

1964

Public Offerings: A Comparative Study of Disclosure in Western Europe and the United States

Robert H. Jackson

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>



Part of the [Law Commons](#)

Recommended Citation

Robert H. Jackson, *Public Offerings: A Comparative Study of Disclosure in Western Europe and the United States*, 16 W. Res. L. Rev. 44 (1964)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol16/iss1/6>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

Public Offerings: A Comparative Study of Disclosure in Western Europe and the United States*

Robert H. Jackson†

INTRODUCTION

The miraculous post-war recovery of Western European countries has wrought significant improvements in their economic, business, and legal systems. With a general increase in affluency being experienced by a majority of European residents, excess capital is searching for new and more attractive areas of investment. One logical and accessible avenue involves participation in the securities markets, as either share or debt holders, of both American and European corporations. European

THE AUTHOR (A.B., University of Illinois, LL.B., Western Reserve University) is an attorney with the Securities and Exchange Commission in Cleveland, Ohio, and a member of the Ohio Bar.

based corporations, including those controlled or directed by American interests, are discovering that expansion of facilities or high loan interest rates frequently necessitate initial or additional demands for funds to

handle these expenses; a public offering of one or more classes of securities often satisfies either need at minimal cost. Yet the American lawyer or corporation exploring the European markets for capital financing will encounter problems in securities regulations and disclosure techniques as a result of basic differences in philosophic and legal principles. Investor protection through disclosure mechanisms remains unsettled due to the inherent problems pervading the civil law systems, problems similar to those existing in the United States prior to 1933. No quick solution is available; for the present, a strong sense of nationalism, linked with antiquated customs and laws, prevents reforms leading to a unified system of securities regulations.

The broadening of international financial markets has been vividly demonstrated in recent years by several European governments¹ and

* Copyright 1964 by Robert H. Jackson.

†The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues on the staff of the Commission.

1. All references to "European" or "continental" countries exclude Soviet controlled areas of Europe.

corporations which have sought capital in this country through public offerings of securities.² Registration of these issues with the Securities and Exchange Commission caused some consternation among the issuers because of the amount and type of disclosures required under the Securities Act. While those items ranged across the whole spectrum of business operations, from details of officers' salaries to accounting techniques, in most instances the issuers conformed to prerequisites of the laws administered by the Securities and Exchange Commission.³ Eventually, as a result of their compliance, these innovations by European corporations were carried through and embodied in their continental business practices. Although they appear temporary from indications received, the permanency of such practices will depend upon the realization by European corporations of the need for full and complete disclosure in order to participate successfully in international trade.

After the enactment of the Securities Act of 1933⁴ and the subsequent acts,⁵ abundant interest in their understanding and ramifications produced a wealth of legal literature.⁶ Surprisingly though, until the recent presentation of a short discussion,⁷ no English language study of civil law securities regulations had been provided in almost thirty years.⁸ Since those relatively unsophisticated days prior to World War II, a number

2. Cohen & Throop, *Investment of Private Capital in Foreign Securities*, in A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTION 519 (Surrey ed. 1963); Stevens, *Legal Aspects of Public Offerings of Foreign Securities in the United States Market*, 28 GEO. WASH. L. REV. 194, 195 (1959).

3. Cohen & Throop, *op. cit. supra* note 2, at 564-66.

4. 48 Stat. 74 (1933), as amended, 15 U.S.C. §§ 77a-aa (1958) [hereinafter referred to as Securities Act], as amended by the Securities Acts Amendments of 1964, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964).

5. Trust Indenture Act of 1939, 53 Stat. 1149 (1939), as amended, 15 U.S.C. §§ 77aaa-bbb (1958), as amended, 15 U.S.C. §§ 17ccc-III (Supp. V, 1963); Securities Exchange Act of 1934, 48 Stat. 881 (1934), as amended, 15 U.S.C. §§ 78a-jj (1958) [hereinafter referred to as Securities Exchange Act], as amended by the Securities Acts Amendments of 1964, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964); Public Utility Holding Company Act of 1935, 49 Stat. 803 (1935), as amended, 15 U.S.C. §§ 79 to 79z-6 (1958); Investment Company Act of 1940, 54 Stat. 789 (1940), as amended, 15 U.S.C. §§ 80a-1 to -52 (1958), as amended, 15 U.S.C. §§ 80a-2 to -47 (Supp. V, 1963); Investment Advisers Act of 1940, 54 Stat. 847 (1940), as amended, 15 U.S.C. §§ 80b-1 to -21 (1958), as amended, 15 U.S.C. §§ 80b-2 to -18a (Supp. V, 1963).

6. See generally LOSS, *SECURITIES REGULATION* (2d ed. 1961) (for best discussion); Cohen, *Federal Legislation Affecting The Public Offering of Securities*, 28 GEO. WASH. L. REV. 119 (1959); Throop & Lane, *Some Problems of Exemption Under the Securities Act of 1933*, 4 LAW & CONTEMP. PROB. 89 (1937).

7. Conard, *Organizing for Business*, in 2 AMERICAN ENTERPRISE IN THE COMMON MARKET: A LEGAL PROFILE 1 (Stein & Nicholson ed. 1960); see also INTERNATIONAL FINANCING AND INVESTMENT (McDaniels ed. 1963), a compilation of speeches presented at a symposium at Yale Law School. The subject is only briefly treated, the main emphasis applying to public financing.

8. Kessler, *The American Securities Act and Its Foreign Counterpart: A Comparative Study*, 44 YALE L.J. 1133 (1935); see also 1 LOSS, *op. cit. supra* note 6, at 427; Gower, *Some Contrasts Between British and American Corporation Law*, 69 HARV. L. REV. 1369 (1956); Neff, *A Civil Law Answer to the Problem of Securities Regulations*, 28 VA. L. REV. 1025 (1942).

of significant changes in continental law have created a favorable investment atmosphere, heretofore unknown for American corporations interested in floating issues in foreign countries for their subsidiaries or joint ventures.

This article will discuss the comparative requisite disclosure techniques and mechanisms of securities regulations of continental Europe and the United States.⁹ Because all continental countries operate under civil law, they have entirely divergent concepts of securities and corporate regulations than those found under our state and federal law. The similarities are few; the differences are many. The existence of the acute contrasts will illustrate the different approaches required to float an issue and to protect investors from unscrupulous promoters.

STATUTORY DIFFERENCES

Federal Securities Acts

Prior to investigation of the particular corporation disclosure techniques and mechanisms of continental Europe and the United States, an understanding of the Federal Securities Acts will assist in establishing the fundamental differences prevailing under the civil law. The primary purpose of the Securities Act is the requirement that a corporation, desiring to offer and sell its securities to prospective purchasers interstate or through the mails, disclose, through a registration statement and its derivative prospectus filed with the Commission, the essential business and financial information necessary for an informed decision on the part of potential purchasers. Civil penalties are imposed for misrepresentations and omissions of material facts,¹⁰ as well as criminal sanctions for the offer and sale of securities in violation of the Securities Act¹¹ on those who play a material part in presenting this information to the public. Unless there is an applicable exemption,¹² all issuing corporations must comply with the Securities Act by making some type of filing. Such a registration statement contains significant financial data and other information concerning the specific securities, the issuer and the offering, and a prospectus which must be given to the investor.¹³

9. The subject of civil liabilities under the Securities Act and in Europe is only briefly mentioned herein as a more thorough treatment is beyond the scope of this article.

10. Securities Act § 11, 48 Stat. 82 (1933), as amended, 15 U.S.C. § 77k (1958); Securities Act § 12, 48 Stat. 84 (1933), as amended, 15 U.S.C. § 77l (1958); Securities Act § 13, 48 Stat. 84 (1933), as amended, 15 U.S.C. § 77m (1958).

11. Securities Act § 17, 48 Stat. 84 (1933), as amended, 15 U.S.C. § 77q (1958).

12. Securities Act § 3, 48 Stat. 75 (1933), as amended, 15 U.S.C. § 77c (1958); Securities Act § 4, 48 Stat. 77 (1933), as amended, 15 U.S.C. § 77d (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964); Securities Act § 5, 48 Stat. 77, as amended, 15 U.S.C. § 77e (1958).

13. Securities Act § 10, 48 Stat. 81 (1933), as amended, 15 U.S.C. § 77j (1958). The Commission does not pass upon the merits of a security or the issuer but attempts to require disclosure of all material facts.

While the Securities Act essentially regulates the issuance of new offerings of securities and their distribution, the Securities Exchange Act of 1934 regulates a variety of subjects in the securities field. This law regulates brokers and dealers who underwrite and trade in securities and the stock exchanges which list and deal in them. It requires the periodic reporting of specific information by corporations having securities listed on national stock exchanges or meeting other requirements.¹⁴ Additionally, such corporations are required to make proper disclosures to their shareholders when soliciting their proxies, and a section of the Securities Exchange Act was enacted to prevent the unfair use of "inside information" by officers, directors, and ten per cent stockholders.¹⁵ Likewise, criminal provisions are provided where there is fraudulent and manipulative activity in the offer and sale of securities;¹⁶ and civil actions alleging such activity may be brought under the act.¹⁷

Organizational Differences

The design of securities regulations in America, contrary to the development in civil law systems, is not built into state corporate codes, but exists as a separate and independent body of law. Except for Nevada and Delaware, all states have some regulatory provisions, with the federal securities laws being the most comprehensive and effective; any security offered and sold interstate or not exempted through a provision of the Securities Act comes under the jurisdiction of the Securities and Exchange Commission.¹⁸ In continental Europe, however, securities regulatory fea-

14. Securities Exchange Act § 12(g)(1)(A), Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964) reads as follows: "Within one hundred and twenty days after the last day of its first fiscal year ended after the effective date of this subsection on which the issuer has total assets exceeding \$1,000,000.00 and a class of equity security (other than an exempted security) held of record by seven hundred and fifty or more persons. . ."

Ultimately the number of shareholders will be reduced to a minimum of five hundred persons after two years from the effective date of the amendment. The new amendment brings such companies under the periodic reporting requirements of Securities Exchange Act § 13, 48 Stat. 894 (1934), 15 U.S.C. § 78m (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964), the proxy solicitation requirements of Securities Exchange Act § 14, 48 Stat. 895 (1934), 15 U.S.C. § 78n (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964), and the insider trading requirements of Securities Exchange Act § 16, 48 Stat. 896 (1934), 15 U.S.C. § 78p (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964).

15. *Ibid.*

16. Securities Exchange Act § 10, 48 Stat. 891 (1934), 15 U.S.C. § 78j (1958).

17. Securities Exchange Act § 10(b), 48 Stat. 891 (1934), 15 U.S.C. § 78j (1958). No specific right is given to permit the institution of such action, but under an implied liability theory, a number of civil actions have resulted in satisfactory decision for the plaintiff. See North, *Implied Liability Cases Under the Federal Securities Laws*, Corporate Practice Commentator, May 1962, p. 1.

18. The federal securities acts are not general corporate laws, although some writers believe that they are so developing. See, e.g., Ruder, *Pitfalls in the Development of a Federal Law of Corporations by Implication Through Rule 10b-5*, 59 NW. U.L. REV. 185 (1964); for an example of the provisions of a state securities code see OHIO REV. CODE §§ 1707.01-99.

tures are inextricably intertwined in the general corporate codes and thus are somewhat similar to state corporate laws. Whereas our statutory law is built on the same basic legal principles and thus has a cohesiveness from which immediate understanding may be derived, the civil law code, by placing disclosure and regulatory provisions throughout the various subjects in the codes, loses this unification.¹⁹ With frequent amendments and modifications to century-old laws, confusion and contradictions of specific subjects are often found. France is representative of this prevailing situation; particular questions of French company law may be located under either the Code of Commerce²⁰ or Civil Code;²¹ moreover, numerous amendments have left the original acts in skeletal form. The German corporate code, less chaotic because of its relative newness, has a separate Stock Company Law dating from 1937. Nevertheless, while legal methods and practices are often different among continental countries, the legal principles are essentially similar.

Substantive Differences

Not only is there an organizational difference of regulatory laws between the United States and civil law countries, but the disclosure provisions of civil law systems affect substantive aspects of corporate laws. The philosophy of the American legal system has determined that investor protection should commence after incorporation; under civil law systems, a publicly-held corporation cannot come into existence without compliance with specific securities regulations. The Federal Securities Acts are not concerned with the procedures of incorporation; those matters have been left to the states, except to the extent that non-compliance or a violation of a state corporate statute may give rise to some form of liability when it is not publicly disclosed.²² As a result of

19. The following specific company laws will be used herein:

Belgium: Code de Commerce, Liv. I, Tit. IX; Wetboek van Koophandel, Boek I, Tit. IX, [hereinafter cited as C. COM. I-IX].

France: Loi du 24 juillet 1867, sur les sociétés, [hereinafter cited as Law of 1867].

Germany: Gesetz über Aktiengesellschaften ("Aktiengesetz") [hereinafter cited as AKTG.].

Italy: Codice Civile, art. 2247-2574 [hereinafter cited as C. CIV.].

Luxembourg: Loi du 10 août 1915 concernant les sociétés commerciales [hereinafter cited as Company Law].

Switzerland: Schweizerisches Obligatenrecht [hereinafter cited as OR].

20. CODE OF COMMERCE arts. 1-64 (France), in COMMERCIAL LAWS OF FRANCE 106 (Foreign Tax Law Ass'n, 1962) [hereinafter cited as C. COM. arts., in COM. L. FR.].

21. CIVIL CODE arts. 1832-73 (France). As some corporations have both civil and commercial activities, the dominating activity will determine the applicable law, although the Civil Code is essentially for forms of partnerships.

22. There is some historical basis for this dichotomy of state and federal powers inasmuch as the federal securities laws were intended to protect investors of all states, involving securities sold interstate or through the mails, since one state's laws are not effective in another; with federal securities regulations there are no jurisdictional problems. Most European countries

these fundamental legal distinctions, the American counterpart of a corporation in civil law countries differs considerably in terms of capitalization, organization, liabilities, ownership and management, and transferability of shares. While American commercial corporations are not legally divided into groups of "closely-held" and "publicly-held," continental countries have different sets of statutes, decrees, and codes for each type of business entity. In America, the closely-held business is incorporated under the same corporate statute as the corporate giant. What distinguishes the two, legally, is that the corporation which offers securities to the public, interstate, and does not have an available exemption, is subject to the regulatory powers of the Commission.²³

Under the civil law, commercial corporations may choose two forms of general corporation law, each having regulatory requirements built into the particular governing law. The two corporate forms are commonly known as a limited liability company and a public or stock company. For all practical purposes, a limited liability company does not have the capacity to issue negotiable securities, except in Germany where bonds may be issued under certain circumstances.²⁴ These corporations are labeled *Gesellschaft mit beschränkter Haftung* (GmbH) in Germany, *société à responsabilité limitée* in France, and *società a responsabilità limitata* in Italy.²⁵ The theory of providing this form of corporation is that the simplified structure permitted for limited liability companies (with only a single manager, no independent auditors, and minor liability provisions) provides small groups of investors the opportunity to participate in a business without complying with the elaborate stock company laws and disclosing significant information during the formative years. Public issuance of securities is consequently prohibited because of the lack of initial and subsequent disclosure.

The form of European corporation which may issue and sell securities to the public is commonly referred to as a stock or public company. This type of corporation is designated as a *société anonyme* in France and Belgium, a *società per azioni* in Italy, and an *Aktiengesellschaft* in

while having a similar concept of individual states generally require that federal law supercede even in those countries composed of federated states. Consequently a central and national corporate code resulted which was applicable throughout the entire country.

23. No attempt is made herein to detail the legal problems of American corporations. Reference is made to OHIO REV. CODE §§ 1707.01-99 as an example of a state corporate statute.

24. DeVries & Juenger, *Limited Liability Contract: The GmbH*, 64 COLUM. L. REV. 866, 877 (1964).

25. Law of March 7, 1925, art. 4 (France), in COM. L. FR. 129 (1962); GmbHG §§ 3, 5 (Germany), in COMMERCIAL LAWS OF GERMANY 1-2 (Foreign Tax Law Ass'n 1962) [hereinafter cited as COM. L. GR.]; C. CIV. arts. 2472, 2486 (Italy), in COMMERCIAL LAWS OF ITALY 113, 117 (Foreign Tax Law Ass'n 1962) [hereinafter cited as COM. L. IT.]; in England the analogous form is called a "private company"; see also Gower, *supra* note 8; Schneider, *The American Close Corporation and Its German Equivalent*, 14 BUS. LAW. 228 (1958).

Germany.²⁶ Only Sweden and the Netherlands have one corporate code for all forms of corporations,²⁷ since they recognize no distinction between public and private companies. It is the stock company which is comparable to the United States corporation, requiring an annual shareholders' meeting, a board of directors, and a management.²⁸

ADMINISTRATION AND REGULATION

In order to administer the various federal laws in the area of securities and finance which seek to "provide protection for investors and the public in their securities transactions," Congress created the Securities and Exchange Commission in 1934. Among its duties and responsibilities, the Commission, in exercising executive, quasi-judicial, and quasi-legislative powers, may prescribe rules and regulations under the various Securities Acts, including those governing the registration statement and prospectus, and investigate alleged violations of the acts to determine if a recommendation for criminal or civil proceedings is necessary.²⁹ Out of this division of authority and responsibility from individual state control, which also separated the regulatory features from general corporate law, there resulted an overall tightening of securities sales practices, and thus provided the prospective purchaser with safeguards of an invaluable nature.

Belgium has the only regulatory agency in Europe which is comparable to the Securities and Exchange Commission.³⁰ Otherwise, unfortunately, the remaining European countries have few legal devices to require disclosure of material facts and to supply adequate private liability remedies for violation of the various codes. The one remaining procedural formality which prevents complete chaos requires all stock companies, in every country but Switzerland and Luxembourg, to obtain either the authorization or the acquiescence of some public official or governmental agency before a public offering is made.³¹

26. Each corporate name invariably must be followed by the words or initials "SA" in France and Switzerland, "SpA" in Italy, or "AG" in Germany, while most American states permit some flexibility in requiring that the firm's name end with or include "Co.," "Company," "Corp.," "Corporation," "Incorporated," or "Inc."

27. Conard, *op. cit. supra* note 7, at 47.

28. See generally LEGAL ASPECTS OF FOREIGN INVESTMENT (Friedmann & Pugh ed. 1959); a general survey of the corporate laws in a number of countries is contained in this book.

29. Securities Exchange Act §§ 8, 19-22, 48 Stat. 888, 898-901 (1934), as amended, 15 U.S.C. §§ 78h, s-v (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964). There is a vast amount of literature describing the function of the Securities and Exchange Commission, e.g., Orlick, *Organization, Procedures and Practices of the Securities and Exchange Commission*, 28 GEO. WASH. L. REV. 50 (1959).

30. Avête Royale No. 185 of July 19, 1934, art. 26-34 (Belgium).

31. France: Administrative Order of Feb. 17, 1954, art. 4; Germany: AKTG § 174(2) (permission needed for convertible bond issue); Italy: Law of May 3, 1955, No. 428.

The few existing continental securities regulations are relatively ineffectual in providing for the supervision of public issues. For example, France has only penal provisions, but throws the responsibility of detecting violations upon the private individual;³² Germany has a judge in charge of the Commercial Register to assure conformity with the code, but his powers are limited;³³ Italy simply requires filings with the Registrar of Business Enterprises before offering securities, although permission to form or increase capitalization above five hundred million lira must be approved by the Ministry of the Treasury;³⁴ Sweden's Royal Swedish Patent and Registration Office must approve a corporation's application, after all the shares have been sold, before it may begin business.³⁵ Only in Switzerland is there absolutely no regulation of public offerings of securities.³⁶

Unique in Europe, Belgium's Bank Commission (Commission Bancaire) remarkably resembles the Securities and Exchange Commission in its powers and regulatory approach in attempting to protect investors. The issuer must inform the Bank Commission of a public offering fifteen days in advance, as compared with twenty days under the Securities Act.³⁷ The Bank Commission has no power to forbid or approve the offering, although the prospectus is examined to test its accuracy. In the event of deficiencies, the Bank Commission will recommend amendments to assure full and complete disclosure of material facts. It may even defer the offering for a maximum period of three months because of misrepresentation or omissions in the prospectus, or for any pertinent violation of the rights of existing shareholders.³⁸ Moreover, the Bank Commission has the singular power, not found in the United States, to stop the flotation of an issue for a three month period on the theory that if too many securities are offered during one period, the market will be adversely affected.³⁹

The relative similarities in approach also extend to the content requirements of the prospectus under each country's securities laws. Disclosures of consolidated balance sheets and profit and loss statements for the registrant and its subsidiaries, a five year summary of earnings in

32. Law of 1867 arts. 15, 45, as amended, Decree of August 8, 1935, in COM. L. FR. 109, 114.

33. AKTG § 25 (Germany), in COMM. L. GR. 11.

34. Nobili, *Italy*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 306 (Friedmann & Pugh ed. 1959).

35. Drachsler, *Business Organization and Operation in Sweden*, in 1 DOING BUSINESS ABROAD 158 (Landeau ed. 1959).

36. Folliet & Oberson, *Switzerland*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 513 (Friedmann & Pugh ed. 1959).

37. Avête Royale of July 19, 1935, art. 26 (Belgium).

38. Avête Royale of July 19, 1935, art. 29 (Belgium).

39. Avête Royale of July 19, 1935, art. 28 (Belgium). In a sense it is to prevent "disturbance of the market."

comparative columnar form, underwriting arrangements, underwriting expenses, and material transactions of officers and directors with the issuer are required by the Bank Commission — all of which are also prescribed under the Securities Act.⁴⁰ The Bank Commission is extremely effective in Belgium. However, this involves a small financial population in comparison with the rest of Europe, and has not as yet stimulated corresponding changes in other countries.

CAPITAL ORGANIZATION AND STRUCTURE

For a company which wishes to sell its securities publicly, compliance with the Securities Act does not become mandatory until after it has been incorporated and has shareholders, a board of directors, and officers. Before then, the corporation may not offer its securities to the investing public. Not all the authorized capital need be issued for the initial offering; the directors may reserve a portion of unissued equity securities which may be offered from time to time without shareholder approval. Likewise, in the case of debt securities, such an offering requires, as the only formality, the approval of the directors. In civil law countries, on the other hand, the entire share capital must be fully subscribed before the company can be formed and legally begin its existence, regardless of whether the consideration is cash or property; there is no recognized distinction between authorized and issued stock.⁴¹ This critical difference in capitalization between the two systems demonstrates the significant role securities regulations must play as a segment of the general corporate code in Western Europe.

Under the Securities Act, it is the registration statement which will provide investors with material information; in Europe, the articles of association, subscription contract or agreement, and other such documents attempt to perform the analogous function of the American registration statement.⁴² For a majority of newly formed or promotional corpora-

40. A public offering which does not have the tacit blessing of the Bank Commission would be doomed to failure because no bank nor other prospective investor would subscribe to an issue concerning which the Bank Commission has some questions. From a practical point of view, nobody proceeds with a public offering without the "green light" of the Bank Commission. Blondeel, *Belgium*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 61 (Friedmann & Pugh ed. 1959); Commission de La Bourse de Bruxelles, *The Brussels Stock Exchange*, in THE PRINCIPAL STOCK EXCHANGES OF THE WORLD 69 (Spray ed. 1964).

41. C. COMM. I-IX, art. 29(2) (Belgium); AKTG § 22(1) (Germany), in COM. L. GR. 9, although § 169(1) (Germany), in COM. L. GR. 103 permits notification in the articles that the capital could be increased within five years; C. CIV. art. 2329(1) (Italy), in COM. L. IT. 60; France permits a form of "variable capital" but it is infrequently used since the stock cannot be made negotiable, either in bearer or registered form; Law of 1867, art. 48-52; OR §§ 632, 638 (Switzerland), in COMMERCIAL LAWS OF SWITZERLAND 102, 103 (Foreign Tax Law Ass'n 1963) [hereinafter COM. L. SWIT.].

42. See 1 LOSS, *op. cit. supra* note 6, at 452; Escarra, *Some Points of Comparison Between The Companies Act, of 1948, and the French Law of Companies*, 11 C.A.M.B. L.J. 15, 19 (1951).

tions in the United States, the registration statement obviously cannot supply all the detailed information required of an established enterprise. And those issuers using the S-2 Form of the registration statement seldom have a previous history of business in any form. At first glance it would appear that all newly organized continental stock companies likewise could not provide exhaustive information, and consequently securities regulations would be effective only for subsequent issues and not for those of promotional type companies. Conversely, the historical pattern of European business reveals that a major portion of these newly formed stock companies were previously business enterprises under different forms, such as a limited liability company, partnership, or sole proprietorship.

Transformation

In America when a closely-held operation desires to go public, only corporate authorization and compliance with state and federal securities laws are necessary; disclosure of property exchanges for stock are revealed after the transaction has transpired. In Europe each country offers a procedure labeled "transformation," to effect a change from one entity to another, as for example, when a limited liability company, comparable to the closely-held corporation, changes to a stock company.⁴³ Like incorporation, this change involves drawing up new articles and depositing and publishing various copies or extracts with the proper government officials or agencies. Because numerous business enterprises utilize this procedure, transfer of their entire asset composition is frequently accomplished.⁴⁴

The liberal use of transformation by going businesses in Europe demonstrates the necessity for the attention given in detailing property exchanges for stock. It is perhaps the most significant protective device available for investors. Consequently, in analyzing securities regulations in civil law systems, it is the scope and mechanism of disclosures, provided for in the articles of association and other documents, that will have a direct bearing on the amount of protection given the prospective purchaser of securities.⁴⁵

Since the steps in the organization of the stock company play a decisive role in disclosure mechanisms as far as European regulations are concerned, a synopsis of them is presented here as a basis for a compara-

43. Conard, *op. cit. supra* note 7, at 60-61.

44. In Belgium the procedure is nonstatutory; Law of 1925, art. 41 (France) (transformation); AKTG §§ 263-77 (Germany) (Umwandlung), in COM. L. GR. 147-53; C. CIV. art. 2498 (Italy) (Transformazione), in COM. L. IT. 121-22; The Netherlands and Sweden have only one form of corporation which essentially obviates the need for its use.

45. See text accompanying note 93 *infra* for comments on property changes.

tive analysis: (1) drafting the articles of association; (2) preparing subscription agreements and obtaining subscribers, including a mandatory partial payment for the shares;⁴⁶ (3) shareholders meeting to elect board of directors and auditor; (4) shareholder approval of property exchanges;⁴⁷ (5) public announcement of the corporation's existence after filing the articles of association, subscription contract, and other important documents with the proper governmental agency;⁴⁸ and (6) in some countries a second shareholders meeting to vote on certain matters.⁴⁹

Financing

Because all authorized stock must be issued by the time of incorporation, the limited methods of raising capital available to civil law companies severely restrict the types of disclosure and amount of protection afforded the investor. Capital must be raised either before incorporation or afterwards by increasing the capital stock or debt securities through an amendment to the articles of association.⁵⁰ The difficulties encountered with a capital increase involve shareholder approval and assurance that the entire capital has been paid in, besides complying with all the formalities that a new company would meet. The limitations of capital financing demanded by the codes result in funds being raised either by the investors subscribing to the entire issue simultaneously,⁵¹ or successively in steps by way of several public subscriptions. Although each of these methods of distribution frequently has numerous disadvantages to the investor, the custom in Germany, Italy, France, and Switzerland is for banking institutions, acting as underwriters, to subscribe to the entire issue simultaneously and then sell the securities publicly.⁵² While this

46. This is true for all countries: 20% in Belgium, Luxembourg & Switzerland, 25% in France & Germany, and 30% in Italy. See note 94, *infra*.

47. Each country has such provisions with some variation, except Belgium which has neither controls over valuations of property nor penal sanctions in the event of fraud.

48. AKTG §§ 16(3)6, 143-44 (Germany), in COMM. L. GR. 7, 90-91 (Bundeszeiges, the official publication of the Federal Ministry of Justice, must reprint extracts of the filings); publications in Sweden must be in the Swedish State Journal, see Drachsler, *op. cit. supra* note 35, at 57-58; OR § 724 (Switzerland), in COM. L. SWIT. 119; Incorporation is effective in France and Belgium when the papers are filed with the court; in Germany and Switzerland it is registration in the Commercial Register.

49. In France two meetings are required only when property exchanges are involved: the first to appoint the auditor, the second to approve his report on the property; see Escarra, *supra* note 42, at 21.

50. However, it is not an important part of European financial practice to seek long or medium term credits or to float bonds. Soutendijk, *Financing Operations in the European Community*, in INSTITUTE ON LEGAL ASPECTS OF THE EUROPEAN COMMUNITY 76 (1960).

51. "Simultaneously" is the most common of all financing methods in Europe; see Kessler, *supra* note 8, at 1138.

52. Strobl, *Principles of the German Law of Partnerships and Corporations*, in DOING BUSINESS ABROAD 118 (Landeau ed. 1959); CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW 132 (1960); see generally THE PRINCIPAL STOCK EXCHANGES OF THE WORLD (Spray ed. 1964).

is similar to the "firm commitment" which is utilized by underwriters in America, which cannot be banks, the European underwriters are generally not required to fulfill the same function. The Securities Exchange Act prescribes rules and regulations with which underwriters must comply, including supplying a prospectus to each prospective purchaser. On the other hand, European underwriters do not normally provide investors with a prospectus, subscription agreement, or summary information sheet, and generally are not responsible for any fraudulent misrepresentations, except in France where the manager of the syndicate is held liable for any violations of the code during the offering of the issue.⁵³

Paralleling the two methods of financing in Europe, there are two modes by which investors may be protected during an offering: either by the disclosure requirements applicable before incorporation and during a capital increase when a successive subscription is involved, or by those mechanisms of disclosure which attempt to protect prospective purchasers who buy from the original subscriber. The safeguard provisions of the civil code essentially relate to successive subscriptions since the codes provide for only perfunctory supervision over simultaneous financing which is principally accomplished by underwriters.⁵⁴ In connection with successive financing, adequate protection is provided through the rigid procedures involving the articles of association, a discussion of which follows in the next section.

With simultaneous financing, to the contrary, minimal protection, if any, is afforded the investor in most civil law countries prior to the first annual meeting of shareholders. Following the first fiscal year, sufficient financial data is made available to stockholders and interested parties through publication in official newspapers or annual meetings. Prior to this time, however, the investor lacks protection since he has not been able to exercise any control over the evaluation of assets, especially in the instance of transformed enterprises. Moreover, the meager business information disseminated during this period is frequently not adequate to provide the prospective investor with sufficient data to make an accurate evaluation of the securities' investment merits. In France and the Netherlands, investors purchasing after registration have only the published articles of association and the prohibition that all shares given in exchange for property other than cash cannot be transferred or sold for two years. And the Italian and German codes do not extend initial disclosure provisions for subsequent investors after the banks underwrite the issue. In regard to stock exchange listings, Germany, France, and Belgium pro-

53. When there is successive financing most countries require two shareholders' meetings prior to incorporation: the first to elect temporary officers and directors and appraisers, if necessary, the second to approve the financing and appraiser's report.

54. Kessler, *supra* note 8, at 1139.

protect the investor who purchases a listed stock since the exchanges require detailed public records of the articles of association and financial statements. But again, in most instances, listing of an issuer does not occur until after the first year of operation.

Types of Securities

Prior to a discussion of the tools and substance of comparative disclosure provisions between the United States and continental Europe, a few comments are required regarding the types of securities used in capital financing. If all securities were similar in nature discussion would be unnecessary. However, the differences in securities regulations likewise occur with the basic instruments that draw in capital.

Each legal system has similar classes of securities represented by either indebtedness or shares of the enterprise equity. By general label they are broken down into bonds and shares, but European companies have a variety of forms either not found here, or surviving on a restrictive basis.

The issuance of debt securities is widely used in Europe since it enables the raising of additional capital without disturbing shareholder voting control. In addition, when computing net corporate income, interest payments are deductible, while dividends are not. Civil law companies often issue bonds secured by mortgages, similar to the American practice, but with certain significant differences. In Germany for example, the stock company may employ an encumbrance upon real property (mortgage bond) having no relationship to a personal obligation,⁵⁵ which investors may buy as new bonds at any time. Bondholders are also provided with many protective devices, primarily following their purchase. In Belgium one-fifth of all bondholders may call a meeting to vote on a number of topics; also, the stock company is not authorized to issue bonds yielding less than a minimum of three per cent.⁵⁶ France permits bondholders to elect officers, while Italy requires that an issue exceeding 500 million lira be authorized by the Ministry of the Treasury and Ministry of Industry.⁵⁷

Bearer certificates in either share or bond form eclipse all other European instruments in popularity, primarily due to their great negotiability and anonymous character. Yet their very nature creates critical problems of investor protection, especially after incorporation, when

55. Cohen & Throop, *op. cit. supra* note 2, at 528; German law also requires that stock companies obtain permission of the Ministry of Economics before issuing convertible bonds, AKTG §§ 159, 174 (Germany), in COMM. L. GR. 88, 106.

56. Blondeel, *Belgium*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 70 (Friedmann & Pugh ed. 1959).

57. In France negotiable bonds cannot be issued until at least after the first fiscal year. Decree of Oct. 30, 1935, art. 2. Even then the capital must all be paid-in. Additionally bondholders must have equal rights along with shareholders. Decree of Oct. 30, 1935; Italy: Law of May 3, 1955, No. 428, art. 1.

avoiding corporate restrictions becomes important to shareholders. The outstanding feature of bearer shares is the lack of registration requirements upon transference from owner to owner, with the exception of Italy which does not permit bearer shares.⁵⁸ To counteract misuse during an offering, certain safeguards are provided. For example, they cannot be issued until all the capital, cash, and property alike, is fully paid up. During the interim period in which the capital is partially paid in, including after registration, those shares remain as registered stock. Conversion to bearer shares transpires after complete payment. Other restrictions of bearer shares encompass limiting foreign ownership (as in Sweden), informing holders of annual meetings only through investment banks, and confining ownership to a maximum percentage.⁵⁹ In Sweden bearer shares may be issued only upon the authorization of the Government; this is infrequent due to the fear of foreign ownership.⁶⁰

The other kind of share used by a stock company, popular in America, is the "registered share." While such shares are a relatively recent innovation in Europe, they have been extensively utilized for the protection of investors against controlled parties during the initial stages of an offering. As noted above, they are used where bearer shares are to be issued but the capital has not been fully paid-in. As a protection against dilution of capital stock in civil law countries, stock issued for property, other than cash, cannot be transferred during a two year period during which time it must be registered in the shareholder's name.⁶¹ In these instances, the object is to delay trading until a reasonable determination is made as to the validity of its valuation. Finally, those designated as "founders shares" are a widely utilized device in Belgium, France, and Italy to compensate for general and promotional services or intangible

58. Italy: Royale Decree of March 29, 1942, No. 239.

59. France has a depository system for bearer shares wherein the shares may be deposited in accounts at the Securities Company to allow greater ease of transferability; this is similar to the system here of keeping stocks in "street name." Proxy fights are not commonly known in Germany because bearer shares do not afford the opposition the opportunity to directly reach shareholders. As a result the banks have set up a Federation, which will circulate any proposal to its members and customers for instructions. The effectiveness of this method is somewhat dubious. See Falkenhausen & Steefel, *Shareholders' Rights in German Corporations*, 10 AM. J. OF COMP. L. 407, 411 (1961). In Belgium no shareholder can own more than 20% of that particular class in an attempt to prevent control by one party. C. COM. I-IX, art. 76.

60. In Sweden, if a corporation issues bearer shares, it is designated as a "dangerous" enterprise which may not acquire immovable property or own proven minerals in that country without special permission. Cohen & Throop, *Investment of Private Capital in Foreign Securities*, in A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTION 519, 526 (Survey ed. 1963).

61. C. COM. I-IX, art 47 (Belgium) (until ten days after the Company's second annual report is published); Law of 1867, art. 3, as amended, Decree of Dec. 7, 1954 (France), in COM. L. FR. 106 (two year period); Company Law, art. 44 (Luxembourg) (same as Belgium; such shares are required to be deposited in the Company treasury by art. 47, § 2). In Germany, basically only insurance companies issue registered shares for primary trading.

rights such as future services or patents to avoid diluting the corporate capital and to protect investors by segregating and describing them through the appraiser's report.⁶² Frequently founders shares are restrictive in nature, limiting the holders to a minimal share in the profits for a short period and preventing any participation in the share capital and voting power.⁶³ Only in France have they taken on speculative value as was the case with the Suez Canal shares.

One additional note should be added concerning the characteristics of securities, an area so broad that only a few comments are possible. While almost every state in this country allows issuance of shares with no par value,⁶⁴ in Europe only Belgium and Luxembourg permit issuance of no par stock.⁶⁵ The absence of no par shares in other continental countries often creates several disclosure problems in underwritings and financial statement reports. In Europe, as in America, shares cannot be issued for less than par, but there is no restriction against issuing above par.⁶⁶ German stock company law, as in France, however, requires that any premium over par value be stated in the publicly filed document of organization,⁶⁷ and that the premium should form part of a legal reserve which is not available for dividends; but, under some conditions, it may be hidden.⁶⁸ However, when underwriters purchase at par value on a firm commitment basis, they do not have to reveal commissions although the stated capital is reduced accordingly; disclosure of the reduction appears only after the end of the first fiscal year. Italian law requires that premiums should not be disbursed until a reserve equal to one-fifth of the stated capital is accumulated from earnings.⁶⁹

62. In France, founders' shares are issued without an increase in capital before or after incorporation and are not negotiable for two years after issuance, after which they are transferable without restriction. Act of Jan. 23, 1929, art. 1.

63. France: Law of Jan. 23, 1929, art. 1 (participation up to 10% of gross profits). Italian law allows the founders to reserve 10% of net profits for the first five years. C. Civ. art. 2340 (Italy), in COM. L. IT. 65.

64. In Nebraska, the issuance of no-par stock is barred by the NEB. CONST. art. XII, § 6 (1869); OKLA. STAT. tit. 18, § 1.73 (1961).

65. C. COM. I-IX, art. 41 (Belgium); Germany has a "Kuxe," a registered share of no-par value of mining companies, but they are of minor importance; see Maurer & Spray, *The Stock Exchanges of Germany*, in THE PRINCIPAL STOCK EXCHANGES OF THE WORLD 124 (Spray ed. 1964); Company Law, art. 37 (Luxembourg).

66. AKTG §§ 16, 21, 28(2) (Germany), in COM. L. GR. 7, 9, 13; Law of 1867, art. 24, as amended, Decree of Oct. 30, 1948, art. 2 (France).

67. AKTG §§ 28, 29 (Germany); in France stock is usually sold at par value for the initial offering, but at a premium for a capital increase. CHURCH, *op. cit. supra* note 52, at 190. Underwriters circumvent this first situation by attempting to place the issue directly with the investor and then obtaining a commission out of the proceeds of the sale after incorporation, although this reduces the stated capital.

68. Falkenhausen & Steefel, *supra* note 59, at 418. It is accomplished by either understating assets or overstating liabilities, and is permissible so long as creditors are protected.

69. C. Civ. art. 2430 (Italy), in COM. L. IT. 100; par value in France is 5000 Ffa francs, 100 DM in Germany, 1000 IL in Italy, and 103 SFr in Switzerland.

DISCLOSURES FOR INITIAL OFFERINGS OF SECURITIES

Because the evolution of securities regulations in civil law systems developed fragmentarily, the lack of uniformity in approach created serious problems in providing sufficient disclosures for an investor to make a valid factual analysis of the issue. The consistency and completeness of disclosure obligations in the United States, to the contrary, greatly assists the investor while also offering valuable protective measures. Ironically, the actual dissemination of information compares favorably between the systems although methods differ as to substance and procedure. Most civil law countries require that information about a new issue and the subsequent annual reports be filed with a central governmental body and published in a recognized financial and legal newspaper. The Federal Securities Acts have no provisions requiring publication of such information in daily newspapers of general circulation, but the Securities Exchange Act requires that many issuers, most of which are listed on a national stock exchange, file financial data and exhibits periodically with the Commission. Eventually a distillation of this material finds its way to the public through one of the communication media. Nevertheless, an exploration of the comparative methods of disclosure will demonstrate several interesting concepts occurring independently in each system.

The most valuable disclosure mechanism and protective device allotted the American investor is the registration statement filed with the Commission and the prospectus or offering circular which summarizes the more detailed filing. By statute, the registration statement becomes effective on the twentieth day after it is filed or "on the 20th day after the filing of any amendment thereto," during which time the Commission reviews and determines if full and fair disclosure has been set forth.⁷⁰ In the event of deficiencies, which is frequently the case, amendments to the statements are required, resulting in delays averaging fifty-two to seventy-eight days in recent years.⁷¹ This interval enables underwriters, prospective purchasers, and other interested parties to familiarize themselves with the nature of the offering.⁷² The criteria for determining the essentiality of the required information is supplied under

70. Section 8(a), 48 Stat. 79 (1933), as amended, 15 U.S.C. § 77h (1958); 29 SEC ANN. REP. 22 (1963). The ultimate responsibility of adequate and accurate disclosure belongs to the issuer, its directors and officers, underwriters, and independent public accountants.

71. 29 SEC ANN. REP. 22 (1963). Any amendment to the registration statement starts a new effective date, twenty days from the filing of the amendment. Section 8(a), 48 Stat. 79, as amended, 15 U.S.C. § 77h (1958).

72. The effective date may be accelerated upon an order of the Commission where warranted. Section 8(a), 48 Stat. 79, as amended, 15 U.S.C. § 77h (1958). See also Gadsby & Garrett, Jr., "Acceleration" Under the Securities Act of 1933 — A Comment on the A.B.A.'s Legislative Proposal, 13 BUS. LAW. 718 (1958); Mulford, "Acceleration" Under the Securities Act of 1933 — A Reply to the Securities and Exchange Commission, 14 BUS. LAW. 156 (1958).

Schedule A of the Securities Act.⁷³ On or after the effective date, the securities may then be offered to the public, but each purchaser must receive a prospectus at or before the sale or delivery of the security, or at the time of confirmation of his purchase.⁷⁴ Under no circumstances can a subscription be received prior to incorporation.

Civil law systems, as earlier stated, entangle their securities regulatory features in their general corporate codes. Because none of the continental countries, except Belgium, have the concept of a registration statement as prescribed under the Securities Act, the investor must view the articles of association for the salient information. This is what Americans consider a combination of the articles of incorporation and by-laws, the contents being decreed by the corporate codes.

The basic format of the articles of association, *i.e.*, the structure and substance, are approximated throughout the continental countries, with the specific details varying from country to country. Such articles generally contain regulations concerning periods of longevity, procedure for declaration of dividends, capitalization, composition, mode and functions of officers and directorate, the relationship between capital and reserve, or capital and surplus, and the mode of convening general meetings and issuing public notice.⁷⁵ Since no *ultra vires* theory is recognized in civil law countries, the lengthy American all-purpose clauses are short and generally specific; every contract entered into by the directors on behalf of the company is held to be valid unless the articles specially stated that the directors had no such powers.⁷⁶

Except in France, the articles of association are drawn up by the organizers, and the contents are generally not altered even after incorporation unless misrepresentations or omissions exist therein. France, however, places the burden of validity on the stockholders by requiring them to ratify its contents at a second shareholders meeting when property or services are exchanged for shares.⁷⁷ A ratification of its terms probably

73. Form S-1 (as revised Oct. 25, 1955) is the Commission's basic form of registration statement under the Securities Act, while Form S-2 (as revised Sept. 19, 1957) is the Commission's form of registration statement for offerings of stock in an industrial company which has not had any substantial gross returns from the sale of products or services, or any substantial net income from any source, for any fiscal year ended during the past five years. It should also be noted that the Commission has no authority to control the nature or quality of the issue to be offered for public sale or to pass upon its merits or terms of distribution. A statement to this effect must be contained in all prospectuses. Rule 425 of the Securities Act, 17 C.F.R. § 230.425 (rev. ed. 1964).

74. Securities Act §§ 5, 10a, 48 Stat. 77, 81 (1933), as amended, 15 U.S.C. §§ 77e, j (1958).

75. C. COM. I-IX, art. 30 (Belgium); Law of 1867, art. 1 (France), in COM. L. FR. 87; AKTG § 16(3) (Germany), in COM. L. GR. 7; C. CIV. art. 2328 (Italy), in COM. L. IT. 59; W.K. art. 36b-d (Netherlands).

76. AKTG § 74 (Germany), in COM. L. GR. 41; France: Escarra, *supra* note 42, at 24.

77. France: Law of 1867, as amended, Decree of Aug. 4, 1949, art. 28; if cash is the only consideration one meeting is required to elect officers before the filing of the documents.

voids any claims the shareholders may subsequently have against the founders in case of fraud, except when the articles of association do not include transactions involving property exchanges; then neither the shareholder nor the corporation is required to honor those shares as part of the capital.⁷⁸

In France instead of relying on such articles for information, purchasers, in signing a subscription contract, are revealed the name, purpose, registered office of the company, number of shares to be subscribed for in cash and in property, and designation of where subscription payments are to be escrowed until the required sum is completed.⁷⁹ Essentially the investor receives little material information from the subscription contract in France, even in comparison with Germany or Italy.⁸⁰ There is, nonetheless, thorough public advertisement of an offering by publication in the "Bulletin des annonces légales obligatoires à la charge des sociétés financières," or Bulletin of Compulsory Legal Notices,⁸¹ before any other announcement is published. This statement is, ironically, more extensive than the subscription agreement. Besides the above stated material, it will also include length of existence, a certified copy of the last balance sheet, or a statement that no balance sheet has yet been drawn up, and the advantages or benefits given to the promoters and directors or any other persons.⁸² Once the statement is advertised in the Bulletin, it is then binding upon the individuals or institutions who issue, exhibit, offer for sale, or place on the market the shares or bonds.⁸³ In practice they are the promoters or bankers acting as underwriters (syndicates d'émission).⁸⁴

All additional advertisements and every prospectus and circular relating to the issue must reproduce the above information with additional

78. However, Neff, *A Civil Law Answer to the Problems of Securities Regulation*, 28 VA. L. REV. 1025, 1036 (1942), states that approval by shareholders is no defense to an action for fraud resulting from over-evaluation.

79. France: Law of 1867, as amended, Decree of Aug. 4, 1949, art. 22. The capital must be subscribed to within six months. A declaration is drawn up after subscriptions have been contracted and signed by the promoters or founders. A list of subscribers and their payments are attached to the declaration along with the articles of association, approved by the shareholders at the second meeting, if property is part of the consideration, and then filed in the Commercial Register within a month after the corporation's formation. Law of 1867, art. 1.

80. The subscription form in France is often considered only an application and advertisement, without legal consequences.

81. Act of Jan. 30, 1907, art. 3. It also applies for capital increases even where present shareholders have pre-emptive rights.

82. Act of Jan. 30, 1907, art. 3; for a complete itemization of its contents see CHURCH, *op. cit. supra* note 52, at 555.

83. In the case of a foreign company issuing shares or debentures in France, a complete French translation of the articles of association must also be published in the statement. COM. L. FR. 105-06.

84. CHURCH, *op. cit. supra* note 52, at 132-38.

reference to its notice in the Bulletin. Criminal penalties apply for fraudulent statements but are not effectively utilized.⁸⁵

Publication of this summary information in official journals in France, Italy, Switzerland, and Sweden becomes exceedingly important for the protection of the investor. Unlike the requirements under the Securities Act,⁸⁶ this material, whether or not in the form of a prospectus, need not be given or mailed to the purchaser at or before the time of his investment and, thus, an advertisement becomes the only medium of communication. This is prominently highlighted during a successive subscription offering since the articles of association are not published until their filing, and this is only after the financing has been obtained.

The German disclosure method of distribution is more representative of the systems in the Netherlands, Italy, Sweden, and Switzerland than in France. It affords greater protection to the investor through disclosure as a method of regulation and, to some extent, approaches the Securities Act concept of securities regulations. When a new issue is offered, each prospective buyer must sign a declaration statement which discloses the number of shares of each class offered, their offering price, and name a date on which subscribers will be released if one hundred per cent of the capital has not been subscribed, including the bank which retains the money in escrow.⁸⁷ If the shares are to be exchanged for property, the declaration must also disclose the names of the persons or company making the exchange, the identity of the property, and the par value of the shares for which it is being exchanged.⁸⁸ After all the stock has been subscribed, the declarations, a statement of expenses of flotation, the government authorization (if required), the articles of association, and an application for registration are filed with the judge in charge of the Commercial Register.⁸⁹ Prior to approval of the registration, the German code provides for the judge to appoint a professional and independent auditor from an approved list to appraise the value of property used as consideration for the shares.⁹⁰ If the property has not been overvalued, and the papers submitted or facts stated are proper and meet all

85. Law of 1867, art. 15, as amended, Decree of Aug. 31, 1937, (France), in COM. L. FR. 109; Escarra, *op. cit. supra* note 42, at 20. Filing false information may involve a substantial fine or imprisonment, and failure to file permits the judge to issue an injunction to force registration. Decree of Aug. 9, 1953, arts. 2, 3 (France).

86. Securities Act §§ 2(10), 5, 10, 48 Stat. 74, 77, 81 (1933), as amended, 15 U.S.C. §§ 77b, e, j (1958); Kessler, *The American Securities Act and Its Foreign Counterpart: A Comparative Study*, 44 YALE L.J. 1133, 1147 (1935).

87. AKTG § 152 (Germany), in COM. L. GR. 95.

88. AKTG §§ 150, 152(2) (Germany), in COM. L. GR. 95.

89. AKTG § 29 (Germany), in COM. L. GR. 13.

90. AKTG §§ 30(5)-(12), 31 (Germany), in COM. L. GR. 15-17.

the statutory requirements, then the judge will approve the registration.⁹¹ Publication of a notice of the complete subscription declaration is then made in legal newspapers and the *Bundesanzeigern*.⁹²

Property Transfers for Stock

The paucity of information in the articles of association, in comparison to the American registration statement, is relieved only in respect to property transfers for stock. The evil of controlling individuals, or parent corporations "watering" the stock through an over-evaluation of property other than cash given as consideration, has been recognized, and thus some safeguards, generally unknown here, have been provided. Most civil law systems require that detailed information of property transfers be contained in the articles, along with a statement of value and the number of shares given.⁹³ Whereas each payment requires that only a certain percentage be paid-in at or before the completion of incorporation, with the remainder to be supplied within a prescribed period, all property exchanges must be one hundred per cent paid-in prior to incorporation.⁹⁴

The challenge of providing the investor with information concerning property transfers and, at the same time, protecting prospective creditors has been met by European countries in various ways,⁹⁵ with the man-

91. *Ibid.* In Germany, the promoters are considered collectively liable during the organization period and the act of any one of them may bind all. AKTG § 34 (Germany), in COM. L. GR. 18. The distinction between *de facto* and *de jure* corporations does not exist in Germany and thus complete compliance with all technical requirements of organization must precede corporate functions in order to relieve the promoters of that collective personal liability. AKTG § 31.

92. AKTG § 157 (Germany), in COM. L. GR. 98. When the basic documents are recorded in the Commercial Register and the publication requirements have been met, then the civil law treats the documents as a contract between the corporation and the shareholders, as well as a contract among the shareholders themselves.

93. France and Germany permit equipment, patents, trademarks, and concessions as consideration but Germany does not allow any value placed on services. AKTG § 20 (Germany), in COM. L. GR. 8-9. In Italy know-how and technical secrets are not acceptable as capital contributions unless represented by specific patents, while goodwill is allowed. Norway accepts know-how so long as it is represented by patents or specific formulas of economic value. In Belgium shares may be paid for by intangibles such as patents, goodwill, and technical know-how, but the shares thus issued may not be transferred until ten days after publication of the second annual balance sheet.

94. C. COM. arts. 1, 3 (France), in COM. L. FR. 87-106 (25%, with the remainder paid within five years); AKTG § 28(2) (Germany), in COM. L. GR. 13 (25%, with the rest due at a time to be determined by the Board of Directors); Italy: 30% must be deposited in the Bank of Italy and the rest within one year from time of incorporation; Sweden: 50% and the remainder within two years; OR § 633 (Switzerland), in COM. L. SWIT. 102.

95. In Switzerland there are no legal controls over capital contributions but in practice they are detailed in a report submitted in the form of a prospectus; civil liabilities do not apply for fraudulent misrepresentations by directors. In The Netherlands publicity is the only protection afforded investors. Where the shares are issued in return for payment other than cash at the time of incorporation, the agreement concerning the exchange must be set forth in the articles of association. Any such agreement after incorporation must be contained in an explanatory report annexed to the annual balance sheet.

ner of presentation in the articles determining the effectiveness of the valuation. In Germany, Belgium, Luxembourg, and the Netherlands stock companies must detail the proposed assets, the names of the transferors, and the principles of evaluation used.⁹⁶ France, however, requires only a summary description of the property and the number of shares given as consideration, without disclosing the transferor.⁹⁷ Each method, while varying in procedure, still results in similar protective devices, the effectiveness of which is debatable.

Since stock companies in France are required to include in the articles only a brief description of the property or services, the subscription agreement, which all investors sign, reveals in greater detail the nature of the property, the individuals involved, and their relationship.⁹⁸ The agreement remains conditional, even when all the shares have been subscribed, until the time of the initial shareholders meeting where an auditor is appointed to appraise and verify the property to be exchanged.⁹⁹ A second shareholders meeting is held shortly thereafter, again prior to registration of the corporation, where they receive and hear the auditor's report and, if acceptable, approve the transfer by a vote.¹⁰⁰ At the same meeting the permanent officers are elected and after the meeting the registration papers are filed in the Commercial Register. This same procedure applies to capital increases when property or services are part of the consideration, including a provision that the subscription money and property be escrowed until final shareholders' approval on the property evaluation.¹⁰¹ Without it, the amended articles are void; similarly, good will is not considered property at any time. Another stringent reservation placed on shares given in exchange for property involves the restriction that they are to be non-negotiable within two years after formation or capital increase.¹⁰² A legend is placed on the stock, similar to restrictive legends on American shares and for a like period,¹⁰³ as in Belgium, and cannot be detached from the stub book although it may be acceptable as collateral.

German and Italian law take a more realistic approach to the problem

96. See p. 69 *infra*.

97. CHURCH, *op. cit. supra* note 52, at 200.

98. Law of 1867, art. 4, in COM. L. FR. 106-10.

99. Law of 1867, art. 4. The auditor may be one of the shareholders.

100. Law of 1867, art. 4. The report is made available five days before the second meeting. At this second meeting the shareholder receiving stock for property cannot vote nor can a single shareholder cast more than ten votes.

101. Law of 1867, as amended, Decree of Aug. 4, 1949, art. 28.

102. Founders' shares likewise are non-negotiable for two years subsequent to formation, as are shares issued for special advantages. C. COM. art. 3 (France), in COM. L. FR. 106. Switzerland and Italy also have a two year restriction on negotiability.

103. *Ibid.* There is some question whether shares representing capital of a transformed company are immediately negotiable.

by instructing the judge of the local Commercial Register to appoint one or more appraisers.¹⁰⁴ Instead of allowing the shareholders the right to elect the appraisers, as is done in France where the appraisers are often controlled by the founders, the German method results in a greater independency of the auditor since the judge is allegedly independent of the corporate officers. Consequently, only one pre-incorporation shareholders meeting is required to approve or reject the independent auditor's evaluation of the property.¹⁰⁵ An additional buffer to dilution of shareholder's equity includes a requirement that, for the property to be transferred, the incorporators must make a written report of such transactions to the local court which may reject the evaluation if the appraisers oppose the validity of the transaction.¹⁰⁶

SUBSEQUENT DISCLOSURES

With the exception of the details of property transfers during initial offering, few additional facts are supplied to investors. The one period in which investors can be, but are often not, better informed begins after the first annual meeting and during solicitations to increase capital. Understandably, the materiality of disclosures of business information deviates from country to country and business to business because of customs, traditions, or the unique nature of the business enterprise. But it is through the device of financial disclosures that the investor, regardless of his nationality, can be afforded maximum protection. Yet accounting disclosures lack uniformity and consistency and vary widely between the Securities Act and the continental countries — and even among themselves. As a result the sophisticated American investor, for example, is required to learn not only the disclosure laws in connection with financial information, but also the accounting practices of each country. In the United States, the disclosure requirements under Schedule A of the Securities Act for initial issues are extended to securities listed on national stock exchanges and certain securities traded in the over-the-counter markets through the Securities Exchange Act.¹⁰⁷ It requires that such issuers file periodic and annual reports that will include the same type of financial statements contained in a registration statement and other current material information regarding its business and financial affairs.¹⁰⁸

104. AKTG §§ 25, 26, 34 (Germany), in COM. L. GR. 11-12, 18-19.

105. AKTG § 20 (Germany), in COM. L. GR. 8-9.

106. AKTG § 191 (Germany), in COM. L. GR. 114-15.

107. Securities Exchange Act §§ 4, 12-16, 48 Stat. 885, 892-96 (1934), as amended, 15 U.S.C. §§ 78d, *l-p* (1958), as amended, Pub. L. No. 88-467, 88th Cong., 2d Sess. (Aug. 20, 1964).

108. *Supra* note 14. The periodic reports which are filed with the Commission in Washington, D. C. are available for public inspection either at the Headquarters or the other SEC offices throughout the country.

Traditionally, European companies have cloaked themselves in such a shroud of secrecy that subsequent investors were provided with little, if any, information; only insiders were aware of material changes. In France, for instance, stock companies customarily did not publish their gross income. A recent law decree now provides that any company whose shares are listed on a stock exchange or traded by brokers, the assets of which, as stated in the balance sheet, exceed a billion francs, must publish its annual balance sheet and profit and loss statement during the month following its annual meeting, such profit and loss statement including gross sales.¹⁰⁹ The same law provides for half-yearly reports and requires that companies whose balance sheets are not at least one billion francs in assets, must give similar information to any shareholder who asks for it within fifteen days prior to the annual shareholders meeting. The penalties for violations may reach two billion four hundred thousand francs;¹¹⁰ the recentness of enactment, however, forestalls any evaluation of its effectiveness.

The German code likewise provides for subsequent periodic reports to shareholders that are also available to additional investors. Besides filing and registering all amendments to the articles of association with the judge of the Commercial Register and publishing them in official newspapers,¹¹¹ financial statements regarding the company's status are published. In addition to a balance sheet and a profit and loss statement, explanations as to any holding by the corporation of its own shares, the amount of the authorized capital, pre-emptive rights, liabilities, material transactions in detail between its officers, directors and the company or with affiliated or subsidiary corporations, and other significant facts must be reported.¹¹² Unlike shareholders in America, German shareholders must approve the annual report prepared by the board of directors and the financial statements prepared by the auditors who are elected or appointed sometime prior to the annual shareholders meeting. An unaudited financial statement is considered legally nonexistent and cannot be presented to the board of directors or to the shareholders.¹¹³ Assuming there is approval, the directors then file the report with the

109. Ordinance No. 59-247 of Feb. 4, 1949. However, while a holding company must publish an annual report, the financial statements of its subsidiaries are not usually available.

110. In connection with financial statements, supervisors (auditors) must prepare a report to inform shareholders and directors of any irregularities in them. C. COM. §§ 15, 34, 45 (France), in COM. L. FR. 109, 113, 114.

111. Oppenheimer, *Business Organization Problems and How the Community Affects Them*, in INSTITUTE ON LEGAL ASPECTS OF THE EUROPEAN COMMUNITY 45, 58 (1960).

112. AKTG §§ 129-46 (Germany), in COM. L. GR. 75-88.

113. AKTG §§ 143, 144, 33, 125(4), 135(1) (Germany), in COM. L. GR. 90-91, 17-18, 73, 85.

Commercial Court, subsequently publishing a major portion of it in a daily newspaper originally designated by the articles of association.¹¹⁴

While the submitted information is similar to those areas detailed in Form 10-K of the Securities Exchange Act, the German disclosure obligations can be vague. Unique to Germany, the annual report and financial statements or any part of them may be omitted by the directors when the best interests of the corporation or of an affiliated enterprise, or superior political considerations demand it. Thus, the worth of these reports can be gravely damaged; it requires an astute and experienced eye to detect the missing items in order to evaluate the significance of the remaining information. Not only is the investor's protection injured through this maneuver of the directors, but the shareholders must resolve their responsibility. Upon receiving the potentially mutilated reports at the annual meeting, the shareholders decide by vote whether to discharge the executive board from liability to the corporation for damages resulting from any misleading or false statements or omissions in the balance sheet and profit and loss statement, and from mistakes of the management during the previous fiscal year. Obviously, once the shareholder approves the reports, he cannot attack them in the event of later uncovering a fraud, nor can he question the net profit figures.¹¹⁵ Consequently, the German statutes, though relatively new, still leave the shareholder vulnerable in many areas.

Even though most civil law code provisions require publication of financial statements and certain other information, a review of them reveals serious damaging concealments or omissions not found within the Securities Act or Securities Exchange Act in respect to a number of items. Under Schedule A of the Securities Act, issuers, in their registration statements, are required to supply items and supporting documents in thirty-two areas of information. These items include, among other things: information as to names and addresses of all persons owning more than ten per cent of the stock; general character of the business — past, present and proposed; stock option plans and the individuals included;

114. AKTG §§ 18, 96, 143-44 (Germany), in COM. L. GR. 8, 86-87, 90-91.

115. AKTG § 126(3) (Germany), in COM. L. GR. 74. While the majority of European nations have minor regulatory provisions in their acts, in some countries the shareholder continues to have protection by way of internal private controls. The German statute requires that the shareholders elect a professional auditor for the examination of the annual report and financial statements submitted by the corporate management, in addition to an outside directorate board which has internal supervisory powers. The Belgium law provides for an audit by the Board of Supervisors which is elected by the shareholders, except in the case of a publicly owned corporation where at least one member of the Board must be a professional auditor selected from a court approved list. Under the Swiss law, none of the supervisors are required to have any professional training. The closest concept in American law is the requirement that publicly owned corporations must be audited by independent public accountants, selected, not by shareholders as such, but by the directors. Regulation S-X requires certification by an independent public accountant except under special circumstances.

purpose of proceeds as well as terms and conditions of underwriting agreements, including any commissions or discounts paid; remuneration of management, who they are and if they participated in any transactions with the company and in its securities; a balance sheet, not more than ninety days before filing, along with a certified balance sheet as of a date within a year prior to filing if the later balance sheet is not certified, and profit and loss statements for the last three fiscal years (if the issuer has been in business that long) certified by an independent accountant which fairly reflect the financial condition of the company and operations of the issuer; and copies of all material documents and contracts, including the articles of incorporation and by-laws.

To make the financial data in the prospectus and annual report meaningful to the investor and the financial community, the Commission has prescribed in Regulation S-X detailed rules concerning the form and content of financial statements contained in registration statements.¹¹⁶ In general, it requires an appropriate breakdown and explanation of current assets and liability, fixed assets less depreciation, investments, and other items of an unusual nature; this likewise applies to the expense and income items. In addition, the financial statements for the last three or five years, depending upon the circumstances, are to be included in the registration statement; basically the same format is followed for filing 10-K Forms with the Commission.

Accounting Variances

With at least the basic accounting provisions delineated and reflected in the particular financial statements, the American investor will have a foundation from which to begin a proper analysis of the investment merits of a security. The continental financial statements vary severely from the specific disclosures and formats required under Regulation S-X and the instructions of the various registration forms. The variances of accounting methods in Europe are not only indigenous to a particular country, but many are specifically devised to assist the corporate management rather than enlighten the investor. These discrepancies, often arising out of an historical economic development, result in a lack of pertinent information which impairs the investor's ability to make an accurate evaluation of the financial data. For example, while many continental countries specify that a stock company reserve a certain percentage of its net profits, they also permit these corporations to increase this reserve without disclosing the amount to shareholders. According to the Swiss Code, such "silent" reserves are permissible to the extent to

116. SEC Regulation S-X, 17 C.F.R. § 210 (rev. ed. 1964). Section 7 of the Securities Act gives the Commission power to vary the requirements of Schedule A so long as there is fully adequate protection of the investor. 48 Stat. 78 (1933), 15 U.S.C. § 77g (1958).

which they appear desirable from the viewpoint of the continuous prosperity of the enterprise and the distribution of steady income.¹¹⁷ The German Code prescribes a legal reserve, yet allows a corporation to exceed that amount without reason, as is also true in France where it may be used for any purpose and may even be derived from premiums obtained through capital increases.¹¹⁸

There are many contrasts between the Securities Act disclosure requirements and traditional continental business practices and accounting methods. The scope of this article does not permit elaboration, but some of the most notable discrepancies are mentioned immediately hereafter. Under Regulation S-X, fixed asset valuations and depreciation methods are to be determined upon a historical foundation, *i.e.*, original cost, rather than a write-up on the basis of present reproductive value or fair market value. In Europe and particularly in France,¹¹⁹ the original basis for depreciation charges cannot be changed except after express approval at the shareholders meeting, which must be preceded by a report of the supervisor assigning the reason for the change; but the rates of depreciation are arbitrary and seldom reveal the correct cash flow.¹²⁰ Especially for capital increases, no depreciation formulas for fixed asset valuation are ascribed to the codes. When part or all of the fixed assets are initially received as consideration for stock, the company writing-up the property to an exaggerated figure is limited by few restrictions. As a result a large depreciation reduces the amount of profits available for distribution as dividends, while an understated replacement cost, enables funds to be hidden and possibly disappear forever. Further, under the Commission's regulations, data on gross sales

117. Folliet & Oberson, *Switzerland*, in LEGAL ASPECTS OF FOREIGN INVESTMENT 523 (Friedmann & Pugh ed. 1959). The corporation must also reserve 5% of the net profit and up to 20% of the paid-up capital besides these other amounts. OR §§ 671, 677 (Switzerland), in COM. L. SWIT. 109-10.

118. AKTG § 130 (Germany), in COM. L. GR. 77-78 (legal reserve). The most important source of this account is the so-called capital surplus. As long as the legal reserve is below 10% of the capital, the company is required to transfer to this account 5% of its annual net earnings. This account, for practical purposes, can be regarded as capital; in particular, it may not be distributed as a dividend. In France a legal reserve of 10% of the capital is required with 5% of yearly net profits also set aside, while Swedish law prescribes a 10% reserve, yet allows another 10% of yearly profits set aside until at least 20% of the capital is equaled.

119. In France no prescribed rules for the form of the financial statements are found, although once a format is devised it must be repeated each year unless the stockholders, at a meeting, expressly approve the changes after the auditor gives his reasons. C. COM. arts. 34, 35 (France), in COM. L. FR. 113. In respect to valuations and depreciations, no formulas are provided with the exception of a general rule that over-evaluation is not permitted. Likewise, standard rates for depreciation are not described and the correctness of the rate is a question of fact for the courts. For a general description of accounting procedures, see CHURCH, BUSINESS ASSOCIATIONS UNDER FRENCH LAW 445-58 (1960).

120. Law of Oct. 30, 1935; see also Heller, *Disclosure Requirements Under Federal Securities Regulations*, 16 BUS. LAW. 300, 308 n.18 (1961); Lese & Lee, *Cash Flow: Misleading Connotations of "Dividend Distributions,"* 13 CLEV.-MAR. L. REV. 267 (1964).

and profits are required to be broken down and stated separately for each division and subsidiary of the company which accounts for fifteen per cent or more of the consolidated figures. Such requirements are avoided in France and Italy where corporations believe the disclosure of these figures would pose a serious menace to their competitive position.¹²¹ Despite certain exchange listing requirements in Germany which may alter the situation, the code does not even force disclosure of gross or net sales figures, regardless of whether or not there are subsidiaries or divisions; figures relating to cost of production and overhead likewise are omitted in reports.¹²²

The one area in which the European financial regulations closely approach the American system concerns the certification of the financial statements by public accountants. Regulation S-X requires that the financial statements be certified by an independent public accountant. While an essential test of independency depends on the accountant having no relationship with the company other than auditing its books and records, the scope of the accountant's function in Belgium, France, Germany, and Italy is broader. Most countries require that they be appointed for a number of years, usually three, with the additional power to investigate shareholders' complaints against management, and the authority to call shareholders meetings.¹²³ It would appear that their participation in certain of the company's affairs fail to meet the test of independency in the United States according to the views of American lawyers. Yet the responsibilities planted on them, including the assumption of liability for losses due to negligence, plus incurring penal liability for not complying with the rules as to their duties and qualifications, result in the highest duties of care in the performance of their functions; this is similar to the American concept.

121. See Cohen & Throop, *Investment of Private Capital in Foreign Securities*, in A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 564 (Surrey ed. 1963); see also Item 9 of Form S-1. The purpose is to highlight the trend of sales. Heller, *supra* note 120, at 318.

122. According to Falkenhausen & Steefel, *Shareholders' Rights in German Corporations*, 10 AM. J. OF COMP. L. 427 n.94 (1961), most German corporations have two sets of financial statements: one for the shareholder and one for the tax-collectors. See also Maurer and Spray, *The Stock Exchanges of Germany*, in THE PRINCIPAL STOCK EXCHANGES OF THE WORLD 133 (Spray ed. 1964) for the most current listing requirements.

123. C. COM. I-IX, arts. 64, 73 (Belgium); C. COM. arts. 32, 33 (France), in COM. L. FR. 112-113; AKTG §§ 136-37 (Germany), in COM. L. GR. 86-87; C. CIV. arts. 2367, 2399, 2400, 2407 (Italy), in COM. L. IT. 74, 86, 88. See also Conard, *Organizing for Business*, in 2 AMERICAN ENTERPRISE IN THE COMMON MARKET: A LEGAL PROFILE 107-10, (Stein & Nicholson ed. 1960). Loss believes that the Swedish statutes have made substantial advances in the area of accounting and auditing practices, especially in reporting total wages and remuneration, qualifications and duties of auditors, and in specifying the forms of the financial statements. While there are no extensive treatments of the Swedish law in English, a comparison of Loss' comments with the codes of the continental countries exhibits great similarities in the obligations imposed upon accountants and auditors. If anything, Swedish law has finally recognized its mistakes. 1 LOSS, SECURITIES REGULATION 453 (2d ed. 1961).

In addition to differences in financial disclosures, a review of the civil law countries reveals that certain information asked for in Schedule A and the registration forms is absent under the codes. While a prospectus under the Securities Act must state "the names of and amounts paid to each director and the three highest paid officers whose remuneration exceeded \$30,000.00 during the previous fiscal year," only in Germany and France is at least the total amount of management's salaries given; and even then, the directors may omit this information if it is expedient to business.¹²⁴ No continental country requires disclosure as to holdings of corporate stock by officers, directors, and principal shareholders, or of material contracts between the company and any of these men. Except in Belgium, underwriting arrangements and commissions are not disclosed; presumably, the prohibition against issuance of stock below par value protects the shareholder in this instance.

The few cited examples of disclosure differences succinctly demonstrate the hindrance, rather than the aid, of the code provisions to original and subsequent investors; only in the detailed disclosures of property exchanges for stock are all the material facts revealed to the purchaser. Subsequent purchasers after the first annual meeting are better informed, but never to the extent that American investors are. There is, nonetheless, an apparent growing tendency toward standardization of accounting disclosures and uniform business practices through the initial efforts of the Common Market Conferences, which should eventually enlarge the amount of information available to the prospective investor.

Capital Increases

Covering the spectrum of disclosure mechanisms afforded both American and European investors, there remains the type of information available when a corporation decides to offer and sell a second issue of securities — either debt or equity. As earlier stated, an American corporation may still have unissued but authorized securities which it may sell without additional shareholder approval. Registration requirements with the Commission are identical, as if it were an initial offering, although the structure might differ. Capital increases of companies in continental countries, however, are required to repeat the same procedures necessary for pre-incorporation subscriptions, subject to the altered situation. Permission for the increase must be approved by a statutory majority of the shareholders, and the issue must be one hundred per cent subscribed before the increase is fully effective. Germany is an exception; under certain conditions, the board of directors, if authorized in the articles, can increase the capital without shareholder approval (Verwer-

124. AKTG § 128(7) (Germany), in COM. L. GR. 76.

tungsaktien).¹²⁵ While each country varies the percentage, at least a mandatory minimum twenty per cent of the issue must be paid in cash or property prior to its effectiveness.¹²⁶ Additional provisions are written into the codes of all the countries, except Italy, conferring unconditional pre-emptive rights to all shareholders on a pro-rata basis in order to prevent any dilution of power. Where a prospectus has been issued for an initial offering, such as in France, those codes also require a prospectus for capital increases; the contents must also include financial data of the corporation since its inception, as well as publication of the increase in legal newspapers.¹²⁷ Otherwise, the prospective purchaser is expected to rely on prior annual financial statements and annual reports approved by shareholders.

Because of these mandatory pre-emptive rights, not demanded by statute in the United States, capital financing methods in Europe for second issues involve a different group of underwriting difficulties. Regardless of the country, the obvious and most practical method of financing is to obtain a firm commitment from an underwriter, as previously mentioned, which guarantees the issuer the funds almost immediately and with minimal effort. In Europe the underwriters, which are often banks, are estopped from utilizing the initial subscription method of successive financing. Instead, the only alternative available involves a provision in the underwriting agreement giving present shareholders first rights to purchase, and then selling the unexercised portion. Even so, delays are unavoidable. When the stock company cannot obtain underwriters, they must either personally canvass shareholders and investors as prospective subscribers, or amend the subscription agreement which would permit adjustment of the projected capital increase when the intended amount is not obtained.¹²⁸

125. In Germany, the amendment must be adopted by at least 75% of the shares represented at the meeting. AKTG § 146(1) (Germany), in COM. L. GR. 92. Besides not being able to issue the shares below par value, the authorization may not be given for longer than five years. AKTG §§ 169, 151 (Germany), in COM. L. GR. 103, 95. The executive board may approve this arrangement. AKTG §§ 169-73 (Germany), in COM. L. GR. 103-06.

126. AKTG § 28(2) (Germany), in COM. L. GR. 13. In Germany it is 25%. In France, when the rights of any class of securities are to be subordinated to the new stock, a special meeting is held to obtain the consent of those shareholders, if possible. Law of 1867, art. 34.

127. Law of 1867, arts. 1, 2 (France), in COM. L. FR. 115-17; AKTG § 153 (Germany), in COM. L. GR. 95-96 (to reduce or change rights, 75% of the votes are needed); C. CIV. art. 2441 (Italy), in COM. L. IT. 103.

128. AKTG §§ 146, 153 (Germany), in COM. L. GR. 92, 96. German corporations may sell treasury shares without shareholder approval and no pre-emptive rights apply to those shares, although they cannot be sold for less than market value unless sold as "employee shares." Falkenhausen & Steefel, *supra* note 122, at 423 n.72. In France the several modes of raising capital through an increase include enlarging the par value of the outstanding shares with the shareholders contributing the difference, increasing par value and transfer reserve to capital account, convert company debts into paid-up shares, and, of course, public sales. C. COM. art. 31 (France), in COM. L. FR. 112.

CONCLUSION

Thirty years ago, Kessler labeled securities regulations in continental European countries, "especially in France, as trivial"¹²⁹ in comparison with its United States counterpart. After the intervening war, expanded international trade stimulated comprehensive improvements in securities regulations in most countries. Yet an initial perusal of these present code provisions of civil law systems reveals serious flaws to the American lawyer who is deeply immersed in the common law tradition; doubt is cast by many upon the effectiveness of these provisions. Without question this is essentially a valid position but, in part, some fallacious conclusions are reached because of the criteria used by the lawyer in analyzing the situation. Utilizing the American legal system as the point of reference for a comparative study, instead of viewing that particular country's social, historical, political, legal, and economic traditions in an independent perspective, may frequently develop erroneous concepts. Awareness of this problem will aid in clarifying the issues.

An understanding of the aims, theories, and techniques of capital financing through public offerings in Europe is, today, a valuable tool in advising the American corporation which desires to conduct or expand business overseas. Despite a current belief¹³⁰ that the recent stock slump in Europe makes it difficult to float new issues, even with an acknowledged greater affluency, a more cosmopolitan approach maintains that existing conditions are conducive to public financing.¹³¹ In addition it is believed that the new tax¹³² on certain foreign securities traded by American purchasers will not cause a retrenchment of United States companies shifting new investments to Europe. The law may result in some delays, but the singular factor of increasing European prosperity will overcome any hesitancy on the part of American investors to pay the extra tax while it remains in effect.

An attempt has been made herein to demonstrate that there are an assortment of hiatuses and inconsistencies in securities regulations in Europe which need attention, although the simpler capital structure of stock companies may not require all the necessary refinements demanded under the Federal Securities Acts. For example, German investors are not given detailed financial data on transformation property, nor are French investors provided with adequate publicity media on new issues; yet the Belgium securities regulations, the new French laws on stock ex-

129. Kessler, *The American Securities Act and Its Foreign Counterpart: A Comparative Study*, 44 *YALE L.J.* 1133, 1164 (1935); 1 *LOSS, op. cit. supra* note 123, at 452.

130. *Time*, July 3, 1964, p. 85.

131. *Business Week*, June 27, 1964, p. 81.

132. §§ 4911-20, *INT. REV. CODE OF 1954*, Pub. L. No. 88-563, 88th Cong., 2d Sess. (Sept. 2, 1964).

change listings, and the modern Swedish law providing strict financial statements for public companies are great steps forward in giving the investor protection on new and subsequent issues. Europe's prosperity has cultivated an atmosphere of cooperation, even though the multitude of laws tend to discourage some American participation. When the Common Market has absorbed and fused the various capital markets into a homogeneous entity, it is foreseeable that many favorable aspects of the Federal Securities Acts will be reflected in the labyrinth of civil law systems in Western European countries.