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The Principles of Transparency and Disclosure as a Tool for Corporate Governance

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Abstract: The world of commerce is a world characterized by speed and credit. Therefore, countries have tried to maintain speed because it brings profit. However, in return, they have supported credit with the principles of governance, especially the principles of transparency and disclosure, which companies are committed to, given that the company (joint-stock companies) separates ownership from management.

This study aims to demonstrate the extent to which the legislature requires disclosure of certain information related to a company's activities, future plans, management members, and budget at the end of each fiscal year, excluding confidential information known as competitive information, whether for companies that resort to savings or not.

Keywords: Transparency; Disclosure; Governance; Company; Stock Market.

ملخص: إن عالم التجارة، عالم يمتاز بالسرعة والائتمان، ولذلك حاولت الدول المحافظة على السرعة لأنها تجلب الربح، ولكن بالمقابل دعمت الائتمان بمبادئ الحوكمة وعلى الخصوص مبدئي الشفافية والإفصاح التي تلتزم بها الشركات، نظرا لأن الشركة (شركات المساهمة) تفصل بين الملكية والإدارة .

تهدف هذه الدراسة إلى تبيان مدى إلزام المشرع بضرورة الإفصاح عن بعض المعلومات المتعلقة بنشاط الشركة والخطط التي ستقوم بها في المستقبل وأعضاء الإدارة والميزانية عند نهاية كل سنة مالية، دون تلك المعلومات السرية والتي تسمى بالمعلومات التنافسية . سواء بالنسبة للشركات التي تلجأ للإدخار أم لا .

كلمات مفتاحية: الشفافية ; الإفصاح ; الحوكمة ; الشركة ; البورصة .

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1. INTRODUCTION

Due to the increasing size of projects, the complexity of their operations, and the separation of ownership from management, multiple agency relationships have emerged within firms. Because each party seeks to maximize its own utility and achieve its interests, even at the expense of others, agency problems and ethical issues in dealings arise. This has led to the development of a new technique that all companies must adhere to, which aims to protect all parties dealing with the company: corporate governance¹

Among the fundamental principles of corporate governance is the company's commitment to disclosure and transparency (Transparence), principles established by the Organisation for Economic Co-operation and Development (O.C.D.E) in the field of corporate governance²

These two principles are among the most important, or more precisely, the most crucial foundations upon which the governance system is built. They are the cornerstone for the success of this system due to the role played by adherence to this principle in providing the information needed by shareholders, investors, and external bodies, based on which they make their decisions regarding joining the company by purchasing its shares or not. Therefore, attention to this principle has increased both nationally and internationally, given its effective role in the success of financial markets and the advancement of companies, or conversely, the collapse of the former and the bankruptcy of the latter.

From the above, the following problem can be raised: Has the Algerian legislator succeeded in obliging companies to adopt this principle, or is it merely a clause in international agreements ratified by Algeria? This problem leads to several questions: What is the legal concept of the principle of transparency and disclosure? What are its types? Who are the legal persons obligated by it? And is this principle applied to all company information or are there exceptions?

To answer this problem, we propose the following hypothesis: The more the Algerian legislator intervenes with mandatory legal texts accompanied by penalties to oblige companies to disclose their essential data concerning shareholders and investors, the more it contributes to strengthening the principle of disclosure and transparency, thus contributing to the prosperity of the economy.

To address the problem, we used several methodologies, including the descriptive method when presenting the opinions of jurists, the comparative method when comparing Algerian laws with laws of developed countries, the analytical method when analyzing the provided information and legal texts and identifying the main advantages and drawbacks that the legislator must avoid to achieve an effective legal system, and finally, we used the critical deductive method at the end of each section we addressed and in the conclusion.

2. The Concept of the Company's Commitment to Transparency and Disclosure:

The terms disclosure and transparency are commonly repeated phrases in the media and among specialists dealing with securities (companies and investors). However, despite the use of these terms by the aforementioned persons, their understanding of them remains ambiguous, which necessitates defining them precisely³

2.1 Definition of the Company's Commitment to Transparency and Disclosure:

The origin of the principle of disclosure and transparency on a global scale dates back to 1837 when an article on disclosure was published in the Railway Magazine, discussing the necessity of periodically disclosing the company's financial information, including data on profits, capital, and other data related to the company and its activities. In 1867, the French legislator regulated, in the first company law, the right of shareholders to access information related to the company.

Disclosure can be defined as: announcing information, data, and reports related to companies and presenting them to the supervisory authorities, whether internal or external.

As for the definition of transparency: it is the commitment of the issuing entities of securities to provide true and non-misleading information and data about their activities and make them available to shareholders, investors, and regulatory authorities, in a manner consistent with internationally recognized accounting standards, and not to withhold information from the aforementioned parties, enabling them to access it, except for that which could harm the interests of the issuing entity, in which case it may be withheld⁴.

We mean by misrepresentation or, more precisely, the lack of transparency, "anyone who contributes to wrong choices due to the scarcity of easy to obtain information that anyone performing analysis can get. Thus, the financial analyst turns to internal information (from people inside the company), which contributes to complicating matters and falling into prohibition. Regarding equality among all, the balance of justice will be disrupted because information is given to a person with the goal being only misrepresentation."⁵

Despite the difference between the two terms, they remain intertwined, as most writers in this field define them as a single principle, where they cannot be separated as they are two complementary principles.

This principle also means the company providing information and reports that enable individuals and bodies to know the true financial position of the company, based on which they can determine their stance towards the company currently and in the future, while the company retains its right to withhold what it deems necessary to avoid harming the company, its financial position, or the interest of partners or shareholders.⁶

As Dr. Tarek Abd el Aal Hammad says: "Fair disclosure or transparency relies on obliging companies to provide appropriate and reliable information, audited by independent auditors, so that it can be relied upon in making necessary decisions. The characteristic of transparency is achieved by relying on actual facts supported by documents, and the information must also be comparable with previous periods, in addition to being understandable through the use of clear and comprehensible terminology."⁷

Professor Ammar Habib Behloul Al Ali Khan adds, "The commitment to transparency in general is the disclosure of information related to economic activity, specifically concerning its financial and legal aspects, providing a clear picture of the true nature of the disclosed activity."

The commitment to transparency and disclosure is considered a fiduciary system that enables partners to exercise their rights correctly and based on the principle of equality, allowing them to obtain the necessary information to achieve their control over the company, make appropriate decisions regarding their relationship with it, and claim their rights therein. It also provides a significant amount of protection for investors through the disclosure of information concerning the true financial and legal situation of the company.

2.2 Conditions for Implementing the Principle of Transparency and Disclosure:

Within the legal framework of corporate governance, several basic conditions must be met for implementing the commitment to transparency and disclosure:

***Disclosure must be of true information:**

The effectiveness of the commitment to disclosure and transparency requires that the disclosed information be true, reflecting the actual financial and legal position of the company. The legal system of corporate governance is based on the principle of good faith in forming and executing contracts, and the commitment to disclosure and transparency is a practical result of this principle. Therefore, there is no room for disclosed information to be untrue or inaccurate. Examples include speculative financial reports. For instance, the Enron energy company in 2001 used complex accounting methods to hide part of its debts, aiming to promote its activity and increase its share prices in the stock market. Consequently, Enron included other companies, its workforce increased from 200 to 2000 workers, its revenues rose from \$4 billion to \$7 billion, and the share price reached \$80. However, this data falsification was soon discovered by the US Securities and Exchange Commission, and it quickly declared bankruptcy in 2001.

Accounting information disclosed is assumed to be of high integrity, as this characteristic justifies public trust in it and the possibility of relying on it. It must truthfully represent reality and must be subject to review and verification. Therefore, this provided information must be an accurate representation of the essence of the events involved without distortion or misrepresentation.⁸

***Disclosure must be timely:**

Disclosure must be timely, allowing the disclosed information to be utilized. If the purpose of the disclosure obligation is to inform the beneficiaries with information to make the appropriate decision at the right time.

Appropriate timing also means that information must be made available to users when needed in a timely manner, because information loses its utility if not available when needed⁹. For example, Article 677 of the Algerian Commercial Law states: "The board of directors or the board of managers must notify shareholders or make available to them, thirty days before the general meeting is held, the necessary documents to enable them to form an informed opinion and make an accurate decision regarding the management and operation of the

company's business." We infer from this article and many other articles in Algerian law¹⁰ that they address the issue of disclosure and transparency as an obligation on the company from which shareholders and third parties benefit, and they specify in many articles the appropriate time for disclosure. The Commercial Law also obliges managers and administrators to submit documents under penalty of financial coercion by court order from the summary proceedings judge.¹¹

In all cases, the company is responsible for complying with the disclosure of information related to its economic activity at the end of each fiscal year as a general and specific time for evaluating its economic activity for the past period and reviewing its development plans for the upcoming stage¹². Examples of penalties for companies not disclosing data on time include the suspension of trading shares of 22 Iraqi companies by the Securities Commission for failing to submit their final data and accounts to the Commission on time. The Commission also decided to delist the Agricultural Investment Company for non-compliance with the conditions for submitting data and final accounts for the years 2006 and 2007.

This is a preventive measure taken to protect investors and increase confidence in the financial transactions market.

***Understandability of Information:**

Information cannot be utilized if it is not understandable to its users. The possibility of understanding information depends on the nature of the data contained in the financial statements and how they are presented on one hand, and on the capabilities and culture of the users on the other hand.

***Neutrality of Information:**

Neutrality of information is a term describing the absence of bias, meaning that biased information is information that cannot be trusted or relied upon. Information must be characterized as impartial, free from bias towards any predetermined outcomes.

***Comparability of Information:**

This characteristic enables users of information to identify the real aspects of similarity and difference between the performance of the company and the performance of other companies over a specific period.¹³

2.3. Types of Commitment to Transparency and Disclosure:

The commitment to disclosure within the framework of the company's economic activity is a fundamental measure of its suitability for the business environment based on trust and credit. Therefore, it can be divided from this perspective into two parts:

***Legal Obligation of Disclosure:**

As per Article 3 of Regulation 96-02 concerning information required to be published by companies.¹⁴ This refers to the obligation to disclose information that legislation related to economic activity regulates by specifying who is obligated to disclose, the nature of the information to be disclosed, in addition to the specified time for it.

Since the obligation to disclose here is a legal duty, it is accompanied by a penalty to ensure its implementation.

***De Facto Commitment to Transparency or Disclosure:**

Since disclosing the company's conditions undoubtedly represents the greatest guarantee for building investment decisions on correct objective foundations, disclosure has become a focus of competition in attracting investment among companies. Consequently, the latter began to exceed the legal limit of disclosure in their quest to attract investment.

The disclosure required varies according to the nature of the information to be revealed related to its economic activity, which may take the form of financial or non-financial information.

***Financial Disclosure:**

By financial disclosure, we mean the disclosure of financial information and data related to the company's activity regarding its assets, liabilities, and financial results periodically, or when something occurs that necessitates disclosure. But this importance becomes useless if the nature of the strategies and policies set by the company are not mentioned so that the path to achieving goals is drawn and clear.¹⁵

Obtaining financial data should use clear and approved accounting policies in accounting dealings. Countries and economic organizations concerned with financial accounting activity have tended to set international accounting standards subject to continuous renewal and development to obtain correct and guaranteed financial information and data, as is the case with the International Accounting Standards set by the International Accounting Standards Board, which recommended their international adoption.

***Non-Financial Disclosure:**

This refers to the disclosure of other non-financial information related to the general activity of the company, especially concerning its application of the legal, administrative, and regulatory system, such as disclosure about the formation of the board of directors, the position of employees in the company, and their rights.¹⁶

Non-financial information disclosed by the company is considered highly important for investors, as through reviewing it, they can evaluate the nature of economic relationships within the company and its efficiency and seriousness in achieving the declared goals.

Disclosure also varies according to its functions and importance into: adequate disclosure, appropriate disclosure, full disclosure, fair disclosure, educational disclosure, and preventive disclosure.

Regarding its timing, there is preliminary disclosure, which occurs before the issuing company lists its securities on the stock exchange; periodic disclosure, which occurs at specific intervals, usually at the end of each fiscal year; and immediate disclosure, which occurs when any important event happens in the life of the company.¹⁷

3. Persons Subject to the Obligation of Transparency and Disclosure and its Subject Matter:

This section addresses the persons upon whom the duty of disclosure falls and the subject matter of the disclosure obligation.

3.1. Persons Subject to the Obligation of Transparency and Disclosure

***Obligation of Board Members to Disclose:**

The administrators of the company are the persons most aware of its financial and legal situation. The existence of this capability comes with the possibility that administrators might exploit their positions to achieve their personal interests. In this regard, Article 615 states: "A shareholder employee of the company cannot be appointed as a manager unless his work contract predates his appointment by at least one year." Article 316 states: "A manager cannot accept a work contract from the company after the date of his appointment therein."

Article 628: "Any agreement between the company and one of its managers, whether directly or indirectly, is prohibited under penalty of nullity, unless prior authorization is obtained from the general assembly."

The same applies to agreements concluded between the company and another entity if one of the company's managers is an owner, partner or not, manager or administrator, or director of the entity. The manager who is in this situation must declare it to the board of directors, the statutory auditors must submit a special report to the general assembly on the agreements made by the board.

Article 630: "Without prejudice to the liability of the concerned manager or general director, the agreements referred to in Article 628 and concluded without prior authorization (disclosure condition) from the board of directors, may be annulled if they have harmful consequences for the company."

Rules relating to insider trading in the company's shares, meaning trading in the company's shares by the company's directors, employees, and anyone whose position enables them to obtain confidential internal information from the company, allowing them to anticipate market movements by buying and selling shares, thus avoiding loss or achieving a profit exceeding what anyone without access to this secret information could achieve. The general rule in this regard is that the company must either announce the information, so that anyone who wants to rely on it can do so, or keep it confidential while refraining from trading based on it.¹⁸

***Company's Obligation to Disclose:**

The company is obligated to disclose financial and non-financial information related to its economic activity. The Iraqi legislator made the company's obligation to disclose such information a basic condition for acceptance, by presenting its securities in the stock market for the purpose of trading them.

By the company's obligation to disclose, we mean providing its private information to non-shareholders in the company. By these third parties, according to Algerian law, we mean

the Stock Exchange Operations Regulatory and Monitoring Commission (commonly known as the regulatory authority), as the latter periodically publishes information related to companies listed on the stock exchange to attract investors and inform them of the status of the company they wish to invest in or are already invested in.¹⁹

That is, companies whose transferable securities prices are set by the Stock Exchange Regulatory Commission must disclose their financial and non-financial status to this commission periodically, which in turn publishes it.²⁰

***Obligation of the Stockbroker to Disclose:**

In addition to offering shares and bonds, the joint-stock company also offers transferable securities. The role of the broker in stock exchange operations involves buying and selling these securities on behalf of investors. Therefore, he is also obliged, when carrying out this operation, to disclose information about the company to the Stock Exchange Regulatory Commission by highlighting its financial and non-financial situations. Regarding Algerian law, Article 12 of Regulation No. 96-02 concerning information required to be published by companies and bodies that publicly resort to savings when issuing transferable securities states:

"The financial brokers responsible for collecting subscriptions must ensure that the information memorandum and the statement have obtained the visa from the Commission and have been made available to the public under the conditions stipulated in Article 11 above".

3.2. Subject Matter of the Disclosure Obligation:

Disclosing information related to the company is considered a fundamental guarantee in the theory of corporate governance, as it indicates the company's good faith in executing its legal relationships.

However, on the other hand, it makes the economic and legal reality of the company exposed to the public, which harms the company and deprives it of the competitive ability necessary for investment.

Therefore, does the disclosure obligation cover all of the company's private information or not?

***Information Required to be Disclosed (Fiduciary Information):**

American jurisprudence calls this information material information, which US judiciary defines as: "Information where there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote or make an investment decision. It is also such if the investor would take it into consideration when making a decision to buy, sell, or hold securities".

The UAE legislator defined it as: "Substantial information, which is any event, fact, decision, or information that may directly or indirectly affect the price of a security or its trading price, or holding, selling, or dealing in it".

Among this information are the results of the company's operations, profit or loss, in addition to the decisions of its board of directors and general assembly, especially those related to increasing or decreasing capital or merging the company.

***Information That May Not Be Disclosed (Competitive Information):**

If the purpose of imposing the disclosure obligation on the company's private information is to protect those dealing with it, it certainly is not intended to harm the company itself, as the business environment is based on competition.

Therefore, the question arises about the extent to which the disclosure obligation includes that information which represents a competitive advantage against other companies, expressed as trade secrets, represented by technical information related to the nature of the economic activity carried out by the company, such as information related to the method of manufacturing a product or a special method for retaining customers.

Competitive information generally does not affect the interests of those dealing with the company, such as creditors or investors, and therefore there is no benefit in disclosing it to the public compared to the harm inflicted on the company.²¹

4. The Position of the Algerian Legislator on the Principles of Transparency and Disclosure

After the transformation Algeria underwent from a directed economy towards a market economy, and the series of reforms that concerned public economic institutions, the necessity of their privatization and not relying on financing from the public treasury, and after Algeria's participation in the NEPAD project, which requires the periodic evaluation of member states regarding the application of governance standards – where the initiative came from the private sector to develop enterprise management in line with the modern concept, namely corporate governance – this initiative resulted in the issuance of the Charter of Good Governance for Enterprises in Algeria in 2009. This is an educational charter aimed at helping company presidents master the basic tools for effectively applying corporate governance principles.

Apart from what is stipulated in the Commercial Law regarding the mandatory publication of the annual result of companies' activities according to Article 716 of the Commercial Law, and the criminal protection granted by the legislator in Article 811 of the same law, which penalizes the publication of a balance sheet not conforming to the true reality of the company or the distribution of fictitious profits, as well as Article 813, which penalizes failure to submit the financial report for the past fiscal year, the Algerian legislator did not dedicate a specific text to transparency and disclosure despite its importance. Even after the issuance of Legislative Decree 93-10 concerning the stock exchange of transferable securities, as amended and supplemented, the legislator did not stipulate the duty of disclosure except in Section Three, Article 35, concerning the competence of the Stock Exchange Operations Regulatory and Monitoring Commission to ensure that companies listed on the stock exchange comply with the information they are obliged to publish according to legislative and regulatory provisions.

This publication previously mentioned was specific only to companies listed on the stock exchange, excluding other companies. However, after amending Legislative Decree

93-10 by Law 03-04, its Article 41 stipulated that every company or public institution issuing securities or any other financial product by publicly resorting to savings must previously publish a memorandum directed at informing the public, containing the organization of the company, its financial situation, and the development of its activity.

Article 65 was also introduced, obliging any natural or legal person who acquires a number of shares or voting rights representing more than one-twentieth, one-tenth, one-fifth, one-third, one-half, or two-thirds of the capital of one of the companies listed on the stock exchange to declare this to the Stock Exchange Operations Regulatory and Monitoring Commission and the stock exchange management company within 15 days from the date of exceeding the minimum participation threshold. Apart from these cases, Law 03-04 lacked reference to the duty of financial disclosure, which is the basis of any financial market.

Referring to the regulations issued by the Stock Exchange Operations Regulatory and Monitoring Commission, it issued Regulation 96-02, amended by Regulation 04-01. The latter obligated, in its Article 3, every company or public institution that publicly resorts to savings when issuing transferable securities by publicly resorting to savings to prepare an information memorandum for the public, containing a set of informational elements that would enable the investor to make an informed decision. In addition to the data stipulated in the Commercial Law, the information memorandum must include:

- Presentation of the source of the transferable securities and its organization.
- Financial situation.
- Activity development.
- The subject of the operation intended to be carried out and its characteristics.

This information memorandum must be filed with the Stock Exchange Operations Regulatory and Monitoring Commission at least two months before the date of issue, and the Commission has the authority to impose modifications on the information memorandum regarding the quality of the information provided or to require clarification, modification, or updating of the information. The Commission may also refuse to grant the visa according to Article 06 of the aforementioned Regulation 96-02, especially if the protection of savers requires it.

This regulation also obligated, in addition to the information memorandum, the printing of an informational statement summarizing the content of the memorandum and its publication. In the event of a significant change in the information provided, the memorandum must be amended and filed with the Commission. If the Commission refuses the amendment, the placement of the transferable securities is suspended. The Commission issued another regulation on this matter, Regulation 2000-02.²²

As for the penal aspect, the Algerian legislator included several articles related to violating the duty of disclosure imposed on companies towards shareholders and investors.

***Crime of publishing false information:**

This was included in the stock exchange law

following the amendment of Legislative Decree 93-10 by Law 03-04 in its Article 60/2. The material element of this crime is the publication of incorrect information. As for its mental element, the legislator required general intent without specific intent. The penalty for this crime is imprisonment from 6 months to 5 years and a fine of 30,000 DZD or one of these two penalties only. The fine can be increased to more than the mentioned amount up to four times the amount of the potential profit achieved, without this fine being less than the amount of the profit itself.

There are also administrative penalties issued by the Disciplinary Chamber of the Stock Exchange Operations Regulatory and Monitoring Commission, stipulated in Article 51 of the aforementioned Legislative Decree. These penalties are as follows: warning, reprimand, temporary or permanent prohibition of all or part of the activity, withdrawal of accreditation, or imposition of fines determined at ten million dinars or an amount equal to the potential profit achievable due to the committed error. The amounts are paid to the guarantee fund.²³

5. Conclusion:

It is noted regarding the Algerian stock exchange law and its regulations that they did not give the topic of disclosure and transparency the status it deserves. If financial disclosure is a definite condition in the world of business and enterprise, it is even more crucial in the world of the stock exchange. Despite this, the Algerian legislator only stipulated it for companies that publicly resort to savings when issuing securities.

Laws of corporate governance, whether Algerian or foreign, have surrounded the principle of commitment to disclosure and transparency with guarantees to compel commercial companies to apply it in good faith. However, we believe that these guarantees are insufficient, especially for Algerian law, due to the professionalism of managers in hiding the true financial situation of the company to attract investors or deceive shareholders on one hand, and the weakness of oversight exercised by general assemblies and the Stock Exchange Operations Regulatory and Monitoring Commission on the other hand. Therefore, the legislator should have established special penalties for the company's failure to disclose information, or for disclosing information contrary to the company's reality, for companies that do not publicly resort to savings, as was done for companies that offer their shares for public subscription in the stock market, more severely than stipulated in the Commercial Law.

If the legislator briefly referred to the condition of publishing an information memorandum by companies wishing to offer their shares on the stock exchange, the Stock Exchange Operations Regulatory and Monitoring Commission should have at least issued a special regulation regarding financial disclosure applicable to every company wishing to offer its shares on the stock exchange.

Governance should also ensure accurate and timely disclosure regarding all matters related to the company's establishment, including its financial position, performance, ownership, and the manner of exercising power. Full disclosure of all decisions affecting the

security's price and even the risks the company is exposed to should also be ensured. Furthermore, information should be prepared and reviewed in a manner consistent with quality accounting standards. The annual audit process must be conducted by an independent auditor to allow for an objective audit of the method used in preparing the financial statements.

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