinforces the dominance of English as the language of international securities market documentation. However, the success of the scheme is still unpredictable because of its dependence on the attitude that the Member States will adopt.

The translation burdens are further reduced by the new rule contained in the Prospectus Directive, which limits the possibility of host Member States to require translation into their official language to the short summary of not more than 2,500 words, where prospectuses are aimed at the retail securities.

Finally, the Member States are required to lay down a system of sanctions for breaches of the national provisions adopted pursuant to the Directives and to take all the measures necessary to ensure that these sanctions are applied. The sanctions should be effective, proportional and dissuasive. Though the question of liability standards is not addressed in detail because of the concerns as to the EU constitutional competence to regulate this question, even a mention of this problem with deferral to the Member States to impose "*dissuasive*" measures can be cited as a move forward.

In conclusion, the new regime clearly brings certain remedies to the defaults of the previous EU regulation which had been adopted several years before and which had introduced a partial and complex mutual recognition mechanism unable to achieve the objective of the single passport provided for by the EU Directives. One may be hopeful that the opportunities offered by the new regime will be used in practice.

IV. Switzerland and the EU Securities Market

A. The Regulatory Framework of the SWX Group

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18 On the other hand, this regime makes life rather more simple for third country issuers. See *M. Blair/C. Harris*, Host State - Home State - Superstate, in: Wirtschaftsrecht zu Beginn des 21. Jahrhunderts, FS für Peter Nobel zum 60. Geburtstag, Bern 2005, p. 461.

The regulatory structure of the core business of the SWX Group, i.e. the SWX Swiss Exchange and virt-x, is influenced by regulatory environments of two countries, namely Switzerland and Great Britain. SWX is subject to Swiss law (the Federal Act on Stock Exchanges and Securities Trading, hereafter "SESTA") and is supervised by the Swiss Federal Banking Commission. Virt-x is a "*recognised investment exchange*" and is therefore subject to British law and is supervised by the UK Financial Services Authority (hereafter "FSA").[19] The regulatory framework for issuers whose securities are traded on virt-x is defined by their respective home-country authorities.[20]

The prospectus requirements existing under Swiss law are mainly contained in the Swiss Code of Obligations (hereafter "CO"), namely Arts. 652a and 1156 CO.[21] The gaps left by the Swiss legislator were filled in by the SWX Listing Rules (hereafter "LR") and by the Additional Rules for Listing in the "EU-Compatible" Segment (hereafter "AR"); the latter are part of the Swiss response to the new European Directives described above.

In response to the Prospectus and Market Abuse Directives, the SWX Group has created the SWX "EU-Compatible" Segment, and has also introduced two new segments on virt-x - the "EU-Regulated Market" and the "UK Exchange-Regulated Market" Segments.

The SWX Group reaffirms by these actions its aspiration, at the regulatory level, to position itself in an effort to strengthen its competitive position while at the same time taking into account the specific characteristics of the Swiss securities market.

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B. The SWX "EU-Compatible" Segment and Virt-x "EU-Regulated Market" Segment

1. The Parallelism Between Listing and Trading Segments

The direct response to the Prospectus and Market Abuse Directives was the creation by the SWX Group of the SWX "EU-Compatible" Segment and the "UK Exchange-Regulated Market" Segment on virt-x.[22] Equities that are listed in the SWX "EU-Compatible" Segment are admitted to trading in the "EU-Regulated Market" Segment on virt-x, once the prospectus has been approved by the FSA; the case of existing securities as at July 1, 2005 automatically allocated to the "EU-Compatible" listing Segment and admitted to trading in the EU Regulated Market Segment of virt-x being reserved.

The main segment on the SWX remains available to those issuers which cannot or do not wish to fulfil the requirements of the SWX "EU-Compatible" Segment. The shares in the main segment are automatically and without any further conditions admitted to trading in the "UK Exchange-Regulated Market" Segment on virt-x.

Consequently, there is a certain parallelism between listing and trading segments. Underlying the division of virt-x into two trading segments, the Admission Board has created an "EU-Compatible" listing Segment of the SWX. The AR applicable to this Segment are designed to secure that the securities listed on it comply with the obligations derived from the EU Directives and required by them by virtue of being admitted to trading on the "EU Exchange-Regulated Market" Segment on virt-x.

This allows for more flexibility and leaves the issuers a choice: Those who do not wish to benefit from the EU passport provisions have a possibility of avoiding application of stringent European rules by listing their securities on the main segment. On the other hand, issuers of securities who wish to benefit from the harmonised European securities market are enabled to do so if they choose to be listed on the SWX "EU-Compatible" Segment. Respectively, the EU legislation on securities market applies in principle to the issuers that take advantage of the EU single passport provisions, allowing them to list their securities in any EU Member State in accordance with the mechanism provided in the Prospectus Directive.

2. The "Grandfathering" Regime

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19 *P. Nobel*, Emittenten im Visier europäischen Rechts, NZZ January 25, 2005, available at http://www.nzz.ch/2005/01/25/bm/articleA27XY.html;jsessionid=BB62CDEFB97101D299799721B472AC34.

20 For more detail on virt-x regulation, see *F.M. Huber/P. Hodel/C. Straub Gierow*, Praxiskommentar zum Kotierungsrecht der SWX Swiss Exchange, Zurich 2004.

21 For more detail on prospectus under Swiss law, see *Schleiffer/Rehm*, Zum Prospekt nach Obligationenrecht, Der Schweizer Treuhänder 12/05, p. 1021 ff.

22 From 1 July 2005, virt-x has the following market segments: (i) an EU Regulated Market for Swiss Market Index ("SMI") securities; (ii) a UK Exchange Regulated Market for SMI Securities; (iii) an EU Regulated Market for pan-European securities admitted to trading as of 1 July 2005; and (iv) a UK Exchange Regulated Market for pan-European securities admitted to trading on or after 1 July 2005.

The logic consequence of the new segmentation concept would have been that the admission to trading in the "EU-Regulated Market" Segment on virt-x takes place necessarily according to the rules laid down in the EU Prospectus Directive, or under English law as the means of implementation of this Directive. However, this consequence also appears too drastic considering the fact that all the issuers admitted to trading on virt-x were automatically transferred on the "EU-Regulated Market" Segment as of July 1, 2005, unless they expressly applied for allocation on the "UK Exchange Regulated Market" Segment.[23]

Therefore, Swiss authorities successfully negotiated with the UK FSA that the issuers admitted prior to that date are not subject to the specific provisions of the Additional Rules of the "EU-Regulated Market" Segment, which implement the measures provided for in the EU Directive, so far as these issuers have not explicitly requested or implicitly approved, e.g. by an increase of capital of more than 10%, their entry into the "EU-Regulated Market" Segment. However, the general provisions of the Additional Rules apply. By contrast, those issuers who enter the "EU-Regulated Market" Segment after July 1, 2005 are unconditionally subject to all the provisions - both specific and general - of the Additional Rules and therefore must publish a prospectus in the forms required by the Prospectus Directive.

The resulting regime negotiated with the UK FSA may be described as "grandfathering", which is the process of establishing that an existing nonconformity was established legally and that the use has been "continuously occupied" since it was established.

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3. The Implications of the MAD

Finally, it is noteworthy that once an issuer of securities admitted to trading in the "EU-Regulated Market" Segment on virt-x expressly requests or approves its admission to trading, it becomes also subject to the issuer's obligations set out in Art. 6 of the Market Abuse Directive. This provision, among others, imposes an obligation on Member States to ensure that issuers of financial instruments inform the public as soon as possible of inside information which directly concerns the said issuers. Member States shall also ensure that issuers, for an appropriate period, post on their Internet sites all inside information that they are required to disclose publicly. As to the issuers' obligation pursuant to Art. 6 MAD, they not only have to inform the public of inside information (ad hoc publicity)[24] but they must also draw up - and transmit on request to the relevant Competent Authority - a list of insiders and report and publish transactions by the relevant persons on their own account relating to securities of the issuer and linked financial instruments.

The most important consequence of the application of Art. 6 MAD in Switzerland is described in Art. 23 AR. This provision provides for the application in Switzerland as well as in the UK of the UK rules implementing the sub. 4 of Art. 6 MAD, which deals with the director's dealings to issuers deemed to have requested or approved the admission of their securities to trading on any EU regulated market - which is in any event the case as soon as an EU-compatible prospectus is published. In such case, the obligations of Art. 74a LR - more lenient as compared to Art. 6 MAD - are not applicable and the UK rules must be fully complied with.

4. Sub-conclusion

In conclusion to this section, it should be recalled that if after July 1, 2005, the existing issuers, which were automatically allocated to the "EU-Compatible" Segment on SWX and accordingly admitted to trading on the "EU Regulated Market" on virt-x because they have not opted for another listed segment, take no steps that amount to requesting or approving admission, the additional set of obligations resulting from both the Prospectus Directive and the MAD may be ignored. A decisive step is the issuance of a prospectus. Issuers not affecting 10% or more of the number of shares of the same class already admitted to trading can use to the full the exemptions provided for by the Prospectus Directive.

C. EU Home Member State and Competent Authority

Under the Prospectus Directive, every non-EU issuer will have an EU home Member State (and accordingly an EU Competent Authority for certain market regulatory purposes) if its shares are admitted to trading on any EU Regulated Market.

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23 It is noteworthy that in the case of securities which become constituents of the SMI on or after July 1, 2005, the position is reversed: the initial allocation is to another listing segment (and thus to the "UK Exchange Regulated Market" Segment on virt-x) but the issuer can apply to be allocated to the "EU-Compatible" listing segment (and thus to the "EU Regulated Market" Segment on virt-x): in that event a new prospectus satisfying the AR and a formal approval of the FSA will be required.

24 As to the duty of disclosure of price-sensitive information or ad hoc publicity, the obligations under Art. 72 LR were considered to be equivalent to the corresponding obligations under Art. 6 MAD by the UK authorities. Consequently, the obligations of issuers in connection with the disclosure of price-sensitive information remain unchanged. This is so irrespective of whether a prospectus in accordance with the AR has been published or not.

For the issuers whose shares are admitted to trading on the "EU Regulated Market" Segment of virt-x, the competent authority within the EU for the approval of a prospectus is the UK FSA. The latter is also the competent authority for those whose securities are not already admitted to trading on any other regulated market in the EU and for those who have not actively chosen any Competent Authority by December 31, 2005.

Issuers subject to a different competent authority may have to go through the notification procedure provided for in the Prospectus Directive. Namely, if, prior to have the UK as its EU home Member State, an SMI issuer or other Swiss company admitted to trading on virt-x were to take any action that amounted to an intention to offer to the public or to an application for listing or for admission to trading within a Member State other than the UK, then this latter Member State would irrevocably become the EU home Member State for that issuer.

It is noteworthy that among conditions for maintaining listing, Art. 25 AR also imposes an obligation to inform the Admission Board if the issuer has a home Member State other than the UK for the purposes of the Prospectus Directive, and is contemplating the making of an application to the competent authorities of that State for the approval of a prospectus under that Directive in respect of an issue of equity securities.

This additional burden is consistent with the SWX's recommendation to choose the UK as the home Member State and the FSA as the Competent Authority with regard to the fact that the UK is the domicile of virt-x and the trading place for the SMI

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securities.[25] In practice, there is no existing case where an issuer would have chosen another State than the UK as the home Member State.[26] Consequently, we may be dispensed of a closer examination of this case.

Finally, it is recalled that in addition to the EU Competent Authority's control, the securities that are admitted to trading in the "EU-Regulated Market" Segment on virt-x must be listed through SWX, which also checks the corresponding prospectus. Special measures - in particular the SWX Directive on the Procedure for Listing in the SWX "EU-Compatible" Segment (see Chapter D below) - ensure that the parallel prospectus review procedures can be conducted with consistency and efficiency by the SWX and the FSA.

The AR also define the respective competence of the Admission Board and of the competent authorities in the EU. The role and authority of the Admission Board is defined, unless otherwise provided in the AR, by Arts. 2 ff LR. The Admission Board, in compliance with Art. 8 SESTA and Art. 16 of the Articles of Association of the SWX Swiss Exchange, decides on the admission of securities and supervises the continuing obligations of issuers during listing. In particular, it rules on suspension of trading and termination and cancellation of listing. In addition, the Admission Board may request from issuers information and documents as well as disclosure of specific information in so far as this is necessary to provide investors with fair information and to ensure the smooth operation of the market.

D. The New SWX Regulation

By decision of 27 May 2005 which entered into force on 1 July 2005, the SWX adopted a Directive on the Procedure for the Listing on the SWX "EU-Compatible" Segment. This Directive is aimed at providing the issuers with details regarding the procedure for the listing on the SWX "EU-Compatible" Segment. The Directive applies to issuers whose equity securities are already listed on the SWX "EU-Compatible" Segment or who apply to the SWX to have their shares listed on this Segment.

The following transactions require an application and prospectus, which must be established in accordance with the Additional Rules for the Listing on the SWX "EU-Compatible" Segment:

(i) A capital increase through ordinary or authorised capital, or the listing of conditional capital, that leads to an increase of 10% or more of the equity securities already admitted to trading (over a period of 12 months);

(ii) Mergers, takeovers or restructurings, insofar as an increase of 10% or more of the equity securities already admitted to trading takes place (over a period of 12 months);

(iii) Capital transactions associated with currently listed securities (e.g. splits, exchange of securities) if the transaction leads to a capital increase of 10% or more (over a period of 12 months);

(iv) Listing of an additional category of equity securities;

(v) A change to the SWX "EU-Compatible" Segment from any other SWX listing segment.

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25 See Regulatory Framework for Issuers. Trading of SWX-listed securities on virt-x, 2005, n. 14, p. 3, available at http://www.swx.com/download/admission/regulation/rules/addrules_framework_virtx_en.pdf.

26 *D. Fischer-Appelt/O. Favre*, Anwendungsbereich der EU-Prospektrichtlinie unter vergleichender Berücksichtigung des US-amerikanischen Kapitalmarktrechts, Der Schweizer Treuhänder, 1-2 2006, 49, p. 53 with reference to the information provided by the SWX.

The following transactions require an application and the submission of the appropriate documentation (but without a prospectus):

(i) Transactions resulting in an increase of less than 10% of the equity securities already admitted to trading (over a period of 12 months);

(ii) Listing of equity securities resulting from a conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided the shares are of the same class as the ones already on the SWX "EU-Compatible" Segment;

(iii) Delisting;

(iv) Request for the opening of a second trading line.

As established by AR, no prospectus needs to be prepared for listing of:

(i) Equity Securities representing, over a period of 12 months, less than 10 per cent of the number of Equity Securities of the same class already listed on the "EU-Compatible" Segment;

(ii) Equity Securities issued in substitution for Equity Securities of the same class already listed on the "EU-Compatible" Segment, if the issuing of such Equity Securities does not involve any increase in the issued capital;

(iii) Equity Securities offered in connection with a takeover by means of an exchange offer,

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provided that a document is available containing information which is regarded by the Admission Board as being equivalent to that of a prospectus;

(iv) Equity Securities offered, allotted or to be allotted in connection with a merger, provided that document is available containing information which is regarded by the Admission Board as being equivalent to that of a prospectus;

(v) Equity Securities offered, allotted or to be allotted free of charge to existing shareholder, and dividends paid out in the form of Equity Securities of the same class as the Equity Securities in respect of which such dividends are paid, provided that the said Equity Securities are of the same class as the Equity Securities already listed on the "EU-Compatible" Segment and that a document is made available containing information on the number and nature of the Equity Securities and the reasons for and details of the offer;

(vi) Equity Securities offered, allotted or to be allotted to existing or former directors or employees by the issuer or by an affiliated undertaking, provided that such Equity Securities are of the same class as the Equity Securities already listed on the "EU-Compatible" Segment and that a document is made available containing information on the number and nature of the Equity Securities and the reasons and details of the offer;

(vii) Equity Securities resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said Equity Securities are of the same class as the Equity Securities already listed on the "EU-Compatible" Segment.

As to the issuer-related obligations of the MAD, the AR expressly state that an issuer shall comply with the provisions of the national law in the Member State of the EU in which the relevant EU Regulated Market is situated.[27] The significance of this rule is reinforced by the additional sanctions that can potentially be imposed by SWX in accordance with Art. 29 AR with reference to Arts. 82 f. LR.[28]

E. Assessment of the New System

To recall the summary of the new system: Where securities listed on the SWX EU-Compatible Segment are to be admitted to trading on an EU Regulated Market, the issuer must supply to SWX any relevant documents, which are required to be filed with the EU Competent Authority. Once the securities listed on the SWX EU-Compatible Segment are admitted to trading on an EU Regulated Market, the issuer may be

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27 This provision reflects the territorial approach laid down in Art. 10 (a) MAD that imposes an obligation on each Member State to apply the prohibitions and requirements provided for in this Directive to actions carried out on its territory or abroad concerning financial instruments that are admitted to trading on a regulated market situated or operated within its territory. See section II. D above.

28 Namely a reprimand; publication of the fact that the issuer or guarantor has been requested without success to publish or disclose the information required by the LR; publication of the information required by the LR which has not been published by the issuer or guarantor itself, provided the Admission Board has such a possibility; a fine of up to CHF 200,000; suspension of trading; cancellation of listing (delisting); exclusion of the issuer or guarantor from further listing; withdrawal of the status of recognised representative pursuant to Art. 50; publication of the sanctions imposed.

subject to additional requirements derived from the law of the relevant EU Member State, including, for example, an obligation to supply certain periodical reports to the appropriate EU Competent Authority.

Even though, this system presents an advantage in terms of investor protection because of the double-check of issuer's activities by both Swiss and EU competent authorities, it might appear as to heavy for issuers, at least in comparison to the situation they would have if their securities were listed within the EU only. This creates a situation of inequality between issuers of securities listed on the SWX EU-Compatible Segment and those of securities listed on the other EU national regulated markets because the latter benefit from the maximum harmonisation character of the Prospectus Directive. Put differently, even though an effort has been made for the introduction of common procedures of the SWX and the FSA to be conducted with consistency and efficiency, there is still a potential drawback in comparison with the system established by the EU Directives with a single control by the home Member State.

Furthermore, one should hope that a coherent practice will be developed between the FSA and the SWX and that no heavy burden will be imposed on issuers, there is a risk - even though rather theoretical - as to the practice of competent authorities of the Member States, other than the UK.

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This pessimistic view is of course mitigated by the alternative solution open to issuers, which is to choose listing on the main segment of the SWX. Under the new SWX/virt-x segmentation concept, the only competent authority with regard to the listing and admission to trading of the securities listed on the main segment on SWX remains the Admission Board.

In conclusion, the new SWX segmentation concept certainly comes at the good moment and will allow issuers listed on the SWX to choose the most appropriate segment for their activities. In the light of the new EU Directives, new SWX regulation was urgently needed to open to the issuers listed on the SWX opportunities as equivalent as possible to those available to the issuers whose securities are listed on the regulated markets of the EU Member States.

V. Conclusion

Unfortunately, the prospective of development of the cross-border activities under the new EU regulation remains questionable. The cross-border secondary market linkages have diminished the need for European issuers to comply with the legal requirements of other Member States, at least in the area of dual listing. Therefore, the pre-conditions for regulatory competition - in particular entity mobility - remain doubtful and the maximum harmonisation opted for by the Prospectus Directive might appear as the best solution. Notwithstanding this fact, improved rules on international style offerings undoubtedly make a positive impact by adding a supplementary possibility to arrange a transnational securities market activity.

On the overall assessment of the new EU Directives, their strongest point appears to be facilitation of exempt offers to the wholesale market, while the weakest point is probably the insufficient attention paid to the non-EU issuers with potential adverse long-term consequences.[29]

In Switzerland, the SWX Group tried to find a compromise at the regulatory level by introducing the new SWX segmentation concept, between positioning itself in an effort to strengthen its competitive position and at the same time taking into account the specific characteristics of the Swiss securities market. In general, this task has been accomplished successfully. Today, the issuers have a choice of either being subject to the EU obligation and having their securities traded on the "EU Regulated Market Segment" of virt-x, which allows to request from the FSA a certificate enabling the issuer to "passport" the prospectus on any other EU Regulated Market outside the UK using the simplified procedure of the Prospectus Directive, or trading its securities in the "UK Exchange Regulated Market" Segment and continue being regulated by the Swiss authorities by virtue of their SWX listing, including rules on prospectuses, on continuing transparency obligations and on disclosure of shareholdings and transactions.

Finally, the most significant achievement of the new regime introduced by the SWX Group was the "grandfathering" negotiated with the FSA. It concerns the existing SMI securities as at July 1, 2005, which were allocated automatically to the "EU Regulated Market Segment" on virt-x. Unless the issuers of such securities take steps amounting to the request or the approval of the admission, the additional set of

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29 This weak point for EU might benefit the SWX who has already tried to take advantage thereof with its new listing regime for bonds aimed at attracting non-EU bond issuers unhappy with the increased prospectus requirements of, and the additional costs associated with, the Prospectus and Transparency Directives. For more detail on the new regime for bonds offered by SWX and entered into force on 1 February 2005, see *Haeberli/Bösch*, "Swiss Exchange Revamps Listing Regime for Bonds", *International Financial Law Review, Supplement - Switzerland*, available at www.iflr.com.

obligations resulting from the EU Directives and described above does not apply. In practice, most of the issuers remained passive and could in this way benefit of the "grandfathering" regime.